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IBA International Principles on Professional Indemnity Insurance for the Legal Profession

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Guidelines authored by a Working Group of the IBA Bar Issues Commission Policy Committee and by the IBA Legal Policy & Research Unit

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Introduction

Professional indemnity insurance is highly relevant and consequential for all those involved with the legal profession and yet, at a global level, there is comparatively little awareness of the framework or concept. This statement seeks to raise awareness of professional indemnity insurance by providing an introductory sample overview of its global framework. This will be high-level and principle-based. It is not intended to be an exhaustive or comprehensive analysis of the claims involved, and does not seek to provide advice or an opinion on merit. The purpose of this statement of principles is to assist bar associations and attorney regulatory bodies around the world in addressing three principal issues relating to professional indemnity insurance: (1) should such insurance be mandatory or non-mandatory, and if mandatory, under what conditions; (2) whether the fact that an attorney in an individual case carries or does not carry professional indemnity insurance should be mandatorily disclosed; and (3) if so, to whom should it be disclosed, that is, the client, the public or a regulatory body? A related issue that does not involve private professional indemnity insurance concerns whether bar associations or regulatory bodies should mandate the establishment of client protection funds and if so, what they do or should cover.¹

Professional indemnity insurance is essentially the equivalent of an errors and omissions policy for attorneys and those acting under their direction. It is meant to provide coverage for acts and omissions relating to their rendering of legal advice and otherwise engaging in the practice of law. Its scope and exceptions are paramount; it is generally not meant to cover business advice or other activity engaged in by the lawyer that would not be deemed the practice of law.

At an International Bar Association (IBA) Bar Issues Commission programme held at the IBA Mid-Year Meetings in Budapest, Hungary in May 2019, a distinct regional divide was observed. Most countries in the European Union mandate professional liability insurance, meanwhile, the United States – one of the largest legal markets in the world – only has mandatory professional indemnity insurance in two states, and only a handful of other states require disclosure on registration statements. Canadian and Australian provinces/states have mandatory malpractice insurance, whereas it is far less common in Africa, Asia and South America.

While there has been no express IBA policy on these issues, the IBA did provide comments in 1999 to the World Trade Organization regarding its proposed accountancy disciplines prior to any application to the legal profession.² Citing the EU Establishment of Lawyers Directive (98/5) which addressed, inter alia, lawyers bringing with them their home insurance policy, the comment identified various issues relating to professional indemnity insurance, namely the variable definition of a lawyer, issues in the translation of technical terms and the organisation of Bars and law societies such that similar activities may be covered by insurance in different ways. In terms of commenting on the accountancy disciplines, the IBA recommendation accounted for the proposed language in Article IV(12), stating that: ‘Members shall ensure that requirements regarding professional indemnity insurance for foreign applicants take into account any existing insurance coverage, in so far as it covers activities in its territory or the relevant jurisdiction in its territory and is consistent with the legislation of the host Member.’ The IBA suggested

1 While ‘professional liability insurance’ and ‘professional indemnity insurance’ are used interchangeably in certain jurisdictions, other jurisdictions make the distinction between the former as addressing general claims as to bodily harm and damages relating to business activities, whereas the latter more specifically addresses violations of the duties owed by a professional, such as legal advice or practice. The latter is addressed here and the term ‘professional indemnity’ is used. Some jurisdictions refer more colloquially to ‘legal malpractice insurance’.

2 Exhibit B: Explanatory Memorandum accompanying the IBA’s suggested changes to the World Trade Organization accountancy disciplines before they can be applied to the legal profession.

an additional phrase be incorporated to state ‘subject to Members being permitted to put the burden, including the costs of the exercise, on to foreign applicants to show the extent of their existing insurance, and the solvency and security of the company providing such insurance’.

The IBA commentary also noted:

‘If the Accountancy Disciplines are extended to lawyers, with or without the extra phrase proposed above, it may be useful to have the IBA establish a committee in conjunction with the global insurance industry (just as the CCBE³ has done with the European insurance industry to deal with the problems arising out of the Establishment Directive), to ensure that professional indemnity insurance crosses borders as easily and safely as possible.’

Generally speaking, the issue resolves itself into two broad views. Those arguing against mandatory professional indemnity insurance note that one size does not fit all. In certain types of practice, exposure based on malpractice is disproportionate to the costs of maintaining the insurance, and most lawyers voluntarily maintain malpractice insurance, so mandatory rules are a solution in search of a problem. Conversely, those arguing in favour of it see it in terms of ensuring access to justice and fairness to clients because not all lawyers carry relevant insurance. Those arguing in favour of disclosure speak of providing the client with meaningful information, whereas those opposing mandatory disclosure note that what is disclosed, without context, may be misleading, and that disclosure may even encourage frivolous claims.

This document addresses the issue at a global level beyond the context of the Directive. It seeks to impartially inform any bar association or regulatory body.

Mandatory versus non-mandatory professional indemnity insurance

1. Defining professional indemnity insurance

The authors of a leading treatise have defined professional indemnity insurance as follows:

‘Professional liability insurance or professional indemnity insurance, as it is known in the market, is insurance made available to professionals to cover the consequences of breach of professional duty. The insurance is typically a general civil liability cover restricted to the professional activities of the insured, excluding general trading liabilities. It would usually cover breach of regulatory duties. It is a regulatory requirement that certain types of professionals should obtain such insurance and there are often rules about the minimum amount and scope of the cover.’⁴

Generally, professional indemnity insurance does not include criminal acts⁵ or fraudulent behaviour, for example.⁶

3 Council of Bars and Law Societies of Europe.

4 Geoffrey Maddock, Alison Matthews and Kristien Geeurick, s 51:20. *Professional Liability Insurance*, 1 *International Insurance Law and Regulation* s 51:20.

