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Nicholas A. Marsh

University of Kentucky

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NOTES

"Bonded & Insured?:" The Future of Mandatory Insurance Coverage and Disclosure Rules for Kentucky Attorneys

BY NICHOLAS A. MARSH

I. INTRODUCTION

It is no secret that in today's legal environment, lawyers are becoming increasingly susceptible to malpractice claims. Many attorneys and law firms focus on avoiding these claims, and malpractice avoidance has become the subject of many continuing legal education seminars, law review articles, and other legal writings. Lawyers in every area of legal practice are being forced to guard against seemingly imminent malpractice claims. Frequently lawyers get so involved with protecting themselves, they forget their clients need protection as well.

* J.D. expected 2005, University of Kentucky. B.A. 2002, University of Louisville. I wish to thank Attorney Ruth H. Baxter, Crawford & Baxter, P.S.C., Professor Eugene Gaetke, and Ms. Nancy Fritz for their help with this Note. I would also like to thank Justice James Keller, Kentucky Supreme Court; Bruce Davis, Kentucky Bar Association; and Asa "Pete" Gullett, Lawyers Mutual Insurance Company of Kentucky, for meeting with me and offering his insights on this topic. Most importantly, I would like to thank my parents, George C. Marsh and Patricia J. Marsh, for their continued support and encouragement.

1 See Ronald E. Mallen, Cutting Through the Malpractice Maze, 15 BRIEF 10, 10-11 (1986).

2 See id.

An attorney’s most fundamental duty is to help clients understand their legal rights and enforce them. This duty adheres whether the lawyer is performing a routine title examination or representing the client in a personal injury case. Regardless of the area of practice, a lawyer must adhere to a minimum standard of care. Although this burden may seem rather light, an attorney’s deviation from that standard of care, may have lasting consequences for the client.

Due to the high likelihood that today’s attorney will face a malpractice claim at some point in his or her career, many attorneys carry professional liability insurance. If an insured attorney deviates from the required standard of care and the client is damaged as a result, the insurance provides a source of recovery. On the other hand, if an uninsured attorney commits malpractice, a client could be left without an adequate remedy.

Two basic solutions have evolved to protect clients from uninsured attorneys. The first solution, which has been implemented in Oregon, requires that all attorneys carry a minimum amount of professional liability insurance. This mandatory coverage plan provides absolute client protection. The second solution requires attorneys to make information regarding their professional liability insurance coverage available to potential and current clients. This is based on the notion that, given adequate information about an attorney, clients can make an informed decision as to whether hiring a particular attorney is a risk they are willing to accept. Several states have adopted such plans, generically referred to as mandatory disclosure.

4 Model Rules of Prof’l Conduct pmb., R. 1.3 cmt. (2003) (“A lawyer should pursue a matter on behalf of a client despite opposition, obstruction, or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client’s course or endeavor. A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client’s behalf.”).

5 Mallen, supra note 1, at 10.

6 See James E. Towery, The Case in Favor of Mandating Disclosure of Lack of Malpractice Insurance, PROF. LAW, Winter 2003, at 22 (stating that as many as one-third of American lawyers in private practice lack malpractice insurance, which suggests that at least a majority of America’s lawyers do carry malpractice insurance).

7 For purposes of this Note, the term “uninsured” will also refer to attorneys who are underinsured.


9 Towery, supra note 6, at 22.

10 See id. at 23.

11 See infra notes 116–133 and accompanying text.
Despite the surge in malpractice claims, Kentucky has adopted neither a mandatory coverage nor a mandatory disclosure system. The purpose of this Note is to explore whether either of these solutions would be appropriate for Kentucky. Part II examines the prevalence of uninsured attorneys in the legal profession. Part III details possible solutions to the problems posed by legal malpractice, addressing both Oregon's plan of mandatory coverage and the various mandatory disclosure regimes. The mandatory disclosure regimes are first considered broadly with an analysis of the theoretical underpinnings of those rules, and then various mandatory disclosure regimes are discussed to show the range of possibilities available to Kentucky if it elects to adopt such a scheme. This Note also considers whether the rules adopted by other states should be modified or updated to better coincide with today's legal atmosphere. Finally, in Part VI the current safeguards employed in Kentucky and potential additional protective measures are evaluated.

II. WHAT'S THE PROBLEM?

America's legal system is plagued by three major problems with regard to malpractice insurance. First, the number of malpractice claims filed against attorneys has increased sharply over the past decade as the practice areas subject to such claims become increasingly diversified. Second, the percentage of attorneys without coverage has remained static. Third, and not unexpected given the first two problems, is the greater probability that an attorney who commits malpractice will be uninsured. Kentucky is not without these problems and its attorneys are experiencing the effects of this changing legal environment.

A. Attorneys are Increasingly Susceptible to Malpractice Claims

The number of malpractice claims filed against attorneys in the past several years has skyrocketed. In today's legal society, lawyers are more

12 See infra notes 18–44 and accompanying text.
13 See infra notes 45–138 and accompanying text.
14 See infra notes 77–138 and accompanying text.
15 See infra notes 116–133 and accompanying text.
16 See infra notes 135–138 and accompanying text.
17 See infra notes 139–152 and accompanying text.
18 See infra notes 22–32 and accompanying text.
19 See infra notes 33–40 and accompanying text.
20 See infra notes 33–44 and accompanying text.
21 See infra notes 22–44 and accompanying text.
apt to be sued, which means "that a new attorney is likely to face three claims before finishing his or her career." A 1999 American Bar Association ("ABA") study revealed that the number of claims filed against attorneys increased by nearly 18,000 since 1995, an increase of over 90%.

While Kentucky has not kept pace with the national trend, the state has still witnessed a rising number of malpractice claims. Lawyer’s Mutual Insurance Company of Kentucky ("LMICK") estimates that, from 1995 to 2002, the number of claims against its insured attorneys has increased nearly 150%. Clearly, the number of malpractice claims is rising, but the problem is even worse than one might imagine: these studies only include claims filed against insured attorneys.

