A Portrait of Uninsured Lawyers: Using Empirical Data to Enhance Public Protection

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Leslie C. Levin, Lawyers Going Bare and Clients Going Blind, 68 **Fla. L. Rev.** 1281 (2016).

Many professors reading this review teach professional responsibility courses. These courses cover the law of lawyering, commonly focusing on the ABA Model Rules of Professional Conduct. As revealed in a small survey that I conducted in 2011, many professors do not devote much attention to studying legal malpractice law. The survey revealed that an even smaller percentage cover legal malpractice insurance. As a result, the majority of law students likely graduate without the basic understanding of legal malpractice insurance and without considering the crucial role that insurance plays in a professional's practice. Professors' failure to discuss the role insurance plays in helping lawyers function as accountable professionals may contribute to the large number of lawyers who fail to carry legal malpractice insurance.[1] From the standpoint of access to justice, uninsured lawyers may leave injured persons without a remedy because experienced malpractice counsel often decline to sue lawyers who do not carry insurance or have significant assets to cover a malpractice judgment or settlement.[2]

Among practice settings, solo practitioners constitute the largest group of uninsured lawyers. Although some scholars have studied the role that insurance plays in affecting the conduct of lawyers in large firms,[3] no one has studied the issues related to malpractice insurance and solo practice. That is why I especially liked *Lawyers Going Bare and Clients Going Blind* by Leslie C. Levin. The article provides a fascinating window into the world of uninsured solo lawyers.

To put the issue of uninsured lawyers in perspective, the article opens by discussing mandatory insurance for lawyers. Unlike other common law countries, in the United States, only two states now require that lawyers in private practice maintain a minimum level of malpractice insurance. With this background on insurance requirements, Professor Levin's article examines the profile and perspectives of lawyers who "go bare," drawing on data derived from a 2011 survey of uninsured New Mexico lawyers and more recent surveys of insured and uninsured lawyers in Arizona and Connecticut. The data paint an interesting portrait of uninsured lawyers and their conduct. Most notably, the results address the role that cost plays in lawyers going bare. The results reveal a "disconnect" between what some lawyers know about cost and the reasons they indicate for not carrying insurance. Although New Mexico lawyers most frequently cited cost as the reason for not carrying insurance, 40.8% of New Mexico lawyers never applied for insurance. (P. 1290.) This suggests that the lawyers may not have actually known of the relatively low cost of insurance (around $3,000 per lawyer for minimum levels of coverage). This amount appears to be relatively low, assuming that you are a lawyer with a profitable practice.

A number of respondents in the survey reported that insurance was unaffordable because they were running their practices on a shoestring, practicing law without support staff and without a dedicated office. By contrast, a significant percentage of uninsured lawyers reported that the cost of insurance was not prohibitive and that they would purchase insurance if the state required them to do so. (P. 1291-92.) From the standpoint of client protection and accountability, this group of lawyers may be the most troubling, despite their claims that they could afford to hire counsel to defend a claim. Evidently, these lawyers make an economic calculation, weighing the cost of insurance, the value of insurance protection, and the likelihood of a plaintiff will successfully recover on a malpractice claim.

Some lawyers refuse to carry insurance because they believe that insurance makes them more attractive targets. Others reported not carrying insurance because they practiced in areas, such a criminal law, in which their civil liability

exposure is limited. (Pp. 1293-94.)

As a professor who directs a post-graduate incubator program that is designed to train recent law graduates pursuing solo and small firm practice, the insight I found to be the most interesting is the finding that a lawyers' early practice experience may affect the likelihood that lawyers will opt to carry malpractice insurance later in their career. The results suggested that lawyers who were insured in their early careers were more likely to carry insurance later in their careers. (P. 1296.) As noted by Professor Levin, the lawyers who were covered by insurance when they first enter private practice may come to view insurance "as a necessary part of doing business." (P. 1296.) This observation points to the value of requiring insurance in post-graduation incubator programs.

One factor that may influence lawyers' decisions to purchase insurance is a state requirement that lawyers disclose that they do not carry insurance. Professor Levin's article systematically examines insurance disclosure requirements canvassing the different approaches states take, as well as the possible impact of those approaches. Interestingly, the data does not clearly indicate that disclosure requirements create an incentive for lawyers to purchase insurance (though the disclosures still may have other benefits). (P. 1308.) At the same time, Professor Levin explains that there is no evidence to support the arguments that disclosure requirements stigmatize uninsured lawyers and contribute to an increase in frivolous lawsuits. Id. Professor Levin concludes by urging that states develop more effective disclosure regimes to inform the prospective clients before they contact lawyers.

Rather than relying on enhanced disclosure requirements, Professor Levin recommends that state high courts seriously examine the issue of uninsured lawyers. (P. at 1330.) After Professor Levin's article was written the Illinois Supreme Court took that challenge addressing the special risks of lawyers who go bare. On January 25, 2017, the Court adopted revisions to Rule 756, requiring that uninsured lawyers periodically self-assess their knowledge of ethics and firm practices. In the same year, the Supreme Court of Idaho took a big leap on the insurance front. On March 30, 2017, the Idaho high court adopted See rule amendments requiring attorneys in private practice to carry minimum levels of insurance.

Moving forward, Professor Levin's work can inform the work of other regulators formulating new approaches to address concerns related to uninsured lawyers. Thanks to Professor Levin, these regulators can use empirical data and her recommendations in charting a course to enhance public protection.

1. See Susan Saab Fortney, *A Tort in Search of a Remedy,: Prying Open the Courthouse Doors for Legal Malpractice Victims*, 85 **Fordham L. Rev.** 2033, 2052 (2017) (discussing the reasons lawyers may not carry insurance). [?]
2. See *id*. at 2034 (arguing that malpractice victims are denied access to justice when our civil liability system does not provide meaningful redress). [?]
3. (*See*, *e.g.*, Tom Baker & Rich Swedloff, *Liability Insurer Data as a Window on Lawyers' Professional Liability*, 5. **U.C. Irvine L. Rev.** 1273 (2015). [?]

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