5 The Hartford, ‘Professional Liability Insurance’ www.thehartford.com/business-playbook/in-depth/professional-liability-errors-omissions-insurance accessed 30 November 2022.

6 Lindsay Bowskill, ‘What Does Solicitors Professional Indemnity Insurance Actually Cover?’ www.travelers.co.uk/small-business-insurance/legal/what-pi-covers accessed 30 November 2022.

2. Current state of affairs

There is no uniformity around the world as to the requirements of an attorney being required to maintain professional indemnity insurance, nor is there consistency where it does exist, as to the extent or scope of coverage. The IBA's survey in 2019 yielded 40 responses from all continents; its value is for comparative purposes only to provide a sense, but not a complete survey, of how varied the different jurisdictions are.

EUROPE

The Council of Bars and Law Societies of Europe (CCBE) survey of October 2014⁷ shows that most European countries have mandatory professional indemnity insurance, with the exception of a minority, such as Greece, Latvia and Malta. The most recently released position paper from the CCBE was in 2015⁸ to address the problems lawyers faced regarding obtaining professional indemnity insurance to cover cross-border services. Another summary of the global perspective asserts that '[i]n most common law jurisdictions, professional indemnity insurance for lawyers is made mandatory by law or by law society or bar association regulation'.⁹

In Norway, the Supervisory Council for Legal Practice provides oversight regarding whether all practising lawyers have provided an insurance bond to their clients, for which they can access information from the Council. The minimum amount of the bond is NOK 5m in line with the Courts of Law Act.¹⁰ According to the Norwegian Code of Conduct rule 3.6, lawyers must also uphold professional indemnity insurance, and the bond serves this function, protecting lawyers in the case of malpractice.¹¹

Lawyers in England and Wales are currently facing the hardest professional indemnity insurance market in 20 years due to some insurers seeking personal guarantees following an increase in the combined value of claims.¹² As a result of the Covid-19 pandemic, insurers have increased due diligence measures, asking firms to provide information on their ability to operate throughout the pandemic and how effectively they have managed risks. This is also reflected in the percentage of underwriting work, with many reducing their maximum conveyancing capacity to 25 per cent.¹³

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- 7 Responses to the CCBE Questionnaire on Professional Indemnity Insurance Comparative Table, October 2014 www.ccbe.eu/fileadmin/speciality_distribution/public/documents/INSURANCE/INS_Position_papers/EN_INS_20141107_Response-to-the-CCBE-questionnaire-on-professional-indemnity-insurance-comparative-table.pdf accessed 30 November 2022.
 - 8 CCBE Position Paper on Professional Indemnity Insurance, April 2015 www.ccbe.eu/fileadmin/speciality_distribution/public/documents/INSURANCE/INS_Position_papers/EN_INS_20150424_CCBE-position-paper-on-professional-indemnity-insurance.pdf accessed 30 November 2022.
 - 9 Mandatory professional indemnity insurance & a mandatory insurer: A global perspective, LawPRO Magazine, vol 10, issue 2 www.practicepro.ca/wp-content/uploads/2017/06/2011-09-mandatory-insurance-global-perspective.pdf accessed 30 November 2022.
 - 10 Insurance Bond and Professional Indemnity Insurance in Norway, May 2021 www.advokatforeningen.no/om/om-medlemskapet/english/insurance-bond-and-professional-indemnity-insurance-in-norway accessed 30 November 2022.
 - 11 Key inputs provided by lawyer Margrethe E Willoch, on behalf of the Norwegian Bar Association.
 - 12 Eduardo Reyes, 'Solicitors face hardest PII market for 20 years' (8 March 2021) www.lawgazette.co.uk/news/solicitors-face-hardest-pii-market-for-20-years/5107687.article accessed 30 November 2022.
 - 13 Solicitors' PII Market – Miller's Review of the April 2021 Renewal Season, April 2021 www.miller-insurance.com/-/media/Images_and_downloads/Specialisms/DAPR/Downloads/Miller-Solicitors-Market-Report-April-21.pdf4-5 accessed 30 November 2022.

Singapore has had mandatory professional indemnity insurance for all practising lawyers in the country since 1991.¹⁴ The Law Society's Compulsory Professional Indemnity Insurance Scheme provides SGD 1m cover for each and every claim (inclusive of costs and expenses) for lawyers who practise in sole proprietorships and partnerships and SGD 2m for each and every claim (inclusive of costs and expenses) for lawyers who practise in limited liability law corporations and limited liability law partnerships.

In China, professional indemnity insurance, along with disclosure, is voluntary if asked, and firms' decisions to purchase cover predominantly hinge on their size and clientele.¹⁵ The insurance is available in the market, but it is usually the local bar associations that purchase it for their members. For example, the Beijing Bar Association reported that it purchased liability insurance for its members between 2013 and 2017. Compared to international firms, smaller firms do not usually buy professional indemnity insurance, and it is unlikely to become a mandatory requirement in the near future. Penalties in the form of administrative fines are applicable to firms or lawyers. Any actions that are serious, illegal and violate national laws can also lead to the revocation of the licence to practise. However, firms face civil liability in the case of legal malpractice, the cost of which can be recovered from the lawyer if deemed to be intentional or grossly negligent.¹⁶ This is uncommon, but cases have increased over the past two to three years and therefore, the risk is certainly growing. This is specifically the case prevalent in the securities market, where AllBright Law Offices was recently held jointly liable for five per cent of total compensation amounting to RMB 37m (\$5.7m) for bond issue due diligence failure as an intermediary.¹⁷ Therefore, there is still a probability that more of such firms in this area of work may consider purchasing indemnity insurance policies for themselves.