Not only is the sheer number of claims increasing, but the categories of claims are becoming more diverse. In 1999, the practice areas most susceptible to malpractice claims were personal injury-plaintiff, real estate, and family law. Over the past decade, personal injury-plaintiff and real estate have been the most targeted practice areas for potential malpractice claims. After examining this data, one might be tempted to assume that

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22 Mallen, supra note 1, at 10.
23 ABA STANDING COMM. ON LAWYERS' PROF'L LIAB., PROFILE OF LEGAL MALPRACTICE CLAIMS 1996-1999, 5 (2001) [hereinafter PROFILES] (indicating that the total number of claims rose from 19,158 in 1995 to 36,844 in 1999, an increase of 92.3%).
24 LMICK currently occupies approximately 40% of the legal malpractice insurance market for attorneys in private practice in the state of Kentucky. Interview with Asa “Pete” Gullett, Chief Executive Officer, Lawyer’s Mutual Insurance Company of Kentucky, in Louisville, Ky. (Dec. 29, 2003).
25 Id. This includes the number of attorney-reported incidents, client-reporting claims, and suits filed against insured attorneys. In 1995 there were 148 claims against LMICK insureds; in 2002 there were 168 claims, a 13.5% increase. Id.
26 See PROFILES, supra note 23, at 4; Interview with Asa “Pete” Gullett, supra note 24.
27 PROFILES, supra note 23, at 5. According to LMICK, the majority of claims filed against its attorneys come from cases involving real estate. See Interview with Asa “Pete” Gullett, supra note 24. Real estate comprised approximately 29% of all claims filed against LMICK insured attorneys in 2002. Plaintiff personal injury was second with 20% and bankruptcy cases was third with 18%. Id.
28 See PROFILES, supra note 23, at 5–7. Personal injury-plaintiff and real estate, combined, comprised nearly 36% of all malpractice claims in 1995, and 41.57% in 1999. Family law comprised 9.13% of all claims in 1995, surpassed only by business transaction/commercial Law, which totaled 10.66%. By 1999, family law had increased by 1% to pass all other categories, ranking as the third most likely area of practice to attract a malpractice claim. Id.
attorneys not practicing in one of these "traditional" areas would not be as susceptible to a malpractice claim. However, given the recent developments in the post-Enron legal environment and the passage of the Sarbanes-Oxley Act of 2002, nothing could be further from the truth.29

The scope of malpractice claims has expanded recently to encompass areas of practice that were once considered "protected." Now, even in-house corporate counsel are subject to new liability arising from more expansive responsibilities.30 One commentator speculates that "[w]ith respect to corporate lawyers' civil liability . . . more complaints alleging negligent misrepresentation will be filed against attorneys who represent corporations, because they are easier to bring against lawyers than securities fraud lawsuits."31 In addition to the expanding liability of corporate counsel, ERISA lawyers may be subject to "a new level of liability."32 With such a changing trend, it seems every attorney, from a solo practitioner handling a real estate closing to a partner in a large firm closing a complicated securities transaction, is susceptible to a malpractice suit.

B. Many Attorneys are Still "Going Bare"33

Despite the skyrocketing number of malpractice claims, many attorneys still neglect to insure themselves.34 In 1987, an ABA official estimated that "'[p]robably 20 to 45 percent of the lawyers in a given jurisdiction in private practice are without insurance,'"35 Today, the consensus among experts is that approximately "one third or more of American lawyers in private practice are uninsured."36 Kentucky’s percentage is no better; of the

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30 See id. at 176. Not only are corporate lawyers subject to potential malpractice claims, but due to the passage of the Sarbanes-Oxley Act and its requirement of up-the-ladder reporting, in-house counsel is now liable for a host of possible SEC violations. Id.
31 Id. at 178.
34 See id.
35 Id. at 82 (quoting Duke Nordlinger Stern, a member of the A.B.A.'s Standing Committee on Lawyers' Professional Liability).
36 Towery, supra note 6, at 22.
current 14,212 members of the Kentucky Bar Association, it is estimated that nearly 30% are uninsured.

There are several reasons why so many attorneys decide to remain uninsured. As one commentator suggests:

Attorneys generally “go bare” for four reasons. First, they do not believe that the nature of their practice is such that they will face a malpractice claim. Second, they are willing to accept the risk. Third, they do not have the money to pay the insurance premiums. Finally, they do not want to compensate the victim of malpractice.

Bruce Davis, Executive Director of the Kentucky Bar Association, speculates that the main reasons Kentucky practitioners go uninsured are: (1) the cost of insurance premiums; (2) due to past malpractice claims, some attorneys may be uninsurable; (3) the notion that a lawyer with only minimal resources will have nothing to lose if sued; and (4) many lawyers are willing to assume the risks of uninsured practice. Whatever the reason, the fact remains that many Kentucky practitioners susceptible to malpractice claims remain uninsured.

C. **Uninsured Attorneys: The “Client’s Tough Luck?”**

The static number of uninsured attorneys exacerbates the problem created by the increasing number and types of malpractice claims, and creates another problem: clients do bring malpractice claims against uninsured attorneys and are often deprived of their legal remedy when they

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37 E-mail from Bruce Davis, Executive Director, Kentucky Bar Association, to Nicholas A. Marsh (Nov. 6, 2003, 12:00 pm EST) (on file with author). The number of Kentucky Bar Association members is accurate as of November 1, 2003. See id.

38 Interview with Bruce Davis, Executive Director, Kentucky Bar Association, in Frankfort, Ky. (Sept. 24, 2003). As a matter of pure speculation, Mr. Davis approximates that nearly 30% of attorneys in Kentucky, may be practicing uninsured. See id.; see also E-mail from Bruce Davis, supra note 37. Of the 14,212 K.B.A. members, only 2792 reported having some form of liability coverage in the 2003-04 annual dues statement. Id. Although this evidence is not conclusive, the relatively low number of attorneys reporting insurance coverage is telling.

