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Regulators at the Margins: The Impact of Malpractice Insurers on Solo and Small Firm Lawyers

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INTRODUCTION

What are the factors that cause solo and small firm lawyers to behave like competent and responsible professionals? This is an important

* Joel Barlow Professor of Law, University of Connecticut School of Law. I thank Tom Baker for encouraging me to first think about this topic, Peter Kochenburger and Herbert Kritzer for providing me with important background information for this article, and Anthony Davis, Susan Saab Fortney, Lynn Mather, and John Rappaport for very helpful comments on earlier drafts of this Article. I am grateful to the Arizona State Bar for distributing my surveys to its members. I am also grateful to the insurance industry executives, risk management counsel, and solo and small firm lawyers who spoke with me for this Article, and to the more than one thousand solo and small firm lawyers who responded to my surveys.
question, as more than three-fifths of all private practitioners work in this setting, often representing small businesses and individual clients in personal plight matters. These lawyers receive the same legal education as other lawyers, yet they are subject to more discipline complaints than lawyers in other practice settings. Scholars have long attempted to identify the factors that cause some of these lawyers to behave badly. But it is equally important to consider what causes these lawyers to behave responsibly in their day-to-day practice.

This is a complicated question. We know that the law school experience, professional rules, and the substantive law shape lawyers’ understandings of their professional roles, but they are just the starting point. Lawyers construct their understandings of the norms and values of the profession through their communities of practice, i.e., the groups of lawyers with whom practitioners interact and to whom they look to understand how to behave. Lawyer conduct is also affected by client demands and resources, the economics of practice, reputational

1 The term “small firm lawyer” is used in this Article to refer to lawyers working in firms of five or fewer attorneys. See CLARA N. CARSON, THE LAWYER STATISTICAL REPORT: THE U.S. LEGAL PROFESSION IN 2005 5–6 (2012) (indicating that 62.1% of lawyers in private practice worked in firms of one to five lawyers).

2 Solo and small firm lawyers receive the vast majority of all discipline complaints, even though they constitute less than half of all practicing lawyers. See, e.g., Leslie C. Levin, The Ethical World of Solo and Small Law Firm Practitioners, 41 HOUS. L. REV. 309, 312–13 (2004); see also RICHARD L. ABEL, LAWYERS IN THE DOCK: LEARNING FROM ATTORNEY DISCIPLINARY PROCEEDINGS 54–55 (2008) (reporting that solo and small firm lawyers are overrepresented in discipline proceedings). The reasons for this are complex. See Levin, supra at 314.


4 LYNN MATHER, CRAIG A. MCEWEN & RICHARD J. MAIMAN, DIVORCE LAWYERS AT WORK: VARIETIES OF PROFESSIONALISM IN PRACTICE 6 (2001). These groups of lawyers include lawyers who practice in a locality, groups of specialists or non-specialists, law firm colleagues, and others. Id.

concerns,\textsuperscript{7} cognitive biases,\textsuperscript{8} and individual lawyer differences.\textsuperscript{9} The threat of formal regulatory sanctions (both criminal and disciplinary) further influences the conduct of these lawyers.\textsuperscript{10} We know almost nothing, however, about the impact of malpractice insurers—or concerns about malpractice liability—on the conduct of solo and small firm lawyers.\textsuperscript{11}

The idea that insurers can influence or informally “regulate” the behavior of their insureds has been explored by scholars for thirty years.\textsuperscript{12} Insurers do so in order to reduce the moral hazard of insurance and to incentivize insureds to behave in ways that reduce the risk of loss.\textsuperscript{13} So, for example, insurance policies include deductibles so that insureds still have some “skin in the game and will endeavor to avoid claims.\textsuperscript{14} Insurers offer premium discounts to insureds who implement risk reducing measures, such as installing smoke detectors in their homes.\textsuperscript{15} Insurers exclude from their policies coverage for certain types of risky activities and intentional

\textsuperscript{6} Mather & Levin, Why Context Matters, in LAWYERS IN PRACTICE, supra note 5, at 9.