In India, which has the second-largest number of lawyers globally, the increasing numbers of law firms across cities such as Bengaluru, Chennai, Delhi, Hyderabad and Mumbai has resulted in the majority adopting professional indemnity insurance if they are engaged in any international work. This is particularly among larger firms operating across jurisdictions, as many private equity funds, unicorn companies and international clients request this prior to engagement with the firm, and this covers them for actions brought from outside India. However, for small firms only practising in Indian jurisdictions, no law mandates professional indemnity insurance and it is infrequently taken out, as the process of suing lawyers is lengthy and impractical. This also reflects the cultural perception of lawyers as of higher authority. The majority of the higher judiciary also comprises judges who have been practising lawyers. If there is a real breach of duty by the lawyer, then it is usually the disciplinary committee of the State Bar Council that acts on it. At least in the near future, it is unlikely that there will be any mandatory requirement for professional indemnity insurance cover for Indian lawyers.¹⁸

14 The Law Society of Singapore, 'Professional Indemnity Insurance' www.lawsociety.org.sg/for-lawyers/professional-indemnity-insurance accessed 30 November 2022.

15 Key inputs provided by Victor Yang, Senior Consultant, Clyde & Co, Shanghai, People's Republic of China.

16 Civil liability is set out in the Securities Law of the People's Republic of China on Lawyers (Revised in 2017), Art 54, which states: it is forbidden for practitioners of securities exchanges, securities companies, securities registration and clearing institutions, securities trading service institutions and other financial institutions and functionaries of the relevant regulatory departments or trade associations to use the undisclosed information other than inside information obtained by taking advantage of their positions, engage in securities trading activities related to such information in violation of provisions, or expressly or implicitly suggest that others engage in related trading activities. Whoever uses undisclosed information for trading, causing losses to investors, shall bear compensation liability. This is also created in the Several Provisions of the Supreme People's Court on the Trial of Cases of Civil Compensation Arising from the False Statement in Securities Market (2003), specifically in Arts 24, 161 and 202.

17 China's AllBright Law Offices Liable for Bond Issue Due Diligence Failure, Court Says, 6 January 2021 <https://practicesource.com/chinas-allbright-law-offices-liable-for-bond-issue-due-diligence-failure-court-says> accessed 30 November 2022.

18 Key inputs provided by Sumeet Lall, Partner CSL Chambers, New Delhi, India.

There is no mandatory professional indemnity insurance in Indonesia, the fourth most populous country in the world. In Indonesia, unlike the US, there has not been a culture of suing lawyers for malpractice, though anecdotally, this may be starting to change.

SOUTH AMERICA

Clyde & Co, in its 2014 report on global trends and developments, noted in regard to Latin America that '[c]laims against professionals remain uncommon across most of Latin America, which is traditionally not a litigious region and accordingly, the region does not have a well-developed professional indemnity market', and that 'somewhat paradoxically, therefore, the growth of a professional liability market in the region would likely result in an increase in the likelihood of claims'.¹⁹ The same report noted at the time that there was 'no developed professional indemnity market across most of Latin America'.

AFRICA

The Law Society of South Africa requires all admitted attorneys to take out indemnity cover. Attorneys regularly take out professional indemnity insurance, although there is no legal obligation to do so. In South Africa, professional indemnity for legal practitioners is regulated by the Legal Practice Act 28 of 2014. This empowers the Legal Practitioners' Fidelity Fund to contract with an insurer, the Legal Practitioners Insurance Fund (LPIF), to provide professional indemnity insurance to practitioners (insured) that have a Fidelity Fund Certificate. The LPIF provides for the primary layer of professional indemnity insurance to firms of practising attorneys against professional legal liability to pay compensation to any third party. There is no statutory fidelity fund for advocates. Advocates may take out professional indemnity insurance. Recently, there has been a decrease in the number of claims, but this has largely been attributed to risk management interventions in South Africa.²⁰

AUSTRALIA

In Australia, each state's bar association has mandated professional indemnity insurance, and there has recently been a general increase in the frequency of claims. In New South Wales, the average number of claims in 2010–2014 was approximately 90 new complaints, whereas in the period 2017–2020, the average was 160.²¹ In Victoria, there was a 10–15 per cent increase in claims from solicitors in 2020, the majority being in the period from May to June when a large portion of businesses were impacted by the Covid-19 pandemic.²² Equally, the main proportion of these claims arose in conveyancing and mortgages, which the Legal Practitioners' Liability Committee deems to be a direct result of the economic impact of the pandemic on consumers, corporations and lenders.²³ In both states, the main causes for the claims were

19 Clyde & Co Global Professional Indemnity Report, 30 August 2013 www.clydeco.com/uploads/Blogs/insurance/CC003430_Global_PI_Report_UK_30.08.13_lowres.pdf accessed 15 November 2019.

20 Legal Practitioners Indemnity Insurance Fund Annual Report 2020 https://lpiif.co.za/wp-content/uploads/2020/12/6216_LPIIF_IR2020-SINGLE-PAGE.pdf accessed 30 November 2022.

