

JOIN THE DISCUSSION: WHETHER MALPRACTICE INSURANCE SHOULD BE MANDATORY FOR NEVADA ATTORNEYS

Weigh in with your input to help shape these potential programs!

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On November 8, 2017, the State Bar of Nevada's Board of Governors approved moving forward with the next steps to require Nevada attorneys to maintain professional malpractice insurance as a condition of being licensed in the state of Nevada. The board invites responses from *Nevada Lawyer* readers on this topic; bar members can join the discussion by sending feedback to publications@nvbar.org.

Proposal

The initial concept of the proposal regards bar members in private practice, requiring them to maintain minimum coverage limits of \$250,000 per claim with a \$250,000 aggregate for all claims. Nevada attorneys will be permitted to purchase malpractice insurance from any provider they wish: a system known as the "open-market model."

Taskforce Evaluation

Part of the State Bar of Nevada's mission is to protect the public. In order to study issues regarding mandatory malpractice insurance, the Board of Governors established a Professional Liability Insurance Taskforce, which has been meeting regularly throughout 2017.

"The taskforce has learned that the public believes all lawyers have malpractice insurance," said State Bar of Nevada President Gene Leverty. "Our lawyers are not required to have malpractice insurance." The taskforce made its recommendation to the Board of Governors after exploring various concepts it has evaluated.

Some options they explored included:

- Requiring attorneys to disclose to clients whether or not they carry insurance;
- Requiring all Nevada attorneys to carry malpractice insurance, leaving the responsibility of retaining the insurance to each attorney or firm; or
- Adopting a single insurer through the state bar that would provide minimum limits to all Nevada lawyers, while still allowing lawyers to retain excess limits on the open market.

Approaches in Other States

Alaska, California, New Hampshire, New Mexico, Ohio, Pennsylvania and South Dakota currently require attorneys to disclose whether or not they have malpractice insurance to their clients.

Three states require malpractice insurance.

Idaho

Idaho operates on the open-market model, and that state will also soon require all its attorneys to purchase minimum coverage through a professional liability insurance carrier. Idaho's rules become effective in January 2018, and they require attorneys to maintain insurance coverage at a minimum limit of \$100,000 per occurrence, with a \$300,000 annual aggregate.

Oregon

Since the 1970s, Oregon has required the maintenance of a mandatory professional liability fund, operated by Oregon's state bar. All attorneys licensed in Oregon receive minimum coverage through the fund; premiums attach to their annual license fees. Oregon's Professional Liability Fund serves as the insurance provider for Oregon lawyers in private practice.

In 2016, the Oregon assessment was \$3,500, with a reduced rate for lawyers in their initial years of practice. The fund provides coverage of up to \$300,000 per claim with a \$300,000 aggregate, including defense costs, and a \$50,000 claims expense allowance.

Illinois

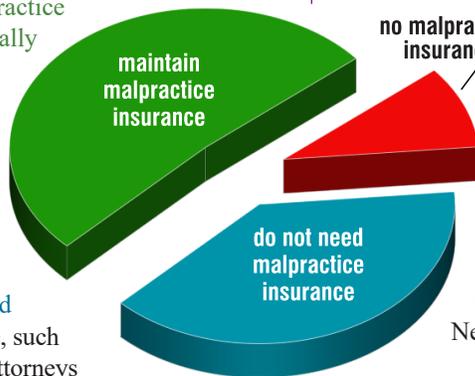
Illinois has adopted a practice-management approach to liability insurance, requiring attorneys who choose not to carry insurance to undergo an online practice assessment that also provides four hours of CLE credit.

Most Bar Members Already Covered

Nevada's Current Coverage Statistics:

- Attorneys engaged in the private practice of law who **maintain malpractice insurance**, either personally or through their firms: **5,301**
- Attorneys engaged in the private practice of law who **do not maintain malpractice insurance**: **988**
- Bar members **not in need of malpractice insurance**, such as judges, government attorneys and attorneys not representing clients: **4,012**

Already, most state bar members practicing private law in Nevada report that they either maintain malpractice insurance themselves or receive coverage through their firms. A strong majority – 5,301 bar members – reported this information on their mandatory disclosures. (The state bar does not verify information reported by attorneys.) There are 988



members engaged in the private practice of law who report they do not maintain insurance.