39 Cunitz, supra note 3, at 647.

40 Interview with Bruce Davis, supra note 38.

41 Towery, supra note 6, at 22.
cannot recover. Unfortunately for the client, uninsured attorneys who commit malpractice and are unable to satisfy malpractice judgments leave their clients without a remedy. These attorneys through their negligence deprive their clients of the judicial remedy they originally sought. Then, by failing to compensate the client for their negligence, they foreclose the possibility of any possible remedy for the unlucky client. As one commentator explained, "that's the client's tough luck."44

III. POSSIBLE SOLUTIONS

Legal scholars, judges, lawyers, and bar officials are well aware of the injustice of leaving clients with no remedy when their uninsured attorney commits malpractice.45 As a result, two possible solutions to the problem have emerged. One solution mandates that every practicing attorney carry a minimum amount of malpractice insurance coverage.46 This solution is illustrated by the Oregon model of mandatory coverage.47 The second possible solution is mandatory disclosure. Several states have adopted various disclosure systems.48 Generally, mandatory disclosure requires uninsured attorneys to disclose their lack of malpractice insurance to their clients.49

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42 See id. ("Many clients . . . presume that all lawyers are required to carry malpractice insurance . . . . [They] often discover the fallacy of that assumption for the first time when they attempt to sue their uninsured lawyers.").


44 Towery, supra note 6, at 22. Towery comments that in most jurisdictions where proof of insurance is not required, the client bears the consequences of an attorney's negligence. See id. One of the main criticisms of this argument is the lack of supporting data. Id. at 23. Towery argues, however, that no study is needed. He claims that attorneys without insurance are just as likely, if not more so, to commit malpractice as those with insurance. He also maintains that the presence of insurance is often the threshold question in determining the merit of bringing a malpractice claim against an attorney. Therefore, many potential malpractice claims are dropped for lack of insurance. See id.; see also Johnston & Simpson, supra note 43, at 32 (noting that clients often suffer a "double injury" caused by an uninsured attorney who commits malpractice).

45 See, e.g., Johnston & Simpson, supra note 43, at 28 (noting instances in which state supreme courts, state bar associations, and the A.B.A. House of Delegates have considered or adopted mandating insurance provisions).


47 Id.

48 See Cunitz, supra note 3, at 663–65.
The purpose of such a rule is to protect clients by providing them with the information necessary to balance the risks of hiring an uninsured attorney. The question becomes: is one of these solutions right for Kentucky?

A. Mandatory Coverage

The mandatory coverage rule was the first adopted to address the problem of uninsured attorneys who commit malpractice. The rule requires that all attorneys in the state, not otherwise excepted, carry a minimum amount of professional liability insurance coverage. Oregon is the only state so far that has adopted this rule.¹¹

1. The Oregon Model

In 1977, Oregon adopted a mandatory malpractice insurance program. The statute gave authority to the state bar’s board of governors “to require all active members of the state bar engaged in the private practice of law whose principal offices are in Oregon to carry professional liability insurance.” Pursuant to this authority, “[t]he Oregon State Bar Board of Governors created the Professional Liability Fund . . . , [which] provides coverage of $300,000 per claim, [and] $300,000 aggregate to all attorneys engaged in the private practice of law in Oregon.” Since the program’s inception, it has been mandatory that every practicing Oregon attorney receive insurance from the Professional Liability Fund.

Although initially met by heavy criticism, the mandatory coverage scheme has generally been accepted by the members of the Oregon Bar.⁵⁶

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¹⁹ See id. at 663.
²⁰ See Memorandum from Lynda C. Shely, Chair, ABA Standing Committee on Client Protection, to Chairs of ABA entities and other interested parties (July 16, 2002), http://www.abanet.org/adminlaw/annual02/councilagendatab10.doc (calling the lack of malpractice insurance a “material fact that may bear upon a client’s decision to hire a lawyer”).
⁵² Cunitz, supra note 3, at 651.
⁵⁵ See id. There are exceptions for certain types of attorneys. Corporate counsel, government lawyers, law professors, and some others are not required to participate. Id.
⁵⁶ See id. (noting that, of those who have used the PLF’s services and filled out evaluation forms, 99% were satisfied and 87% were “very satisfied”).
However, Oregon is currently the only state that requires its attorneys to carry insurance. The Illinois State Bar Association recently considered proposing a similar rule, but when the proposal went before the Illinois Supreme Court, mandatory coverage was rejected in favor of a less extensive system of mandatory disclosure.

When mandatory coverage is proposed, it is often met with criticism. For example, the Pennsylvania Bar concluded that Oregon’s mandatory insurance requirement would not be feasible, and a survey on the subject by the Montana Bar received a mixed response, including strong opposition from some attorneys.

2. Why Mandatory Coverage Is Not the Solution for Kentucky

A proposal for mandatory insurance coverage would likely face criticism and strong opposition in Kentucky. However, the strongest opponent may not be the bar, but rather Kentucky’s constitution. In McGuffey v. Hall, the Kentucky Supreme Court addressed the validity of a statute that required doctors practicing within the state to carry malprac-