21 NSW Bar Association Annual Report 2019-2020 p 63 https://nswbar.asn.au/uploads/pdf-documents/annual_reports/NSWBA_AnnRpt20_23Sept20_e.pdf accessed 30 November 2022.

22 Legal Practitioners' Liability Committee Annual Report 2019–2020, pp 7–10 https://lplc.com.au/uploads/main/Annual-Reports/LPLC_Annual-Report-_2019-2020.pdf accessed 30 November 2022.

23 *Ibid*, pp 5.

poor communication regarding instructions, conflicts of interest, prospects of success and so on, and deficiencies in documentation and preparation.²⁴

NORTH AMERICA

Within the US, which has one of the largest legal communities in the world, two states now have fully mandatory professional indemnity insurance.²⁵ In Oregon, every lawyer is covered for \$300,000 in indemnity coverage and an additional \$25,000 in defence costs by a state agency.²⁶ In determining whether mandatory insurance should be required, there is a balance between costs to lawyers and benefits to clients. Increased premiums are passed on to clients in the form of higher billable rates or may be otherwise reflected in fixed fee costs. In Idaho, every active attorney member must certify whether the attorney represents private clients and if so, submit proof of professional liability insurance coverage of at least \$100,000 per occurrence with a \$300,000 aggregate.²⁷

One very important difference between professional indemnity insurance in Europe and the US is that punitive damages, which are currently awarded in the US to protect and compensate for the breach of private law interests, are not traditionally awarded in continental European legal systems. This means that the average quantum awarded in insurance claims in Europe is much lower and much more predictable than in the US. It also means that it is much easier for European insurers to assess risks and to offer insurance coverage at a reasonable premium. It also explains why the CCBE, in its position paper, does not recommend regulatory interference but prefers market-led solutions.²⁸

GENERAL EFFECT OF COVID-19

According to a global survey by the international insurer Ames & Gough, by 2020, the severity of claims was significantly increasing, despite levelling off between 2019 and 2020.²⁹ A subsequent survey published by the firm in 2021 cited the Covid-19 pandemic as a potential cause for legal malpractice claims remaining at an all-time high.³⁰ The main practice areas currently experiencing the highest number of claims are business transactions, corporate and securities, and trusts and estates.³¹ This, however, is not the dispositive word, and areas of exposure may shift from jurisdiction to jurisdiction.³² As per the 2020 report, the number of new malpractice claims brought against law firms in 2019 was higher than in past years, and marked the first time since 2013 that most insurers surveyed reported a higher claims frequency than what they had experienced the prior year. The global Covid-19 pandemic has triggered yet another wave of legal malpractice claims and increase in premiums, with the most direct impact on

24 Lawcover Annual report, pp 27 and 28 www.lawcover.com.au/wp-content/uploads/2020/10/Annual-Review-2020.pdf accessed 30 November 2022; Legal Practitioners' Liability Committee Annual Report 2019–2020, pp 7–10 https://lplc.com.au/uploads/main/Annual-Reports/LPLC_Annual-Report-2019-2020.pdf accessed 30 November 2022.

25 Jennifer Ip and Nora Rock, 'Mandatory professional indemnity insurance & a mandatory insurer: A global perspective' www.practicepro.ca/2011/09/mandatory-professional-indemnity-insurance-a-mandatory-insurer-a-global-perspective accessed 30 November 2022.

26 *Ibid.*

27 Idaho Bar Commission, '2018 Malpractice Coverage Requirement – General Information' <https://isb.idaho.gov/blog/2018-malpractice-coverage-requirement> accessed 30 November 2022.

28 Key inputs provided by Stéphanie Alves, CCBE Senior Legal Adviser.

29 Legal malpractice claims worries growing: Survey, May 2021 www.businessinsurance.com/article/20210517/NEWS06/912341895/Legal-malpractice-claims-worries-growing-Survey-LPLI-2021-Claims-Survey-Freque accessed 30 November 2022.

30 Ames & Gough LPLI 2021 Claims Survey: Frequency of Legal Malpractice Claims Slows as Costs Continue to Spiral www.amesgough.com accessed 30 November 2022.

31 Legal malpractice insurers see increase in claims: Report, May 2020 www.businessinsurance.com/article/20200520/NEWS06/912334663/Legal-malpractice-insurers-see-increase-in-claims-Report accessed 30 November 2022.

32 Legal Malpractice Claims Have Soared (and May Soar Higher) www.law360.com/articles/1274652 accessed 30 November 2022.

the trust and estates sector. This can be attributed to the mortality concerns it has instigated and the rise in case law enabling third parties to bring claims for their incapacitated relatives.³³

3. *Mandatory or non-mandatory insurance*

MANDATORY INSURANCE

There are a range of arguments in support of mandatory professional indemnity insurance. Within certain regions, such as Europe, mandatory professional indemnity insurance is the rule rather than the exception and has successfully operated in some jurisdictions, including England and Wales, Ireland and Norway, for many years. In Malaysia, there has been a mandatory professional indemnity scheme for lawyers in place since 1992, which insures against negligent legal work.³⁴ Certain large jurisdictions, such as India and Indonesia, do not have compulsory professional indemnity insurance. Suits for negligence against lawyers in India are not common, although the Advocates Act 1961 permits suits against lawyers by aggrieved clients in terms of behaviour.³⁵ Nonetheless, in both India and Indonesia, despite certain isolated cases, there is not a comparable culture of malpractice suits as exists, for example, in the US. Despite the culture of malpractice suits in the US, a Washington State Bar Association report found that 14 per cent of lawyers are uninsured, and among solo or small firms, the percentage rises to 28 per cent.³⁶ However, the New Jersey Supreme Court considered this issue and concluded that mandatory insurance is a solution in search of a problem, mandating that it is not necessary.