\textsuperscript{7} HERBERT M. KRITZER, RISKS, REPUTATIONS, AND REWARDS: CONTINGENCY FEE LEGAL PRACTICE IN THE UNITED STATES 222–23, 231–34 (2004); DONALD D. LANDON, COUNTRY LAWYERS: THE IMPACT OF CONTEXT ON PROFESSIONAL PRACTICE 133–34, 142, 149 (1990); Leslie C. Levin, Immigration Lawyers and the Lying Client, in LAWYERS IN PRACTICE, supra note 5, at 103; Stephen Daniels & Joanne Martin, Plaintiffs’ Lawyers and the Need to Generate Business, in LAWYERS IN PRACTICE, supra note 5, at 126.


\textsuperscript{9} Leslie C. Levin, Misbehaving Lawyers: Cross-Country Comparisons, 15 LEGAL ETHICS 357, 366–69 (2012); Mather & Levin, supra note 6, at 11.

\textsuperscript{10} See CARLIN, LAWYERS’ ETHICS, supra note 3, at 172–73; Levin, supra note 7, at 102–04; Levin, supra note 2, at 371–72.


\textsuperscript{12} See KENNETH S. ABRAHAM, DISTRIBUTING RISK: INSURANCE, LEGAL THEORY AND PUBLIC POLICY 57 (1986) (referring to surrogate regulation by insurers to control the behavior of their insureds); CAROL A. HEIMER, REACTIVE RISK AND RATIONAL ACTION: MANAGING MORAL HAZARD IN INSURANCE CONTRACTS 42–43, 47–48 (1985) (describing some of the ways in which insurers incentivize certain conduct by insureds).


\textsuperscript{14} Baker & Siegelman, supra note 13, at 179.

\textsuperscript{15} Ben-Shahar & Logue, supra note 13, at 224.
misconduct. Insurers informally regulate a wide range of insureds, including purchasers of homeowners’ insurance, workers’ compensation insurance, products liability insurance, and environmental liability insurance. Some commentators have argued that lawyer professional liability (“LPL”) insurers also informally regulate lawyer conduct.

If LPL insurers influence lawyer conduct, they do not do so for altruistic reasons. Rather, LPL insurers wish to reduce claims payments and maximize their profits. Like insurers in other markets, LPL insurers attempt to achieve their economic goals through the underwriting process, in which they collect information from potential insureds and decide whether and on what terms to provide coverage. They also attempt to reduce the risk of loss through, inter alia, risk-based pricing, insurance contract design, and loss prevention (or “risk management”) services. Through these efforts, LPL insurers may regulate attorney behavior by encouraging lawyers to act responsibly with respect to the risks for which they are covered. Insurers may also regulate lawyers’ behavior by excluding other risks that they do not wish to cover or for which they do not.

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16 Baker & Siegelman, supra note 13, at 177–178.
17 Ben-Shahar & Logue, supra note 13, at 219, 223, 225.
19 See Tom Baker & Rick Swedloff, Regulation by Liability Insurance: From Auto to Lawyers Professional Liability, 60 UCLA L. REV. 1412, 1439 (2013) (noting that insurers do not encourage changes in lawyer behavior in order to benefit clients or the legal profession); Charles Silver, Professional Liability Insurance as Insurance and as Lawyer Regulation: Response to Davis, 65 FORDHAM L. REV. 233, 234–35 (1996) (noting that insurers are only motivated to discourage risky behavior to the extent that they must pay for its consequences). But see ALPS, 2013 ANNUAL REPORT 7 (2014) (on file with author) (noting that the insurer’s goal is not just to make a profit, but “to bring peace of mind to our policyholders and make the overall practice of law better through our risk management programs”).
20 See Baker & Swedloff, supra note 19, at 1439.
21 See id. at 1420, 1440–41.
22 See id. at 1418, 1440; Davis, supra note 18, at 211.
23 As used in this Article, LPL insurer “regulation” means incentives and deterrence measures employed by insurers that affect lawyer conduct. Baker and Farrish have noted that some scholars have gone further when discussing insurer regulation—arguing that some private insurance markets essentially play governmental roles. See Tom Baker & Thomas O. Farrish, Liability Insurance and the Regulation of Firearms, in SUING THE GUN INDUSTRY: A BATTLE AT THE CROSSROADS OF GUN CONTROL AND MASS TORTS 292, 292 (Timothy D. Lytton ed., 2005). In some contexts, private insurers have augmented regulatory authorities and they may sometimes outperform the government in regulating the conduct of their insureds. Ben-Shahar & Logue, supra note 13, at 200–01 (“[W]here insurance is offered, it develops templates to regulate behavior in ways that are potentially more finely turned and information sensitive than some forms of government control.”). As will become clear later in this Article, LPL insurers of solo and small law firms do not appear to perform a strong regulatory function. See infra Section II.D.
not think lawyers will pay.\textsuperscript{24}