57 Bailey, supra note 51, at 4.
58 See Molly McDonough, Push for Mandatory Coverage: Illinois Wants to Make Malpractice Insurance the Law, A.B.A.J. E-REP., Jan. 11, 2002, at 1 (noting that the Illinois Bar Association was considering sending a proposed rule to the Illinois Supreme Court that would require all private lawyers in the state to comply with a system comparable to Oregon’s); see also Stephen Anderson, New Rule Would Seek Disclosure of Lack of Liability Insurance, BAR NEWS (Ill. State Bar Ass’n), Sept. 2003, http://www.isba.org/Association/039-16a.htm (discussing the proposed rule requiring mandatory disclosure, not mandatory coverage).
59 Cunitz, supra note 3, at 653–57. Cunitz argues that there are six major criticisms of mandatory coverage. They include (1) the lack of proof that uninsured attorneys are problematic, id. at 653–54; (2) the fact that insurance coverage does not necessarily mean the client will be protected, id. at 654–55; (3) the coercive nature of making insurance coverage mandatory, id. at 655; (4) the cost of coverage, id. at 655–56; (5) the discriminatory nature of compulsory coverage, id. at 656; and (6) the trickle-down effect of coverage costs, id. at 656–57. Cunitz also argues that mandatory coverage will lead to insurance companies controlling the legal field. She hypothesizes that attorneys will become indifferent in the way they practice law and that mandatory coverage will lead to further specialization in the legal environment. Id.
The statute created a liability fund, the Kentucky Patients' Compensation Fund, that was similar in form and function to the Professional Liability Fund instituted in Oregon. Every non-exempt physician and hospital in Kentucky was required to be a member of the fund and carry a minimum coverage of $100,000 per occurrence and $300,000 aggregate liability insurance. The purpose of the statute was to "promote the health and general welfare of the general citizenry through adopting reforms in medical malpractice claims, establishing the Fund so as to increase the availability and lower the cost of medical malpractice insurance, and assuring that medical malpractice judgments and settlements will be satisfied." The court found that the statutory scheme was flawed because there was not "any reasonable relationship to the problem stated . . . or to any other . . . threatened problem shown to exist." The court refused to accept the Commonwealth's argument that the statute was a valid exercise of its police power. It said the Commonwealth failed to show that mandated insurance would increase the availability of or reduce the cost of medical malpractice insurance. Relying on Section 1(5) of the Kentucky Constitution, which protects "the right of acquiring and protecting property," the court held that "the provision for compulsory malpractice insurance has not been shown to be justified as an exercise of the police power, in the absence of which any interference with the natural right of any individual or group to pursue a legitimate business or profession is a violation of [the state constitution]."

Any proposal of mandatory malpractice insurance for lawyers would likely be met with the same constitutional challenges as those set out in McGuffey. Supporters of mandatory coverage argue that the law requires mandatory insurance in other circumstances, such as compulsory automobile insurance, and that attorneys should not receive special treatment.
The court considered the former argument in *McGuffey v. Hall* and concluded that compulsory automobile insurance was obviously necessary to protect other motorists, whereas no statistics supported the need for protecting patients from unsatisfied medical malpractice claims.\(^2\) Yet, *McGuffey* left room for the state to impose a mandatory coverage requirement if the need was statistically documented.\(^3\) That is, if proponents offer sufficient statistics or demonstrate a nexus between the government's need to protect attorneys' clients and a compulsory insurance scheme, the rule might survive constitutional scrutiny. But, without such proof, the rule will have to overcome the constitutional hurdle set forth in *McGuffey*.

One factor distinguishes a proposed coverage rule from the statute in *McGuffey*: a mandatory coverage scheme for attorneys would be created by judicial decision, not legislative action. The Kentucky Supreme Court could rely upon the inherent power doctrine, prescribing that courts have the "exclusive responsibility within this state for the structure and administration of the lawyer discipline . . . system and . . . [courts have] inherent power to maintain appropriate standards of professional conduct and to dispose of individual cases of lawyer discipline."\(^4\) The Kentucky Supreme Court has stated that the power "to prescribe a code of ethics and to establish practice and procedure for disciplining, suspending and disbarring attorneys . . . is inherently a judicial function."\(^5\) Thus, the inherent power doctrine may render the *McGuffey* analysis moot in a constitutional challenge to the promulgation of a mandatory coverage rule. But, even assuming that mandatory coverage passed constitutional muster, it may

\(^{2}\) *McGuffey*, 557 S.W.2d at 414.

\(^{3}\) Id.

\(^{4}\) MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT, pmbl. (1993). See generally RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 1 (2000) (stating that "[t]he highest courts in most states have ruled as a matter of state constitutional law that their power to regulate lawyers is inherent in the judicial function").

\(^{5}\) Ky. Bar Ass’n v. Vincent, 538 S.W.2d 39, 41–42 (Ky. 1976); see also Ratterman v. Stapleton, 371 S.W.2d 939, 941 (Ky. 1963) ("The right to prescribe such rules as necessary to . . . regulate . . . attorneys . . . is a right of self-preservation."); *In re Rudd*, 221 S.W.2d 688, 689 (Ky. 1949) (noting that the power to disbar attorneys is an inherent power of the court); Commonwealth *ex rel.* Buckingham v. Ward, 103 S.W.2d 117, 118 (Ky. 1937) (stating that the right of the court to establish rules of practice and procedure for disciplining attorneys has been upheld previously); Commonwealth *ex rel.* Ward v. Harrington, 98 S.W.2d 53, 58 (Ky. 1936) (holding that courts, independent of any legislation, have the power to make rules necessary for their functioning).
ultimately lack support from the state bar. Unfortunately, there are no published studies to indicate exactly what support or opposition a proposed rule would meet in Kentucky.

B. Mandatory Disclosure

Several states have avoided the resistance associated with mandatory coverage schemes while still protecting the public from malpractice committed by uninsured attorneys by requiring non-exempt, uninsured attorneys to disclose their uninsured status. Five states currently have some variation of this requirement for uninsured attorneys. As many as seven other states have considered similar rules within the past year.

1. Proposed ABA Model Rule

The ABA Standing Committee on Client Protection voted in 2002 to recommend to the ABA House of Delegates "that Rule 1.4 of the ABA Model Rules of Professional Conduct be amended to provide for the disclosure of the lack of malpractice insurance." The relevant provisions of the proposed rule stated:

(c) A lawyer shall inform new and existing clients, in writing, if the lawyer does not have malpractice insurance. A lawyer shall inform the client, in writing, any time the lawyer's malpractice insurance is terminated. A lawyer shall maintain a record of these disclosures for five years from the conclusion of the client's representation.