The primary reason for mandatory insurance is widely cited as being in the name of public protection and the right to access to remedy. This is seen as protection for clients, not just lawyers. Clients of lawyers and victims of malpractice should have some basis for recovery of damages. Without mandatory insurance, in various cases, the lawyer may not have assets sufficient to satisfy a judgment. In creating a more comprehensive and reliable protection framework for the public and to ensure a healthy lawyer–client relationship, mandatory insurance requirements are viewed as helping to improve public confidence and the overall perception of the legal profession. This will also help to preserve the self-regulatory status of the legal profession as there is less requirement to implement public protection measures through legislative regulation of the profession. Attorneys are also seen to benefit by having an insurer that can negotiate with the client or cover the loss.

There is also the notion that mandatory insurance improves the risk management and delivery of legal services. In the process of applying for professional indemnity insurance, lawyers are required to outline their frameworks and processes for managing the risks, conflicts and deadlines associated with the delivery of their service. Such a process highlights lawyers' means of better managing their risks and administration, which improves overall service delivery and exposes 'bad apples' in the profession. An argument has also been made that mandatory insurance would provide greater stability in the market and reduce premiums.

33 'It's a Real Issue': Law Firm Leaders Brace for Another Painful Year of Insurance Premium Rises, 12 February 2021 www.law.com/international-edition/2021/02/12/its-a-real-issue-law-firm-leaders-brace-for-another-painful-year-of-insurance-premium-rises accessed 30 November 2022.

34 Praktis, Malaysian Bar Mandatory PII Scheme www.praktis.com.my/about-us/history-of-pii accessed 30 November 2022.

35 Prince Chadak, 'Analysis of Professional Indemnity Insurance in India' www.latestlaws.com/articles/analysis-of-professional-indemnity-insurance-in-india accessed 30 November 2022.

36 Washington State Bar Association, 'Mandatory Malpractice Insurance Task Force Interim Report to Board of Governors' (10 July 2018) [www.wsba.org/docs/default-source/legal-community/committees/mandatory-malpractice-insurance-task-force/mandatory-malpractice-insurance-task-force-interim-report-july-10-2018\(00430844\).pdf?sfvrsn=398306f1_3](http://www.wsba.org/docs/default-source/legal-community/committees/mandatory-malpractice-insurance-task-force/mandatory-malpractice-insurance-task-force-interim-report-july-10-2018(00430844).pdf?sfvrsn=398306f1_3) accessed 30 November 2022.

An additional reason for mandatory insurance is to create a more level playing field among lawyers. This ‘levelling of the playing field’ argument has been cited as the rationale for compulsory mandatory insurance in Singapore and Hong Kong.³⁷ Furthermore, insurance would not just be the province of larger firms and could make smaller firms more attractive to clients. It has also been argued that mandatory insurance helps raise the favourable perception of the legal profession as a whole; after all, in various jurisdictions, doctors are required to have insurance. Without mandatory insurance, there is a higher risk that, in the instance where an uninsured lawyer commits malpractice, the lawyer responsible will transfer the responsibility to an insured lawyer to avoid the high costs of managing a dispute without insurance. This is seen to be unfair and distorts the responsibility and incentive for voluntarily attaining professional indemnity insurance. Finally, mandatory insurance will help to ensure wider access to coverage, less restrictive coverage and overall stability, and predictability in the insurance market. In turn, this should help to reduce spiralling insurance rates for everyone.

Finally, there is an ‘access to justice’ component. Clients are more likely to seek out lawyers than attempt self-help if they have the confidence that there is a malpractice insurance to cover the claim, if their more-affordable lawyer makes a mistake. Having malpractice insurance is also argued to help weed out bad lawyers whose practice habits may be reflected in their premiums, providing an incentive for more care.

NON-MANDATORY/VOLUNTARY INSURANCE

There are equally well-established arguments against mandating insurance coverage for lawyers. First, there is no concrete evidence to demonstrate that, in jurisdictions where insurance is not mandatory, lawyers cause any more public harm than in jurisdictions with mandatory insurance. In essence, there is no proven need for lawyers to carry professional indemnity insurance. Furthermore, when a client knows that insurance is mandatory, there is a greater likelihood of bringing in litigation that may not be otherwise justified. It may not be entirely desirable to encourage litigation as it is an expensive and impractical means of resolving disputes over malpractice.

Some lawyers argue that the cost of mandatory insurance is too great. As most large law firms have professional indemnity insurance already, requirements for mandatory insurance will have the greatest impact on small law firms and independent lawyers who might not be able to afford coverage. It is possible that the greater costs will be transferred to their clients, making access to legal services more expensive. In the absence of widespread public harm created through legal malpractice, the higher costs for access to legal advice outweigh the greater protection afforded by mandatory insurance. In addition, pro bono law firms will not be able to transfer their increased fixed cost to client bills, which risks lowering the feasibility of such activities. The cost factor may also be seen to affect certain specialty areas more than others.

