

# Practicing law without liability insurance

I recently fielded a question from a trial court judge asking if it was ethical to engage in private practice in Minnesota without malpractice insurance. The answer: yes. The questioner was a bit incredulous at the answer—as I admit I was before taking this job. I always assumed that everyone in private practice carried malpractice insurance. Sure, government lawyers probably did not, and I could see where in-house counsel did not need insurance, but of course everyone else was required to carry insurance, right? Nope.

This is true in all U.S. states save two: Oregon and Idaho. The U.S. stands in stark contrast to its international peers in this regard. Most developed countries require some form of professional liability insurance for lawyers in private practice. All Australian states, all Canadian provinces and territories, most of the European Union, and several Asian countries require varying levels of insurance.<sup>1</sup> The required insurance in those countries is usually not *de minimus*, either: Minimum coverage in Australia is \$1.5 million AUS; British Columbia, \$1 million CAN; England and Wales, 2 million; and Singapore, 1 million SGD. In contrast, the minimum coverage in Oregon is \$300,000 per occurrence/\$300,000 aggregate, and in Idaho, \$100,000 per occurrence/\$300,000 aggregate. This is fascinating to me given the old saw about how litigious America is compared to other developed countries.

## Disclosure requirements

While Minnesota does not require malpractice insurance, we do require attorneys in private practice to disclose in their annual registration statement whether they carry professional liability insurance, and the name of the provider.<sup>2</sup> In 2004, the American Bar Association adopted a model rule on insurance disclosure. Thereafter, Minnesota and 23 other states enacted some form of disclosure requirement, and that information can be found by legal consumers in Minnesota, should they know to look, on Minnesota's lawyer registration website.<sup>3</sup> I am particularly intrigued, however, by the seven states that chose to adopt a requirement of direct disclosure to clients. Since 1999, for example, South Dakota's ethics rules have required attorneys who do not carry at least \$100,000 per claim in liability insurance to disclose that fact to their clients in every written communication.<sup>4</sup>

## The numbers

Because Minnesota requires disclosure, we know generally how many lawyers represent private clients but do not carry insurance. Based upon data

collected in Minnesota as of August 2019, of the 12,995 lawyers who disclosed on their annual registration that they represent private clients, 10,715 (82.45 percent) disclosed they carry liability insurance, leaving 17.55 percent uncovered. Due to data limitations, we do not know the types of practices those uninsured lawyers maintain. Are they solo or small firm practitioners? Do they mainly handle personal claims for individual legal consumers? Illinois estimates that as many as 40 percent of solo lawyers are uninsured. In a 2017 survey in Washington, 28 percent of solo practitioners reported being uninsured.<sup>5</sup>

I was curious to see if there was any correlation between uninsured lawyers and discipline, so we pulled some quick numbers. Just looking at 2019 public discipline: Of the 25 lawyers publicly disciplined this year, only 8 (32 percent) reported carrying insurance when they last updated their annual registration. Because Minnesota does not retain malpractice disclosure information year over year, we were unable to look at whether the attorney carried coverage at the time of the misconduct.

Another interesting but perhaps not surprising statistic is that solo and small firm practitioners represent a disproportionate share of malpractice claims, according to the ABA Profile of Legal Malpractice Claims (2012-2015).<sup>6</sup> For that period, insurers who participated in the survey reported that 34 percent of claims were against solo practitioners and 32 percent were against firms with two to five lawyers, for a total of over 65 percent of claims against firms with five or fewer lawyers! From a public protection perspective, this is not a comforting story: The segment of lawyers with the highest percentage of malpractice claims against them also report a higher lack of insurance.

## The current landscape

Perhaps because of numbers like these, several states have taken up efforts to study the issue of mandatory malpractice insurance. As noted, only Oregon and Idaho require coverage for lawyers in private practice. Oregon has required insurance since 1977, and provides insurance through a shared risk pool. All Oregon lawyers who are not exempt pay \$3,300 annually to the Fund, and receive coverage of \$300,000 per occurrence/\$300,000 in aggregate, with no deductible, and \$50,000 in annual covered defense costs.<sup>7</sup> Idaho became the second U.S. jurisdiction to require insurance on January 1, 2018. Idaho lawyers who represent private clients must carry \$100,000 per occurrence/\$300,000 in aggregate, and must submit proof of insurance to renew their licenses.

Several other states have recently formed task forces to look at mandatory malpractice, and have seen their efforts stymied in large part by factions of the bar militantly opposed to required coverage. The Washington state bar (a unified bar) recently rejected a recommendation for mandatory insurance, despite a unanimous task force recommendation in favor of requiring coverage. This is particularly interesting (or hypocritical?) in view of the requirement that Washington's limited license legal technicians must carry insurance.