The effectiveness of insurer regulation depends, in part, on the importance of insurance to a particular group or industry.\textsuperscript{25} In some fields or activities, insurers play a significant gatekeeping role because it is not legally or practically possible to perform certain roles (e.g., as a government contractor) or activities (e.g., own a car) without insurance.\textsuperscript{26} Thus, insureds must at least appear to conform to the insurer’s requirements if they wish to engage in those roles or activities. This is not the case for many lawyers. Most lawyers are not required to maintain insurance as a condition of practice.\textsuperscript{27} While few mid-sized and large law firms would consider practicing without substantial LPL insurance coverage,\textsuperscript{28} a sizable number of solo and small firm practitioners do not carry malpractice insurance at all.\textsuperscript{29}

This does not mean that LPL insurers have no impact on the behavior of solo and small firm lawyers—many of whom do carry insurance—but that the impact may be less than it is in the large firm context. There are also other reasons to think there are differences in the extent to which LPL insurers regulate lawyers in these two settings. For large firm lawyers,\textsuperscript{30} the process of obtaining LPL insurance is like purchasing a bespoke suit. It is an individualized and carefully tailored process. Firm representatives meet with insurers, discuss their law practice, review their risk management procedures, carefully consider their coverage, and at times adopt new risk management practices to qualify for or maintain insurance.\textsuperscript{31} Malpractice insurance premiums for large firms are expensive, and those firms are often motivated to control insurance costs by working closely with their insurers to do so. Large firms negotiate for certain terms of coverage, and

\textsuperscript{24} See Silver, supra note 19, at 235 (“[S]ome exclusions reflect nothing more than a market-based determination that few insureds are willing to pay for an omitted coverage.”).

\textsuperscript{25} The effectiveness of regulation may also depend on whether all insurers impose the same requirements and at the same cost. So, for example, if an insured could obtain comparable amounts of insurance at the same cost from company X and Y, but company Y imposes fewer requirements on the insured, the ability of company X to regulate through its requirements would be reduced.

\textsuperscript{26} Baker & Farrish, supra note 23, at 294. For the most part, only lawyers who engage in private practice carry LPL insurance. Only Oregon requires all of its lawyers whose principal offices are in Oregon and engage in private practice to maintain LPL insurance. About the PLF, OR. STATE BAR PROF’L LIAB. FUND (2016), https://www.osbplf.org/about-plf/overview.html [https://perma.cc/655L-V7PU].

\textsuperscript{28} Even mid-sized firms often seek insurance limits above ten million dollars. Very large firms may obtain LPL insurance well in excess of $100 million. See Baker & Swedloff, supra note 11, at 1282 (indicating that the largest firms may seek insurance programs with limits up to $400 million).

\textsuperscript{29} See Leslie C. Levin, Lawyers Going Bare and Clients Going Blind, 68 FLA. L. REV. (forthcoming 2016).

\textsuperscript{30} For the purposes of this discussion, “large firm” means firms of 100 or more lawyers.

\textsuperscript{31} Some firms may also be subject to “audits” of their practices and may be required to make changes in their internal management in order to obtain desired insurance coverage. See Davis, supra note 18, at 221–22.
typically maintain the right to choose the lawyers who will defend them if they are sued. Supra note 11, at 1283, 1285. They receive personalized, on-site, risk management training for their lawyers. Infra note 104 and accompanying text. In some cases, these risk management activities are required by the insurers. See supra note 11, at 1284 (reporting that "ALAS requires its members to engage in a variety of risk management activities").

34 See infra note 86 and accompanying text.

35 The term “carrier” is used here to refer to commercial insurance companies, mutual insurers, and risk retention groups that sell insurance.