Moreover, there is an element of authoritarianism that may be seen as incompatible with what is sought to be achieved. For some lawyers, exposure based on malpractice is limited. Lawyers doing a cost-benefit analysis may decide that paying a claim themselves is less expensive than paying the premiums for insurance, given the risks in their particular practice area. It may also have implications for access to justice, as practice in certain geographic areas where lawyers’ costs are increased may result in an absence of accessible legal services there.

37 *Ibid.*

There is also a concern that having ‘insurance’ does not mean that particular claims are covered, and not only may clients not be protected, but litigation over coverage may foster an even more unfavourable view of lawyers by appearing to promise one thing but not deliver it. Further, on a certain level, it is also seen as ‘good’ lawyers subsidising ‘bad’ lawyers rather than letting the market take care of it.

Some also raise the concern that by knowing there is a pool of money, malpractice claims may be encouraged.

There are also philosophical arguments against mandatory insurance requirements raised by the possibility that the insurance industry could have an important say in who is able to practise law. In dictating the price of underwriting, insurance providers have the capacity to price qualified lawyers out of practising. This may particularly impact certain specialties of legal practice, such as securities, which, due to their higher risks of liability, would incur higher premium costs. Mandatory insurance requirements will mean that the underwriting of premiums will be equalised and consequently premiums that are charged to malpractice-free lawyers will account for the faults of lawyers who commit malpractice.

4. Disclosure

There is no uniformity of disclosure requirements. In the US, at least seven states require disclosure directly to the client and 16 states require annual disclosure on an attorney registration statement.³⁸ The American Bar Association (ABA) Model Rule on Insurance Disclosure, adopted in 2004, is a disclosure rule, not a mandatory purchase rule. It requires lawyers to annually disclose, to their respective state supreme courts, the status of their coverage and intent to maintain coverage. How this information is publicised is at the discretion of the state supreme courts.³⁹

The issue regarding mandatory or non-mandatory disclosure is whether meaningful information is disclosed versus potentially misleading information as to claim coverage. Some states in the US, such as California, have a mandatory disclosure rule.⁴⁰

Assuming disclosure occurs, the issue is then to whom must there be disclosure (clients, regulatory bodies or both) and what must be disclosed. Another issue is whether, if there is no mandatory disclosure but a potential (or actual) client asks the question, the lawyer is obligated to answer. Regarding the latter, the New York County Lawyers Association Committee on Professional Ethics issued Formal Opinion 734,⁴¹ which states that a lawyer has no affirmative obligation to disclose to a prospective client whether the lawyer is covered by malpractice insurance. If asked by a prospective client about insurance coverage, lawyers may respond that they, or their firm, have a policy of not providing coverage information to prospective clients. If asked by a current client for such information, lawyers are obligated to disclose this information only if it is relevant to the representation. In addition to the main disclosure rule, the law in California also addresses the issue in the case of contract lawyers; California Rule 3-400 precludes contractually limiting liability to the client. One view is that it would be unethical to use a contract lawyer

38 American Bar Association, Standing Committee on Client Protection, ‘State Implementation of ABA Model Court Rule on Insurance Disclosure’ www.americanbar.org/content/dam/aba/administrative/professional_responsibility/malprac_disc_chart.authcheckdam.pdf accessed 30 November 2022.

39 American Bar Association Standing Committee on Client Protection, ‘Model Court Rule on Insurance Disclosure’ www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba_model_court_rule_on_insurance_disclosure.authcheckdam.pdf accessed 30 November 2022.

40 Rules of the State Bar of California, r 1.4.2 accessed 30 November 2022.

41 NYCLA Committee on Professional Ethics Formal Opinion No 734, www.nycla.org/resource/ethics-opinion/nycla-committee-on-professional-ethics-formal-opinion-on-lawyers-disclosure-obligation-to-prospective accessed 30 November 2022.

without insurance to limit the main firm's liability, and California Rule 3-410 requires lawyers without malpractice insurance to inform clients in writing if four or more hours' work is required.

The argument in favour of disclosure is consistent with the public interest arguments noted above. However, the counterpoint is whether disclosure provides any meaningful information to the client, short of providing the actual policy itself for review.

Disclosure to a regulatory body does not necessarily mean that the client obtains the information.

5. Client protection funds

Client protection funds provide reimbursement to clients incurring financial loss as result of the 'dishonest' conduct of lawyers. Professional indemnity insurance generally does not cover intentional acts, such as stealing. They can be funded by mandatory assessment by a court rule or statute, or by the bar association itself, as a means of assuring continual funding and staffing. The function of client protection funds is to reimburse losses caused by the dishonest conduct of lawyers, licensed or otherwise authorised to practise law in the courts of the relevant jurisdiction, occurring in the course of the client-lawyer or other fiduciary relationship between the lawyer and claimant. However, there may not be enough for dollar-for-dollar recovery. The ABA Model Rules for Lawyers' Funds for Client Protection establish a national model for the establishment and administration of a client protection fund.⁴² Under that regime, the loss must be caused by the dishonest conduct of the lawyer and shall have arisen out of, and by reason of, a client-lawyer relationship or a fiduciary relationship between the lawyer and claimant.