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The Nevada state bar petitioned the Nevada Supreme Court in 2018 to require malpractice coverage, but portions of the bar objected, and the Nevada Supreme Court denied the petition on the grounds that inadequate detail or support for the rule change was provided. In 2017 California's legislature required the bar to form a working group to study the issue. That working group recently recommended against mandatory insurance absent further data, but recommended further study of broader disclosure requirements.

Illinois has gone in a different direction. Beginning in 2017, lawyers who do not carry malpractice insurance but represent private clients must complete a four-hour online risk-management course every two years. This course helps lawyers identify risk areas in their practice and offers suggestions for improvement.

The factors that augur for requiring insurance are largely obvious, and were articulated in a recent article in this magazine in July 2019.<sup>8</sup> Such a mandate ensures meaningful remedies in cases of malpractice—and lawyers do make mistakes. It strengthens the reputation of the profession and protects lawyer's assets. It also strengthens the profession—lawyers with insurance have better access to risk management assistance and continual learning, including remediation services when things do go wrong. It also promotes self-regulation, and to me, it is an obligation inherent in a self-regulated profession: We have a responsibility to ensure that consumers of legal services are financially protected when mistakes are made.

Those opposed to mandatory insurance have cited the fact that there is no proof that there is harm going unremedied. They also argue that any requirement would encourage litigation against lawyers; that the cost of insurance can be prohibitive; that a lawyer may be uninsurable (though reportedly all Idaho lawyers who sought coverage obtained it); and that it could discourage pro bono or low bono work—a presumably cost-related argument. And the libertarians among us see most, if not all, regulation as harmful.

### Conclusion

I have spoken with other judges who are just as surprised as the above caller that lawyers are not ethically required to carry insurance in private practice. The more I look at the issue, however, I am not surprised that lawyers have success-

fully lobbied against such a requirement to date. Minnesota does not require doctors to carry liability insurance, either. While many do because of hospital or health plan requirements, it is not a requirement of licensure.<sup>9</sup> But ultimately I agree with the (rejected) conclusion of the Washington State Task Force, after its extremely thorough and thoughtful review of the matter, that "[a] license to practice law is a privilege, and every lawyer engaged in the business of providing legal services should be financially responsible for the effects of his or her own mistakes."<sup>10</sup> Because the task force ultimately concluded that legal liability insurance is generally affordable, available, and the right thing to do, it should be required in a profession that is regulated in the public interest. ▲

### Notes

<sup>1</sup> Washington State Bar Association Mandatory Malpractice Insurance Task Force, Report to the WSBA Board of Governors (February 2019) at 26-27, [https://www.wsba.org/docs/default-source/legal-community/committees/mandatory-malpractice-insurance-task-force/mandatory-malpractice-insurance-task-force-report.pdf?sfvrsn=558e03f1\\_0](https://www.wsba.org/docs/default-source/legal-community/committees/mandatory-malpractice-insurance-task-force/mandatory-malpractice-insurance-task-force-report.pdf?sfvrsn=558e03f1_0).

<sup>2</sup> Rule 22, Minnesota Rules of the Supreme Court on Lawyer Registration.

<sup>3</sup> <https://www.lro.mn.gov/for-the-public/lawyer-registration-database-search-public/>

<sup>4</sup> Rule 1.4(c), South Dakota Rules of Professional Conduct ("If a lawyer does not have professional liability insurance with limits of at least \$100,000, or if during the course of representation, the insurance policy lapses or is terminated, a lawyer shall promptly disclose to a client by including as a component of the lawyer's letterhead, using the following specific language, either that: (1) "This lawyer is not covered by professional liability insurance;" or (2) "This firm is not covered by professional liability insurance.") See also Rule 1.4(d), SDRPC ("The required disclosure in 1.4(c) shall be included in every written communication with a client.")

<sup>5</sup> WSBA Task Force Report at 11.

<sup>6</sup> ABA Standing Comm. on Law Prof. Liability, Profile of Legal Malpractice Claims 2012-2015, at 7 (September 2016).

<sup>7</sup> WSBA Task Force Report at 23.

<sup>8</sup> Seth Leventhal, *The Case for Mandatory Legal Malpractice Insurance*, Bench & Bar (July 2019).

<sup>9</sup> A quick web search discloses that seven states, including Wisconsin, have minimum liability insurance requirements for doctors, and some additional states require insurance to avail yourself of state tort reform caps for medical malpractice claims.

<sup>10</sup> WSBA Task Force Report at 45.