36 See infra note 86 and accompanying text.
management services that may have some impact on the conduct of solo and small firm lawyers. Section III shifts gears and examines solo and small firm lawyers’ perspectives on LPL insurers and their experiences with them. It considers the ways in which insurers may informally regulate the behavior of these lawyers through underwriting, premium pricing, insurance contract design, and risk management services. In Section IV, the Article addresses a related question, which is the extent to which solo and small firm lawyers appear to be concerned about the risk of malpractice liability in their day-to-day work lives. This question sheds additional light on the likely efficacy of insurers’ efforts to regulate the behavior of these lawyers. In Section V, the Article identifies an unexpected insurer—title insurers—that more effectively regulate the conduct of some solo and small firm lawyers. It also explains the conditions that make this more effective regulation possible. The Article concludes by considering why LPL insurers seem to have only a modest impact on solo and small firm lawyers and suggests how these insurers might more effectively regulate the conduct of these lawyers to encourage them to behave like more responsible professionals.

I. STUDY METHODOLOGY

This Article draws on a mixed-methods study to explore the impact of LPL insurers on the conduct of solo and small firm lawyers. Initially I conducted semi-structured interviews with ten insurance executives who worked in the solo and small firm LPL market and two risk management counsel who are paid by insurers to provide advice to their insureds about practice and malpractice issues.37 These interviewees were located through snowball sampling38 and were promised anonymity. The purpose of the interviews was to learn, inter alia, about the solo and small firm LPL market, the underwriting process, premium pricing, risk management practices, and lawyer behavior when dealing with LPL insurers. The interviewees included individuals who worked for large commercial insurers, mutual insurance companies, large brokers,39 and agents. Many of them had worked for more than one LPL insurer and were knowledgeable about both the large firm and small firm LPL market. The interviews with the insurance executives, which were conducted in 2014 and 2015, lasted

37 In addition, I had brief telephone conversations with one insurance executive and one insurance agent that were not recorded, and email communications with three other insurance agents.

38 In other words, the interviewees referred me to other executives I might interview and in some cases made the introduction for me.

39 “Large brokers” are companies that sell LPL insurance through programs to similarly situated lawyers (e.g., members of a bar association). The lawyers in these programs are then insured by a single commercial insurance carrier. For a further discussion of how large brokers operate, see infra notes 82-83 and accompanying text.
from forty to ninety minutes and were tape recorded and transcribed.\footnote{The interviews with risk management counsel lasted less than thirty minutes and were also taped and transcribed.}

I also interviewed thirty Connecticut lawyers working in solo and small firms about their experiences with LPL insurers and malpractice-related issues.\footnote{The study focused on Connecticut lawyers for two reasons. The first was convenience. The second was because I anticipated the response rates would be higher than in other jurisdictions because the request to participate came from an in-state investigator at a state university. Interviews with insurance executives indicated that there was no reason to believe that Connecticut lawyers’ experiences with LPL insurers are significantly different than they are for lawyers in many other states.} The lawyers’ names were randomly selected from the Connecticut Judicial Branch website, which identifies all lawyers admitted to the Connecticut bar who maintain “active” status. In order to contact those lawyers, I searched online for email addresses, which could not be located for some lawyers. For this reason, the interviewed lawyers were likely to be more sophisticated in their use of internet marketing than the general population of Connecticut solo and small firm lawyers. Of the thirty interviewed lawyers,\footnote{I sent emails to 105 Connecticut lawyers who I believed were working in firms of one to five lawyers, asking them to participate in an interview. Almost forty lawyers initially indicated a willingness to participate, but for scheduling and other reasons, only thirty were interviewed. The email soliciting participation in the study did not directly reference malpractice insurance but explained that the study was “designed to explore how—if at all—concerns about professional liability may affect the everyday conduct of solo and small law firm practitioners.”} twenty-one were male and nine were female. Nineteen of the lawyers worked in solo practices and all but one of the interviewed lawyers maintained LPL insurance at the time of the interview. Their offices were located in cities, suburbs, and rural areas throughout Connecticut. They each participated in approximately forty-minute semi-structured, tape-recorded interviews in early 2015 and were promised anonymity.