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76 See interview with Bruce Davis, supra note 38.
78 See Lawyer Malpractice Insurance Coverage and Disclosure of Coverage, WYO. LAW., Feb. 2003, at 41–42 (noting that Alabama, Colorado, Illinois, Missouri, Nebraska, and Pennsylvania all have some sort of rule pending either at the bar association or supreme court level); Mandatory Malpractice Insurance to be Debated Feb. 14, RES GESTAE, Jan.–Feb. 2003, at 7 (noting that the Indiana State Bar Association Professional Legal Education, Admissions, & Development Section was to hold public debates regarding the feasibility of either a mandatory coverage or mandatory disclosure rule).
79 Memorandum from Lynda C. Shely, supra note 50.
The requirements in (c) do not apply to full-time members of the judiciary, or full-time, in-house counsel or government lawyers when representing the entity by whom they are employed.\footnote{ABA STANDING COMM. ON CLIENT PROTECTION, PROPOSED AMENDMENT TO RULE 1.4 OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT TO PROVIDE FOR THE DISCLOSURE OF LACK OF PROFESSIONAL LIABILITY INSURANCE, http://www.abanet.org/adminlaw/annual02/councilagenda10.doc (June 5, 2002).}

When the committee met in October 2002, however, it decided not to present the proposed rule for adoption because comments from other ABA committees did not produce adequate support.\footnote{Attributed to Linda C. Shely, Chair of the ABA Standing Committee on Client Protection in James Podgers, Time-Out Call: Sponsor Holds off on Proposal Regarding Malpractice Insurance Disclosures, A.B.A. J., Jan. 2003, at 66.} It should be noted that the proposal may still be submitted for adoption at a later date. According to Committee Chairperson Linda Shely, the committee is merely “regrouping,” and they “have no specific game plan.”\footnote{Id. (quoting Lynda C. Shely, Chair of the ABA Standing Committee on Client Protection).} Given the activities of state supreme courts, state bar associations, and the ABA, the prevailing trend favors mandating disclosure.\footnote{See Marvin J. Rudnitsky, Witnessing ‘Glacial’ Change, PA. LAW., Sept.–Oct. 2002, at 48 (noting that in his experience as a member of the House of Delegates, Rudnitsky noticed that “changes in the ethical rules come slowly but inexorably”).}

### 2. Justifications for Mandatory Disclosure

If the Kentucky Supreme Court considers adopting a disclosure requirement, the justifications or theoretical foundations for such a rule will be important.\footnote{Perhaps the best way to explore the justifications for mandatory disclosure is by comparison to other areas of the law. The most evident area is compulsory automobile insurance. The state’s primary reason for requiring that all drivers be insured is to “demonstrate that [drivers] have the ability to protect the public if anyone is injured by [their] negligence in [their] use of that license.” Towery, supra note 6, at 22. Drivers want the assurance of knowing that they can recover in the event another driver causes an accident resulting in injury. However, it is not difficult to recognize the impracticability of requiring that everyone on the highway disclose whether they are insured so others can make a choice as to whether or not they want to share the road with them. Recognizing this impracticability, and the importance that individuals place upon being able to recover, states have} An emerging trend in modern legal society is an insistence...
on informed client consent. The new Model Rules define informed consent as "the agreement to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct." A mandatory disclosure rule applying this principle would ensure a client's ability to give informed consent when hiring an attorney.

Underlying the informed consent principle is a fundamental justification for a disclosure rule based on the duty of communication owed to a client. The duty of communication announced in the ABA Model Rules of Professional Conduct stems from common law principles of agency and common law fiduciary duties owed to clients. A disclosure rule is best explained by examining the duty of communication in these two contexts.

Adopted compulsory insurance schemes for licensed drivers so disclosure is not necessary.

Similarly, if given the choice, a client would choose an attorney from whom he or she could recover if the attorney made a mistake resulting in injury to the client. This informed choice is analogous to the consumer who buys a product with a warranty so he is protected in the event of a defect. Unfortunately, many clients may never consider the fact that their attorney might commit malpractice; many people who hire counsel are unaware that attorneys are not required to carry malpractice insurance. Id. Therefore, many potential clients inadvertently make uninformed decisions. Given that the formation of the attorney-client relationship is less arbitrary than the random accidents that occur on the highways, the same level of protection may not be needed. McGuffey v. Hall, 557 S.W.2d 401, 414 (Ky. 1977) (noting that "the uninsured motorist is a known and recognized public menace who should have been outlawed long ago"). In the case of attorneys and their clients, both current and potential disclosure is much more practical and feasible. Even though the means vary slightly, the goal remains the same. The unknowing client should be protected by being given the information he would want if he knew to ask for it.

86 Id. at 7.
87 See Podgers, supra note 81, at 66 (quoting Linda C. Shely, Chair of the ABA Standing Committee on Client Protection as stating that the proposed rule is "about communicating material information to clients").
89 LAW. ABA/BNA MANUAL ON PROF'L CONDUCT § 31:502 (Jun. 25, 1997). The link between disclosure rules and the fiduciary nature of the attorney-client relationship is a recurring theme throughout this Note. Agency principles are relied upon for supporting information but are not at the forefront of discussion. Exploration of this topic in terms of an attorney's fiduciary duty was suggested by Professor Eugene Gaetke, University of Kentucky College of Law.
a. Duty of Communication in Terms of Agency Principles

The Restatement (Second) of Agency § 381 details the duty of an agent to give information to his principal:

Unless otherwise agreed, an agent is subject to a duty to use reasonable efforts to give his principal information which is relevant to affairs entrusted to him and which, as the agent has notice, the principal would desire to have and which can be communicated without violating a superior duty to a third person.90

Kentucky courts have long recognized that an attorney has essentially the same responsibilities as an agent.91 More recently, however, Kentucky's courts have noted that an attorney's duties are not truly the same as that of an agent; something more is required of an attorney.92 The Kentucky Court of Appeals held:

[T]he attorney is vested with powers superior to those of any ordinary agent because of the attorney's quasi-judicial status as an officer of the court; thus the attorney is responsible for the administration of justice in the public interest, a higher duty than any ordinary agent owes his principal.93

The thrust of this argument is that the attorney, as the agent, owes the client, as the principal, the utmost duty to disclose information the client would consider important. The Restatement requires that the agent communicate any information to the principal that the principal would desire to have,94 even if "not specifically instructed to do so."95 Therefore, mandatory disclosure is merely a codification of an existing duty the attorney-agent owes to the client.

b. Duty of Communication in Terms of Fiduciary Relationship

The second basis for the duty of communication arises from the fiduciary relationship between attorneys and their clients. A fiduciary

90 RESTATEMENT (SECOND) OF AGENCY § 381 (1958).
91 See Asher v. Beckner, 41 S.W. 35, 47 (Ky. 1897).
93 Id.
94 RESTATEMENT (SECOND) OF AGENCY § 381 (1958).
95 Id. at cmt. a.
relationship is one "in which the one person is under a duty to act for the benefit of the other on matters within the scope of the relationship." The relationship between an attorney and client has traditionally been one in which fiduciary duties are recognized. "Lawyers are the special purpose fiduciary agents of their clients, and are accordingly entrusted by their principal-clients with sensitive tasks that the clients cannot readily undertake for themselves and cannot realistically supervise on an ongoing basis." Kentucky courts have long recognized that "the public has a right to expect from his lawyer fair dealing, fidelity and [a] high degree of competency." In Daugherty v. Runner, the court noted that the fiduciary nature of the attorney-client relationship imposes on the attorney "the duty to exercise in all his relationships with this client-principal the most scrupulous honor, good faith and fidelity to his client's interest." Previously, the Kentucky Court of Appeals (the highest court in the state at the time), noted the fiduciary nature of the relationship between attorneys and their clients stating:

The measure of good faith required of an attorney in dealing with his clients is far higher than that exacted in the ordinary business transaction. The relationship is one of trust and confidence, and it is the duty of the courts to preserve it upon a high plane of moral responsibility for the protection of the public . . . . [Good faith and fair dealing] are essential elements in his contacts with his clients.

Clearly, Kentucky attorneys owe their clients the duties of utmost good faith and loyalty. One way to ensure that attorneys fulfill these duties is to impose upon them the duty to communicate with their clients. Consequently, the arguments supporting mandatory disclosure rest heavily on the recognition of the duty of communication and fiduciary obligations.

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96 BLACK'S LAW DICTIONARY 640 (7th ed. 1999).
97 See id.
99 Ky. Bar Ass'n v. Cowden, 727 S.W.2d 403, 406 (Ky. 1987).
101 Id. at 16.
102 In re Gilbert, 118 S.W.2d 535, 537 (Ky. 1938).
103 See KY. SUP. CT. R. 3.130.
104 Linda C. Shely, Chair of the ABA Standing Committee on Client Protection, has noted that in the absence of mandating insurance coverage, "the best we could do would be to require that lawyers inform clients so they could make an informed
c. How Does Kentucky Deal with the Duty of Communication?

In substance, Kentucky's rule dealing with client communication is comparable to the ABA's Model Rule. The Kentucky rule emphasizes the importance of communication and the significance of explaining information to a client so the client can make an informed decision.\(^\text{105}\) In its commentary, the Kentucky Supreme Court noted the importance of providing the client with "sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued."\(^\text{106}\) While Kentucky places a premium on attorney-client communication, this raises the question of whether the Kentucky Supreme Court should adopt a rule of mandatory disclosure. Ultimately, the court's decision will turn on whether an attorney's lack of malpractice insurance is information necessary to the client's decision regarding representation.\(^\text{107}\)

decision' about whom to hire to represent them." Podgers, supra note 81, at 66 (quoting Linda C. Shely, Chair of the ABA Standing Committee on Client Protection). Bruce Davis agreed, stating that disclosing the lack of malpractice insurance by attorneys would be another piece of information that potential clients could utilize in making a decision to hire an attorney. Interview with Bruce Davis, supra note 38. The comments to the proposed amendment to Rule 1.4 noted that "[t]he absence of professional liability insurance is a material fact that may bear upon a client's decision to hire a lawyer." See ABA Standing Comm. on Client Protection, supra note 80, at cmt. 8. Finally, in two out of the four jurisdictions that have adopted a mandatory disclosure rule, the duty is regarded as an extension of the attorney's duty of communication. Alaska and South Dakota both inserted the disclosure requirements into their version of ABA Model Rule 1.4 dealing with attorney-client communication. See ALA. RULES OF PROF'L CONDUCT R. 1.4; S.D. CODIFIED LAWS § 16-18 app., R. 1.4 (Michie Supp. 2003).

\(^{105}\) See KY. SUP. CT. R. 3.130(b).

\(^{106}\) Id. R. 3.130 cmt. 1.

\(^{107}\) This begs the question: what are the client's objectives in hiring an attorney and bringing suit? One can hardly doubt that legal recourse is an important objective of a client who has been harmed. Obviously, injured people hope to be compensated by bringing suit. Therefore, the probability of recovery is important to the client. Potential clients may find it important to know that if their attorney commits malpractice, they will face the possibility of not being compensated for their injury by the tortfeasor or the negligent attorney.

This argument works well in the area of torts, where alternative sources of recovery may be needed, but it assumes a slightly different character in other areas, such as real estate, adoption, and estate planning. In these specialty areas, the objective of representation may not be to recover from a third party, but rather to
3. **Criticisms of Mandatory Disclosure and Counter-Arguments**

One of the primary arguments against mandatory disclosure is that it stigmatizes uninsured attorneys. Critics argue that this stigma is especially problematic for attorneys operating on limited budgets who may be forced out of their practice area and the legal field altogether if they were required to choose between acquiring insurance or bearing a negative stigma. However, a single malpractice claim could put a small practitioner operating on a limited budget out of business as well. Given the high likelihood that an attorney will incur a malpractice claim during his career, practicing without insurance is counter-intuitive. Even critics concede that “having malpractice insurance is almost always better than not having it.”

