Understanding Lawyer Regulation Initiatives: Is there a Sweet Spot for Achieving Client-Focused Lawyer Regulation?

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Leslie C. Levin, *The Politics of Lawyer Regulation: The Malpractice Insurance Example*, 33 **Geo. J. Legal Ethics** __ (forthcoming, 2020), available at SSRN.

If you ask most individuals why lawyers have a monopoly on the provision of legal services and why lawyer regulation exists, I suspect they would answer that lawyer regulation is necessary for "client protection." Assuming this is correct, it is ironic that most U.S. jurisdictions do not require one of the most basic kinds of protection. Unlike lawyers in many other countries,[1] most U.S. lawyers do not have to carry malpractice insurance, which could protect clients in the event of lawyer error.

Although several U.S. states have recently examined the issue of whether malpractice insurance should be mandatory, only two U.S. jurisdictions currently require lawyers to carry professional liability insurance. Oregon has had this requirement since 1977, and Idaho has had this requirement since 2018. Professor Leslie Levin's article on *The Politics of Lawyer Regulation: The Malpractice Insurance Example*, which will be published soon in the Georgetown Journal of Legal Ethics, is a case study that examines and compares the mandatory malpractice insurance initiatives in these and other states. Her thorough and insightful article makes a compelling read, not only for those who are interested in the malpractice insurance issue, but also for those who are interested in other lawyer regulatory issues and wonder why some reforms succeed, whereas others fail.

Professor Levin's article begins with an excellent roadmap. As it explains, the first part of her article describes the history of lawyer regulation in the United States and explains why lawyers continue to play such a significant role in their own regulation. The second part of her article examines the institutional actors involved in lawyer regulation, including the courts, the legislatures, and bar organizations. This section discusses the reasons "why courts often regulate in ways that favor the legal profession's preferences and why legislatures are (somewhat) less likely to favor lawyers." This section also highlights differences between mandatory and voluntary state bar organizations as well as factors that influence their decisionmaking. The third part of her article recounts the history of the debate over malpractice insurance requirements and some of the arguments against it. This section includes a discussion of the ABA's Model Court Rule on Insurance Disclosure and the limitations of disclosure. The "roadmap" describes the remainder of the article as follows:

> **Part IV** of the article looks closely at how Oregon (forty years ago), and six other states (California, Idaho, Nevada, New Jersey, Texas, and Washington), have handled the regulation of uninsured lawyers relatively recently. The article discusses the political culture of the states, the historical context in which the insurance issue arose, and the role played by the state courts, the legislature, and the bar. Drawing on the case studies, **Part V** then identifies some factors that seemingly affect whether states will adopt public-regarding laws concerning LPL insurance. These factors include whether the organized bar supports it, the applicable lawmaking or rulemaking process, the mandatory or voluntary nature of the state bar, the views of the leadership, and the opportunities for lawyers opposed to the measures to directly lobby against

> the law. In the **Conclusion,** the article briefly considers when states are likely to adopt public-regarding laws governing lawyers. Itsuggests some areas for further research and some possible ways to ensure that the public interest receives appropriate consideration in debates over lawyer regulation.

There are several reasons why I like Professor Levin's article. There were many places where her article provided information that may not be widely known within the field. For example, many readers, including myself, may not know the history of voluntary and mandatory state bar associations, including the early leadership role of the Chicago Bar Association.[2] Professor Levin's article also provides a useful primer on public choice theory, interest group theory, and regulatory capture for those who don't know as much about these theories as they would like. Although many professional responsibility experts will be familiar with the points in the third section of the Article, which summarizes the ABA's actions and regulatory debates, it is helpful to have this material collected together in one spot.

The fourth section was one of my favorite parts of this Article because of the manner in which Professor Levin combined her extensive research about Oregon and the six states that have recently considered the issue of mandatory malpractice insurance (*i.e.,* Idaho, California, Washington, Nevada, New Jersey, and Texas) with political science research and classifications. One result is a "State Comparisons" chart that includes information about the active lawyer population in each state, whether the state bar is mandatory or voluntary, the state's current approach to the malpractice insurance issue and the date of its most recent consideration of this issue, and whether the state has a political culture that is moralistic, individualistic, traditionalistic, or a combination of these categories.