In addition, I surveyed Connecticut and Arizona solo and small firm lawyers about their experiences with LPL insurance. The Connecticut lawyers’ names were randomly selected from the Connecticut Judicial Branch website and were also obtained from voluntary Connecticut bar association websites that listed the email addresses of its members.\footnote{Connecticut does not have a mandatory or “integrated” state bar. The voluntary bar associations included, \textit{inter alia}, the Connecticut Bar Association, the Fairfield County Bar Association, the Connecticut Hispanic Bar Association, and the Connecticut Criminal Defense Lawyers Association.} I sent a web-based Qualtrics survey to 1,764 Connecticut lawyers who appeared to work in firms of one to five lawyers\footnote{Internet searches were performed to determine whether the lawyers appeared to work in solo and small firms and to locate email addresses for lawyers whose names were obtained from the Connecticut Judicial Branch website. Only one lawyer from a firm received a survey. This method of selection means that the surveyed Connecticut lawyers were more likely to belong to voluntary bar associations and to be more sophisticated in their use of internet marketing than lawyers in the general population of Connecticut solo and small firm lawyers.} and obtained responses from 686
lawyers, or a response rate of 38.8%. Approximately 54% of the Connecticut respondents worked in solo practice and the remainder worked in firms of two to five lawyers. At my request, the Arizona State Bar emailed a substantially similar web-based survey to 6,751 Arizona lawyers who indicated on their bar registration forms that they worked in solo and small firms and maintained LPL insurance. The accompanying email asked lawyers in firms of one to five attorneys to complete the survey. Only 303 Arizona lawyers responded, which is a very low response rate. Consequently, the Arizona survey results are only occasionally referenced in this Article.

In order to better understand the impact of LPL insurers on the conduct of solo and small firm lawyers, I also reviewed insurance documents that insured lawyers routinely encounter. This included fourteen LPL insurance applications for solo and small firm coverage that could be located online, including the applications of commercial insurance companies, some bar-related mutual insurance companies, and large brokers. I also reviewed six LPL insurance renewal applications. In addition, I reviewed the terms of ten sample insurance policies covering solo and small firm lawyers and three additional LPL policy descriptions.

It is important to note some of the limitations of the data. While the insurance executives came from a range of companies, only a relatively small number were interviewed and it was not a representative sample. Moreover, most of the executives occupied high-level positions in their companies and some did not have day-to-day contact with solo and small firm insureds. The data obtained about lawyers’ experiences with LPL insurers must also be evaluated cautiously. It may be that the lawyers who agreed to be interviewed or to participate in a survey are not representative because they are particularly interested in, or concerned about, malpractice liability, or are not representative for some other reason. In addition, virtually all of the lawyer data comes from Connecticut lawyers. Although

45 Twenty-eight of the 686 lawyer-respondents were not insured. Unless otherwise stated, their responses are not included in the data analysis reported in this Article.
46 Arizona has an integrated state bar. Arizona lawyers were surveyed because the Arizona State Bar has a history of facilitating scholarly research by sending out surveys to its members on a variety of topics. In addition, it was able to target the surveys to insured lawyers.
47 The Arizona State Bar sent the survey to all insured lawyers who appeared to work in firms of one to five lawyers with the request that only lawyers in firms of that size complete the survey. The survey was designed so that if a lawyer indicated that he or she was practicing in a larger firm, the respondent could not complete the survey.
48 Even if some of the 6,751 insured Arizona lawyers in private practice for whom the State Bar had email addresses worked in larger firms, the responses from 303 lawyers yielded less than a 5% response rate.
49 Infra note 89.
50 Infra note 112.
51 Infra note 143.
Connecticut ranks eighteenth in lawyer population in the United States,\(^\text{52}\) it is a small state geographically and has no large cities.\(^\text{53}\) Connecticut lawyers may have a more favorable view of insurers than lawyers in some other states because Hartford is still considered the capital of the insurance industry.\(^\text{54}\) Connecticut lawyers are required to maintain LPL insurance in order to perform real estate closings, which are a substantial source of business for many small firm lawyers in Connecticut.\(^\text{55}\) They may also be more likely than lawyers in some jurisdictions to purchase their insurance from a large commercial carrier (CNA), which is the Connecticut State Bar Association’s endorsed provider of professional liability insurance.\(^\text{56}\) For these reasons, the study should be viewed as only a preliminary effort to understand the impact of LPL insurers on the conduct of solo and small firm lawyers.