Another viable counter-argument is that to allow the attorney to prioritize his own interests violates the principles of agency and fiduciary obligations as set out above. An attorney-agent may find that he or she can save on premiums, regardless of the potential detriment to the client in the event the attorney commits malpractice. But the attorney’s actions may constitute a violation of other agency principles. The Restatement provides that an agent with interests adverse to his principal can still be an agent, but a breach of duty occurs when he does so “without revealing the existence and extent of such adverse interests.” Therefore, the attorney-agent should disclose to the client that, instead of acting pursuant to the client’s obtain quality, professional legal services. Instead of becoming the secondary source of recovery in such cases, the attorney is the primary source of recovery because his actions are the original tort. The core argument would be that disclosure gives potential clients information to make an informed judgment about the fiscal responsibility of the attorney. Commentators have noted that “it is difficult to imagine a persuasive argument in favor of failing to provide financial responsibility in the event we make a mistake that injures our client.” Johnston & Simpson, *supra* note 43, at 32. Regardless of the client’s representational objective, the client relies on the attorney’s duty to adhere to the required standard of care. If this is not done, a client expects remuneration for the mistakes that constitute malpractice.

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109 See id.
110 See *supra* note 22 and accompanying text.
112 See *supra* notes 90–104 and accompanying text for discussion of agency principles and fiduciary obligations.
113 *RESTATEMENT (SECOND) OF AGENCY § 23 (1958).*
interests, he or she is acting in his or her own financial interest by not maintaining malpractice insurance.

The agency counter-argument can also be couched in terms of the fiduciary duty the attorney owes the client. It is the duty of the attorney "to represent the client with undivided loyalty... [and] unflinching fidelity." Therefore, if the attorney's loyalty to the client is to be undivided, his own financial well-being cannot be the motivating force in decisions regarding representation of clients.

Most critics fail to recognize that a disclosure requirement may already exist, even though it is unstated. Given the agency principles, fiduciary obligations, and duties of communication set out above, attorneys may already have a duty to disclose their lack of insurance to clients despite the absence of a formal requirement. However, a formal rule would clarify attorneys' obligations, protect the client through communication, and give attorneys freedom to choose whether to buy malpractice insurance.

4. Different Types of Plans

If the Kentucky Supreme Court decided to adopt a mandatory disclosure scheme, what type of scheme should it choose? Though only five states have adopted mandatory disclosure rules, each is unique.

a. Virginia

Of the five states with disclosure rules, the Virginia model has been considered by some to be the "simplest and least intrusive." Virginia focuses on dissemination of information to the public about the financial responsibility of attorneys practicing within the state. Specifically, the Virginia rule requires that every active member of the state bar certify annually to the bar whether or not they carry professional liability insurance, and whether they are in private practice or serve the public. In addition to disclosure, the Virginia Bar Association went further, publish-
ing the disclosed information on its website. Unlike other state disclosure rules, which offer exemption from disclosure to certain attorneys who are not in private practice, the Virginia Rule applies to all active members regardless of practice area.

b. Alaska

The Alaska rule builds directly on the traditional rule of professional conduct regarding communication between attorney and client. The rule requires that the attorney inform existing clients in writing if the lawyer does not carry coverage with limits of at least $100,000 per claim and $300,000 per year in the aggregate. The rule does not apply to lawyers in government practice or those employed as in-house counsel.

c. Ohio and New Hampshire

The Ohio statute and the New Hampshire rule are essentially the same as the Alaska rule. They require attorneys to inform clients whether they carry the requisite $100,000/$300,000 coverage, if their coverage is less than the mandatory amount, or if it has been terminated. However, Ohio and New Hampshire are more explicit than Alaska in that they require that disclosure be made at or subsequent to the time of engagement. Like Alaska, Ohio and New Hampshire also provide an exemption for government attorneys and in-house counsel. Ohio and New Hampshire are

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119 James Towery, Should Disclosure of Malpractice Insurance Be Mandatory?, GP SOLO, Apr.—May 2003, at 36, 38 (noting that the website had more than 25,000 hits in the first week after the disclosure information was posted).

120 VA. R. CT. 6 § 4, para. 18.

121 ALASKA RULES OF PROF’L CONDUCT R. 1.4.

122 Id.

123 Id. cmt.

124 See OHIO REV. CODE ANN. § DR 1-104 (West 2002); N.H. RULES OF PROF’L CONDUCT R. 1.17. The Ohio rule and the New Hampshire rule are functionally identical except for a transitional period which was provided in the New Hampshire rule. See N.H. RULES OF PROF’L CONDUCT R. 1.17(d).

125 OHIO REV. CODE ANN. § DR 1-104; N.H. RULES OF PROF’L CONDUCT R. 1.17.

126 OHIO REV. CODE ANN. § DR 1-104(C)(1); N.H. RULES OF PROF’L CONDUCT R. 1.17(c)(1).

127 OHIO REV. CODE ANN. § DR 1-104(C)(2); N.H. RULES OF PROF’L CONDUCT R. 1.17(c)(2).
also more detailed than Alaska in their proof of disclosure, requiring that the notice to be signed by the client.\footnote{128}

\textit{d. South Dakota}

The most intrusive disclosure scheme was adopted by South Dakota. The South Dakota statute requires lawyers to place on their letterhead a statement disclosing that they do not carry the minimum $100,000 of professional liability insurance.\footnote{129} The disclosure language must “be in black ink with type no smaller than the type used for showing the individual lawyer’s names.”\footnote{130} Unlike the one-time disclosure in Alaska and Ohio, South Dakota requires that the disclosure be a component of “every written communication with a client.”\footnote{131} It also provides that the disclosures shall be in every written or media advertisement by the attorney.\footnote{132} Like Alaska and Ohio, though, this rule also provides an exemption for government lawyers or full-time in-house counsel.\footnote{133}

\textbf{5. Pitfalls of Current Disclosure Plans—Is the Proposed Rule Sound?}

The most obvious flaw in the various mandatory disclosure regimes is visible in the wake of the Sarbanes-Oxley Act.\footnote{134} Every state’s disclosure rule, except Virginia’s, provides an exemption for in-house corporate counsel.\footnote{135} Now that claims are being filed against a broader array of practice areas, including in-house corporate counsel, these exemptions may hinder the objective of informing the client. A generic rule without exceptions may be best to ensure that, as the law evolves, client protection evolves as well.