Five Possibilities Considered

During its evaluation period, the taskforce considered five models of malpractice insurance, including:

- **Open Market:** Recently adopted in Idaho, this model requires all attorneys to purchase minimum coverage through a professional liability insurance carrier. This is the model the Board of Governors selected for Nevada.
- **Mandatory Professional Liability Fund:** Oregon is the only state with such a fund. Operated by the Oregon bar, this model provides all Oregon attorneys with minimum coverage; premiums are attached to annual license fees.
- **Captive Insurance Carrier:** This model also provides minimum coverage to all the state's attorneys; however, in this model, a specific carrier is selected to provide policies to all bar members.

Participate in the discussion! Share your thoughts on the topic of mandatory malpractice insurance by emailing the state bar at publications@nvbar.org.

- **Risk Management Model:** This model was recently adopted in Illinois. It requires all Illinois attorneys to carry minimum liability insurance; however, if they elect not to do so, they must take a four-hour online course in risk management annually.

- **Association Group Captive Insurer Model:** In this model, an insurance company is owned by an association, its members or both. Nevada law allows captive insurers for associations, according to Nevada Revised Statute Chapter 694C.

Expert Opinions Gathered

On October 23, 2017, the taskforce held a round table discussion with some insurers currently providing malpractice insurance in Nevada and with Nevada Insurance Commissioner Barbara Richardson concerning various options under consideration by the taskforce. The insurers presented arguments to support certain options and recommended against others. For example, the commissioner expressed concern over premium rates, should the bar lock into one insurance carrier for minimum limits coverage.

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Minimum limits of coverage were also discussed. Attendees recommended considering minimum limits of \$250,000/\$250,000 rather than \$100,000/\$300,000. The price differential between the coverage should be minimal, but the effective coverage is much better with \$250,000/\$250,000 limits. The taskforce thanked the insurers and commissioner for participating in the round table discussion.

Next Steps

The Board of Governors is looking at all avenues with respect to the open market model as they work out details and specifics prior to considering submitting this matter to the Nevada Supreme Court for a rule change. “The consideration process will ... allow everyone to vent their full pros and cons of the concept [through the process],” Leverty said.

Weigh In

The Board of Governors invites members to participate in the discussion. Share your thoughts on the topic of mandatory malpractice insurance by emailing the state bar at publications@nvbar.org.

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RANDOM TRUST ACCOUNT AUDIT PROGRAM

The State Bar of Nevada’s Board of Governors is studying the creation of a mandatory trust account audit program.

Program Overview

Under the initial concept for this program, each year, a set percentage of active attorneys would be selected at random to have their trust accounts audited by a professional auditor with experience specific to lawyer trust accounts. The audits would incur no fees or charges, involve minimal, if any disruption, and be conducted as desk audits at the state bar offices. In addition, bar dues would not increase as a result of this program; it is expected the audits will reduce costs for the Office of Bar Counsel.

At the onset, approximately 60 attorneys would be selected each year for random audits. Attorneys who do not handle client money are exempt from random audits. If a lawyer is randomly selected, the trust account records from that attorney’s entire firm will be audited. At the conclusion of the audit, the attorney and/or firm will be provided with a written report of the auditor’s findings.

Purpose and Benefits

This program, designed to improve the state bar’s mission to protect the public, will provide three important benefits to both attorneys and their clients, including:

- **Education:** Attorneys subject to the random audit will receive a hands-on critique and evaluation of their trust account management. In addition, a similar program in North Carolina has been successful at encouraging members to engage in self-study and monitor their voluntary compliance.
- **Deterrence:** The use of external audits is a common practice in other fields, such as banking, security and taxation. This compliance protocol provides a deterrent aspect, leading to the prevention of possible violations.
- **Detection:** Many of the issues reported to the Office of Bar Counsel involve trust account violations. The ability to proactively detect deficiencies will help the state bar protect the public through self-regulation.

It is believed that the presence of a random trust account audit program will not only reduce the number of safekeeping complaints made to the state bar, but it will also encourage attorneys to be more proactive when managing their trust accounts, helping them self-detect minor infractions before they become substantial deficiencies that negatively impact clients and the public at large.

Your Feedback Matters

A survey was distributed via email to nearly 9,000 active and active exempt bar members to gather input related to the implementation of a random trust account audit program. Members’ feedback is already helping shape the program, and survey responses have also identified the need to avoid misconceptions by more fully informing bar members about the program’s concepts.

More input is invited! The Board of Governors is interested in members’ feedback on the envisioned random trust account audit program. Email your thoughts to publications@nvbar.org. **NL**