II. LPL INSURANCE IN THE SOLO AND SMALL FIRM MARKET

Most solo and small firm lawyers carry LPL insurance, although a sizable number do not.\(^\text{57}\) They can obtain LPL coverage for as little as $100,000 per occurrence/$300,000 aggregate per year, but more often, they

\(^{52}\) CARSON, supra note 1, at 44.


\(^{55}\) In Connecticut, lawyers are often required to close on real estate transactions. ALEX RIGER, OLR RESEARCH REPORT, ATTORNEYS AT REAL ESTATE CLOSINGS IN CONNECTICUT AND MASSACHUSETTS (2015), https://www.cga.ct.gov/2015/rpt/2015-R-0186.htm [https://perma.cc/P7RX-256G].

\(^{56}\) See Find a Vendor - Insurance, CONN. BAR ASS’N, http://ctbar.site-y.com/Insurance [https://perma.cc/EYLC-ZXYY] (stating that Kronholm Insurance Services, the exclusive administrator of CNA in Connecticut, is CBA-endorsed insurance provider). Some Connecticut solo and small firm lawyers do, however, purchase insurance from other large commercial underwriters and brokers, and from Minnesota Lawyers Mutual, a bar-related mutual insurance company.

\(^{57}\) The percentage of insured lawyers in private practice in states other than Oregon ranges from 80% to 94% in jurisdictions where that information is available. Levin, supra note 29, at 17–18, 20–21. The percentage of uninsured solo lawyers appears to be much higher. See, e.g., Chuck Herring, Pro: Disclosure Should Be Required, 72 TEX. B.J. 822, 823 n.2 (2009) (reporting on a State Bar survey indicating that 63% of Texas sole practitioners were uninsured); V. Lowry Snow, Professionally Insured…To Be or Not to Be, UTAH B.J., Nov./Dec. 2007, at 6 (reporting on a state bar survey indicating that 62% of Utah’s solo practitioners were uninsured); E-mail from Jim Grogan, Deputy Adm’r & Chief Counsel, Ill. Attorney Registration & Disciplinary Comm’n, to author (July 19, 2016, 13:39 EDT) (reporting that 41% of Illinois solo lawyers are uninsured).
purchase coverage in the $1 million to $3 million range.\textsuperscript{58} There are often pressures and incentives—in addition to liability concerns—that encourage lawyers to purchase malpractice insurance. Seven states require lawyers in private practice to disclose directly to clients if they do not carry malpractice insurance.\textsuperscript{59} In ten other states, this information is posted on state bar or judicial websites.\textsuperscript{60} Some jurisdictions require law firms that practice as limited liability partnerships to maintain malpractice insurance.\textsuperscript{61} Insurance requirements imposed by banks and title companies also induce some solo and small firm lawyers who wish to handle real estate closings to carry malpractice insurance.\textsuperscript{62} In some states, lawyers who participate in lawyer-referral services or who work as contract public defenders are required to maintain insurance.\textsuperscript{63} Thus, some lawyers may purchase LPL insurance not only—or even primarily—because of liability concerns, but because of other incentives.

\section*{A. LPL Insurers in the Solo and Small Firm Market}

Prior to the 1970s, malpractice claims against lawyers were relatively rare.\textsuperscript{64} Malpractice insurance was offered as an ancillary service by casualty and property underwriters.\textsuperscript{65} In the late 1970s and 1980s, when the

\textsuperscript{58} Baker and Swedloff report coverage in the $1 million to $5 million range, but it is not clear how their sources define a “small firm.” Baker & Swedloff, supra note 11, at 1279. In Connecticut, $1 million to $2 million coverage is more common for one-to-five-lawyer firms. Interview with Insurance Executive # 9 (2014).

\textsuperscript{59} Alaska, California, New Hampshire, New Mexico, Ohio, Pennsylvania, and South Dakota require direct disclosure to clients. ALASKA RULES OF PROF’L CONDUCT r. 1.4(c); CAL. RULES OF PROF’L CONDUCT r. 3-410; N.H. RULES OF PROF’L CONDUCT r. 1.19(b); N.M. RULES OF PROF’L CONDUCT r. 16-104(c); OHIO RULES OF PROF’L CONDUCT r. 1.4(c)(1); PA. RULES OF PROF’L CONDUCT r. 1.4(c); S.D. RULES OF PROF’L CONDUCT r. 1.4(c).