Two other issues not addressed by these rules are the adequacy of the insurance carrier itself and the possibility of a diminishing limits policy.\footnote{136}
First, the reputation of the insurance carrier may be valuable to a potential client. If the carrier has a reputation of not paying claims, it may have some bearing on whether the attorney’s coverage will protect the client. None of the rules set out above provide for approval of the carrier by the bar association or disclosure of the carrier’s identity. Second, none of the rules prohibit diminishing limits policies, an arrangement where defense expenses incurred by the insurer decreases the amount of liability coverage. These policies are problematic because, as defense expenses are incurred, the coverage may fall below the state’s required levels. The existence of such policies seems to make the establishment of minimum coverage levels rather futile.

Regardless of the drawbacks of these disclosure plans, they do have an overall desirable effect. In Alaska and South Dakota, before the effective date of the proposed rules, a large number of previously uninsured attorneys obtained professional liability insurance.

IV. WHAT SHOULD KENTUCKY DO?

Kentucky currently has a limited system of mandatory coverage. Kentucky Supreme Court Rule 3.024 requires that any attorney practicing in Kentucky in a limited liability entity carry a minimum amount of professional liability insurance coverage. According to a survey conducted by the Kentucky Bar Association, approximately 20% of KBA members practice in a “limited liability entity and have professional liability insurance coverage or other acceptable adequate financial coverage.”

Kentucky’s Supreme Court established the Client’s Security Fund (1) “to promote public confidence in the administration of justice and the integrity of the legal profession,” and (2) to ensure that every lawyer

137 Id.
138 Id. at 38 (“[T]he new rules provided a positive incentive for uninsured lawyers to obtain insurance, so that they would not be required to make to clients the disclosure of lack of insurance.”).
139 Kentucky attorneys practicing in a limited liability entity must carry a minimum of $250,000 per claim/$500,000 aggregate professional liability insurance. Ky. Sup. Ct. R. 3.024.
140 See E-mail from Bruce Davis, supra note 37 (revealing that 2792 of the 14,212 members of the Kentucky Bar Association practice in a limited liability entity and have either professional liability insurance or some other acceptable form of coverage).
fulfills his obligation of collectively reimbursing "persons who have lost money or property as a result of the dishonest conduct of another lawyer." The Fund reimburses clients who have lost money or other property due to the dishonest acts of their Kentucky attorney. The Fund is supported by contributions from every practicing attorney in Kentucky.

But the Client’s Security Fund should not be considered a substitute for professional liability insurance. The rule governing the Fund provides that "[t]he loss must be caused by the dishonest conduct of the lawyer and shall have arisen out of or in the course of a lawyer-client relationship between the lawyer and the claimant." The definition of "dishonest conduct" is limited to acts of "theft or embezzlement of money or the wrongful taking or conversion of money, property or other things of value." As a general rule, the Fund does not cover "[l]osses incurred as a result of any negligent act of malpractice." There is an exception, however, that gives the trustees of the Fund discretion to recognize an excluded claim. Even if a claimant proves entitlement to the exception and is reimbursed accordingly, an attorney cannot consider the Fund a substitute for insurance. The rule requires any attorney whose conduct requires reimbursement to make restitution to the Fund.

Kentucky should adopt a rule to protect clients from uninsured attorneys. Currently, many attorneys are not required to carry insurance under Rule 3.024, and many clients are harmed by their attorneys in ways that do not amount to "dishonest conduct." Even though a mandatory coverage scheme is not feasible, a mandatory disclosure rule would be beneficial for all those seeking legal help across the state. The court should

142 Id. R. 3.820(1)(b).
143 Id. R. 3.820(1)(a); see also KY. BAR ASS’N, CLIENT’S SECURITY FUND, http://www.kybar.org/internal.cfm?page=html/law_ethics_clientsecurityfund.html (last visited Jan. 10, 2004) (noting that the current caps on claims filed against the Client’s Security Fund are "$65,000 per claim and $200,000 aggregate payment per lawyer").
144 KY. SUP. CT. R. 3.820(3)(a).
145 Id. R. 3.820(1)(a).
146 Id. R. 3.820(10)(c).
147 Id. R. 3.820(10)(d)(1).
148 Id. R. 3.820(10)(e) (stating that there must be a showing of extreme hardship or special and unusual circumstances.).
149 Id. R. 3.820(3)(c) (stating that any attorney who does not make restitution to the Fund may be subject to “suspension, disbarment or denial of an application for reinstatement”).
150 See supra notes 139–149 and accompanying text.
keep in mind, however, that the rules adopted in other states may not necessarily be right for Kentucky. The South Dakota rule is too strict, while the Virginia rule does not offer enough protection for clients.151 Also, the exemptions offered to attorneys in certain areas of practice may not be suitable for Kentucky.152 Whatever solution the Kentucky Supreme Court chooses must be capable of evolving with the practice of law and offer protection for whomever tomorrow's client shall be.

151 The simplicity of the Virginia rule may inhibit its effectiveness because, in order for disclosure to protect the client, the client must contact the Virginia State Bar Association to determine whether or not his attorney is insured. See Va. R. Ct. 6 § 4, para. 18.
152 See supra notes 134–135 and accompanying text.