A predicate issue is what constitutes dishonest conduct. The ABA model rule states that 'dishonest conduct' refers to any wrongful act committed by a lawyer in the nature of theft or embezzlement of money, or the wrongful taking or conversion of money, property or other things of value, including but not limited to: (1) failure to refund unearned fees received in advance as required by Rule 1.16 of the ABA Model Rules for Professional Conduct; and (2) the borrowing of money from a client without the intention to repay it, or with disregard of the lawyer's inability or reasonably anticipated inability to repay it. Under ABA Model Rule 5.5 for transient practice in certain circumstances, a situation may arise when the lawyer-client connection is of a transient state, where the lawyer is not licensed to practise and has not paid into the fund, therefore the lawyer may not get coverage (in situations where lawyers are admitted *pro hac vice* and appear in court, they are generally required to pay into the client protection fund; in other cases, where lawyers temporarily practise in a state, they do not necessarily have to go through that process, as in transactional matters). As an example of exposure, in *Ohio SBA v Owen No 2015-1317*, the lawyer was disciplined for non-compliance. Ohio has a mandatory disclosure rule to maintain at least \$100,000 per occurrence and \$300,000 aggregate malpractice insurance (Rule 1.4(c)). In this case, the lawyer provided a disclaimer form to clients that did not comport with Rule 1.4(c). The lawyer was a managing partner in the Ohio office of an out-of-state firm and was publicly reprimanded.

Client compensation funds exist in various countries for specified events, such as for the occurrence of fraud in Austria, stolen and unrecoverable funds in Belgium, where malpractice insurance is exceeded or due to lawyer dishonesty in Denmark, theft in Finland, theft/mistakes/negligence in Ireland, and dishonesty of solicitors in England and Wales. Countries that do not have client compensation funds

⁴² American Bar Association, Model Rules for Lawyers' Funds for Client Protection www.americanbar.org/groups/professional_responsibility/resources/client_protection/rules.html accessed 30 November 2022.

include Cyprus, the Czech Republic, Germany, Greece, Italy, Liechtenstein, Poland, Portugal, Slovakia and Slovenia.⁴³ In Ontario, the Law Society Upper Canada Compensation Fund is discretionary and based on dishonesty and may even be funded before the lawyer's disciplinary proceeding is concluded.

The impact on multijurisdictional practice means that there will be overlapping jurisdictions. The *Owen* situation is easily imaginable in cross-border firms.

6. Access to justice

In 2019, the IBA issued its report titled *Legal Expenses Insurance and Access to Justice*.⁴⁴ However, the report addressed programmes pursuant to which individuals pay 'before the event' to obtain coverage for various types of legal representation. This is to be distinguished from professional liability insurance, which only provides redress for lawyer malpractice. In other words, legal expenses insurance is essentially a programme to pay in advance to make sure that individuals or businesses can obtain legal advice or services for particular activities. It is meant to provide manageable and affordable access to legal representation.

Where the client pays a lawyer for representation and the lawyer fails to perform appropriately, the client is not only out of pocket; the client did not get the result that the client paid for. The client paid for access to justice but did not obtain it. Without professional liability insurance, the aggrieved client may have no avenue of recovery against an impecunious lawyer, is out the money spent, and may even have lost the window for bringing the cause of action. It is a practical denial of access to justice.

On the other hand, the New Jersey study committee that considered the issue concluded that mandatory malpractice insurance would have the opposite effect by driving up legal costs that lawyers would pass on to clients, making access to justice even more costly.⁴⁵

Guidance for bar associations and regulatory bodies

General commentary

The IBA appreciates that individual bar associations and regulatory bodies are best placed to assess the needs of their own jurisdictions, while balancing these needs with their capacity and available resources. Therefore, a set of principles has been outlined that bar associations and regulatory bodies should focus on. The IBA Principles are not affirmatively in favour of or against mandatory insurance or disclosure. Rather, they offer some guidance as to issues to consider.

43 Council of Bars and Law Societies of Europe, 'Revised Comparative Table on Professional Indemnity Insurance' www.cbbe.eu/fileadmin/user_upload/NTCdocument/REVISED_Comparative_1_1282909942.pdf accessed 30 November 2022.

44 IBA Legal Expenses Insurance and Access to Justice 2019 www.ibanet.org/MediaHandler?id=98236046-737B-4F05-A964-B7F438F04CD8 accessed 30 November 2022.

45 Report of the Supreme Court Ad Hoc Committee on Attorney Malpractice Insurance (New Jersey) (June 2017).

1. Independence

The primary principle is the lawyer's duty of independence, and the ability to give unbiased advice and representation, as set forth in Principle (1) of the IBA International Principles on Conduct for the Legal Profession.⁴⁶ Professional independence is integral to legal practice. It is important that bar associations and regulatory bodies ensure that their lawyers are not subject to external pressures so that they are impartial when providing advice and representation.

Requiring the lawyer to maintain insurance that covers that advice can provide assurance that the lawyer will be protected for advice.

On the other hand, the costs to the lawyer must be balanced. A certain type of practice may entail less risk. Jurisdictions that have not opted for mandatory malpractice insurance have not found it necessary to ensure the independence of the lawyer.

2. Competence

Lawyers must be competent to perform legal services. This is not result-orientated; a competent lawyer may still lose a case or otherwise not provide 'A'-level service, but even 'C'-level service would not necessarily rise to the level of incompetence such that professional liability is triggered. On the other hand, a lawyer competent in a field where the risk of mistakes and exposure for a negligent result is relatively low may make the calculation that the cost of malpractice insurance is not an economically justifiable decision.

Legal malpractice is based on the contention that the lawyer acted negligently, and that the lawyer did not act in the manner of a reasonably prudent attorney in the same circumstances, providing the required level of care, skill and diligence that a competent attorney would provide.