\textsuperscript{60} State Implementation of ABA Model Court Rule on Insurance Disclosure, Am. Bar Ass’n (2015), http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/chart_implementation_of_mcriid.authcheckdam.pdf [https://perma.cc/FL8B-8YH9]. Pennsylvania, which requires direct disclosure to clients, also posts this information on the Pennsylvania Supreme Court’s Disciplinary Board’s website. Id.


\textsuperscript{63} See CAL. RULES OF CT. R. 7.1101(c)(2) (requiring that contracting public defenders be covered by professional liability insurance); Walther, supra note 62, at 391 (reporting that some states require firms that participate in lawyer referral services to carry LPL insurance).


\textsuperscript{65} Id. at 632–33.
cost of malpractice insurance increased dramatically, new LPL insurers began to enter the market. Several bar associations started bar-related mutual insurance companies to serve its members, including Lawyers’ Mutual Insurance Company (California), The Bar Plan (Missouri), and the Texas Lawyers’ Insurance Exchange. Most of them eventually separated from the bar associations and became independent mutual insurance or risk retention groups, which are now loosely associated in the National Association of Bar Related Insurance Companies (“NABRICO”).

Today the LPL insurance market is segmented by size. The precise segmentation can be debated, but Tom Baker and Rick Swedloff describe the segmentation as solo and “very” small firms (one to five lawyers), small firms (five to thirty-five lawyers), mid-sized firms (thirty-five to two hundred lawyers), large firms (two hundred lawyers plus), and “mega international firms.” The LPL insurance market is also segmented geographically due to the state-based nature of insurance regulation.

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67 Cohen, _supra_ note 18, at 308; Fortune & O’Roark, _supra_ note 64, at 633.
70 Baker & Swedloff, _supra_ note 11, at 1278.
71 _Id._ at 1279.
73 For instance, the Connecticut Bar Association lists on its website a “CBA-endorsed provider” which is the state administrator for CNA, but it also lists information about Minnesota Lawyers Mutual, which is a NABRICO company. _Find a Vendor - Insurance, supra_ note 56. In larger states, state and local bar associations may recommend different LPL insurers. For example, the California State Bar identifies Arch Insurance Company as the state bar “sponsored” insurance program. _State Bar – Sponsored Insurance Programs, STATE BAR OF CAL., http://www.calbar.ca.gov/Attorneys/MemberServices/LawOfficeManagement/InsurancePrograms.aspx [https://perma.cc/T3G6-JWGG]._ The Los Angeles County Bar Association lists AHERN Insurance Brokerage—which places insureds with National Liability & Fire Insurance Company—as its “preferred” LPL insurance broker. _Our Benefits by Category, L.A. CTY. BAR ASS’N_, http://www.lacba.org/benefits/member-benefits [https://perma.cc/U4NH-6275]. Some specialty bars also recommend particular insurers. See, e.g., _AILA Lawyers Malpractice Insurance Program, ASTM. IMMIGRATION LAWYERS ASS’N_, http://www.aila.org/membership/benefits/discounts/lawyers-professional-liability-insurance-program [https://perma.cc/7J5U-4BH4] (identifying Hanover Insurance Group as the underwriter for AILA’s malpractice insurance program).
CNA Insurance is the largest commercial underwriter of LPL coverage, insuring more than 50,000 law firms and 155,000 lawyers nationwide in firms of all sizes.\footnote{74} Some other large casualty and property underwriters—such as Travelers and Zurich—also provide LPL coverage for solo and small firm lawyers.\footnote{75} The commercial underwriters typically offer LPL insurance to solo and small firm lawyers as part of a “program” with the same terms offered to all lawyers who participate.\footnote{76} In addition, fourteen NABRICO companies write LPL insurance for U.S. lawyers. They primarily insure one to three lawyer firms, either in a single state or in several states.\footnote{77}