3. Integrity

Legal professionals shall at all times maintain the highest standards of honesty, integrity and fairness towards clients, the court, colleagues and all those with whom the legal professional comes into professional contact. This guidance is provided in the IBA International Principles on Conduct for the Legal Profession.⁴⁷ The accompanying explanatory note requires that a legal professional shall not knowingly make a false statement of fact or law in the course of representing a client or fail to correct a false statement of material fact or law previously made by the legal professional.

In the context of insurance cover, this guidance is also significant. Many professional indemnity policies exclude cover for allegations of fraud, and acting with honesty, integrity and fairness is likely to mitigate the risk of such allegations.

Lawyers have a duty to communicate with the client so that the client may provide informed consent, including the decision to retain the lawyer in the initial instance. While communication is discussed below, the transparency and honesty of the lawyer in the attorney–client relationship implicates the lawyer in issues

⁴⁶ IBA International Principles on Conduct for the Legal Profession, update adopted on 11 October 2018 [www.ibanet.org/document?id=IBA%20International%20Principles%20on%20Conduct%20for%20the%20Legal%20Profession%20\(2018\)](http://www.ibanet.org/document?id=IBA%20International%20Principles%20on%20Conduct%20for%20the%20Legal%20Profession%20(2018)) accessed 30 November 2022.

⁴⁷ *Ibid.*

of disclosure and the level of explanation provided to the client that inquires as to the existence of insurance. However, at least one bar association in the US has opined that a lawyer has no affirmative obligation to disclose to a prospective client whether the lawyer is covered by malpractice insurance. If asked by a prospective client about insurance coverage, the lawyer may respond that they have a policy of not providing coverage information to prospective clients. If asked by a current client for such information, the lawyer is obligated to disclose this information only if it is relevant to the representation.⁴⁸

4. Risk

Requiring lawyers to purchase and maintain professional indemnity insurance can mitigate financial risks faced by legal practitioners. This is because policies may provide funds for defence costs and limit liability. Bar associations and regulatory bodies could raise awareness around a firm's exposure to cyber risk, and the financial and reputational risks associated with misconduct to facilitate legal practitioners' understanding.

With the increasing commonality of cyberattacks and investigations into the handling of client's funds, lawyers should be reminded of the risks that they face. This is especially true in jurisdictions where insurance is not mandatory as claims could cause firms to become insolvent where litigation is expensive.

On the other hand, costs to the lawyer must be balanced. A certain type of practice may entail less risk. In determining whether to require professional liability insurance, various factors are relevant.

Rules may also be adjusted depending on the legal structure. A professional liability company or other structure that shields individual liability may justify mandatory insurance to ensure recovery.

5. Responsibility

TO UNDERSTAND LOCAL REQUIREMENTS

As requirements for professional indemnity insurance diverge around the world, practitioners have a responsibility to familiarise themselves with local requirements for this type of insurance, as well as any disclosure obligations. It is important that bar associations and regulatory bodies call for attention to be paid to the relevant requirements in their jurisdictions, especially in respect of any minimum cover and scope requirements.

A lawyer should disclose to the regulatory body:

1. whether the lawyer is engaged in the private practise of law;
2. if so, whether the lawyer is currently covered by professional liability insurance;
3. whether the lawyer intends to maintain insurance during the period of time the lawyer is engaged in the private practise of law; and

⁴⁸ NYCLA Committee on Professional Ethics Formal Opinion No 734.

4. whether the lawyer is exempt from this rule because the lawyer is engaged in the practise of law as a full-time government lawyer or is counsel employed by an organisational client and does not represent clients outside that capacity.

TO UNDERSTAND POLICY WORDING

Policy wording will contain insurance-specific terminology that some members of the legal profession may not be familiar with. However, it is important to understand the terminology to ensure that if cover is purchased, it is the right insurance. The ‘inception date’, for example, refers to the date that the policy starts and also dictates that you can only make claims after this date.⁴⁹

6. *Communication*

Principle 5.1 of the IBA International Principles of Conduct for the Legal Profession instructs lawyers to treat client interests as paramount. In the explanatory note, the commentary states that ‘even if not required by the applicable law of a jurisdiction, it is considered good practice in many jurisdictions for lawyers to ensure that they secure in the interest of their clients adequate insurance cover against claims based on professional negligence or malpractice’.

Other jurisdictions, such as the US, require communication with clients on all material matters, particularly those requiring informed consent. In particular, ABA Model Rule 1.4(b) requires that ‘A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation’.

7. *Confidentiality*

Attorney–client confidentiality is one of the core values of the profession, addressed in the IBA International Principles on Conduct for the Legal Profession, the CCBE Charter of Core Principles of the European Legal Profession and other places. Legal practitioners owe a duty to their present and former clients to ensure that they comply with all legal and ethical requirements related to confidentiality.

8. *Maintaining public confidence*

Legal practitioners are an important mouthpiece for their clients, and a link between the public and the judiciary. Members of the public and clients should be able to place their trust in legal professionals, aiding in the maintenance of public confidence. Legal practitioners should monitor their behaviour to ensure that they are aware of the duties owed to clients and the broader implications that professional misconduct has on public confidence. Irrespective of whether a legal practitioner has professional indemnity insurance, it is important for bar associations and regulatory bodies to emphasise the duties owed to clients to ensure the legal profession as a whole is one that the public has confidence in.

⁴⁹ AON, ‘Key Terms on your Professional Indemnity Insurance Policy Wording Explained’ <https://insurance.aon.co.uk/business/knowledge-centre/news-and-views/key-terms-on-your-professional-indemnity-insurance-policy-15-09-2017> accessed 30 November 2022.

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