LPL insurance is sold to solo and small firm lawyers directly by insurance carriers, brokers, and insurance agents.\footnote{78} For example, the NABRICO companies typically sell LPL insurance to lawyers directly through sales staff they employ.\footnote{79} CNA has relationships with one exclusive agent in a state, known as a state administrator, which has authority to write LPL policies that fall within certain parameters.\footnote{80} Lawyers find this administrator through advertising by the state administrator, through bar websites, through word-of-mouth referrals by other lawyers, or through independent brokers or agents\footnote{81} who contact

\begin{footnotes}
76 Baker & Swedloff, supra note 69. Many of these companies also write coverage for firms of more than one hundred lawyers, but the vast majority of their policyholders work in small firms. Interview with Insurance Executive # 3 (2015); Interview with Insurance Executive # 6 (2014).
77 See NABRICO, supra note 11, at 1280.
78 See NABRICO, supra note 69. They
80 Interview with Insurance Executive # 9 (2014); see Discover the Pearl/CNA Advantage, W.B. Griffin & Son, http://www.wbgriffininsurance.com/pdfs/080590-WBG%20Pearl%20Adv.pdf [https://perma.cc/HAW7-YG5W] (stating that Pearl is the exclusive state administrator of the CNA LPL program in twelve states). CNA also writes insurance for programs managed by brokers.
81 An independent insurance broker represents the lawyer who is seeking insurance and does not have an exclusive relationship with an insurance carrier. Instead, the independent broker will try to find the most suitable carrier for the lawyer. See RONALD E. MALLEN, LEGAL MALPRACTICE: THE LAW OFFICE GUIDE TO PURCHASING LEGAL MALPRACTICE INSURANCE § 4:2 (2016). While insurance agents are traditionally considered to be representatives of insurance companies, id. § 5:1, independent insurance agents play a role similar to the role of independent brokers. See Benefit from the Personal Attention of a Travelers Independent Agent, TRAVELERS, https://www.travelers.com/value-of-an-agent.aspx [https://perma.cc/3R86-8K5D] (noting that independent agents often represent several insurance companies), Why Choose an Independent Agent?, LPL INS. AGENCY,
CNA’s state administrator. Lawyers can also obtain LPL insurance coverage from other commercial insurance companies by contacting an independent insurance broker or agent who works with several casualty and property insurance companies that write LPL policies. Large insurance brokers such as Aon Affinity and USI Affinity sell LPL insurance to lawyers through state bar and other affinity programs composed of similarly situated lawyers. These brokers place insureds in programs with a single commercial insurance company.

B. The Underwriting Process

As previously noted, the LPL underwriting process is substantially different in the large and small firm contexts. One insurance executive explained:

[A]t least when done well, the large firm market is very individualized. I mean, you go and you sit down with Skadden, Arps, and because they spend so much money on their coverage . . . for a larger firm, typically after rent and payroll, their malpractice insurance is their third largest single expense item. . . . So you would go in, particularly for a larger firm, and you would take apart exactly how do they clear conflicts? How many lateral partners do they have? All these sorts of issues that you would get into.

The smaller firm market, in part just because of the size of it, it tends to be much more what we would call just class underwriting. You ask for their breakdown of their practice. You would ask in what jurisdictions they practice. You ask for a claims history. I mean it’s all very much a box. You’ll hear underwriters talk about an underwriting box. So you would put a firm in, and if it doesn’t ring any of your bells, it gets a rate based on: okay this much that, this much that, matrimonial, blah, blah, blah. So it’s not personal at all.

The relatively routinized nature of the underwriting process for most

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82 For example, USI Affinity manages programs for more than thirty bar associations, including the New York State Bar Association, the New Jersey Bar Association, and the State Bar of Texas. The USI Affinity Lawyers’ Professional Liability Plan, About Us, USI AFFINITY, http://www.mybarinsurance.com/tx/about-us/ [https://perma.cc/E6X2-STGT].


84 Interview with Insurance Executive # 1 (2015).
solo and small firm lawyers was echoed by several other insurance industry executives. One insurance executive explained:

"All of the carriers try to make it as easy as possible. They build portals that are, you know, one page: stick in your name and your limit, and a couple of questions, and it punches out a policy. Pay your money, and it’s done, so that you build a box, and if it fits in the box there’s no interaction between broker and insured, except the logo on the portal.

If something kicks out of the box—you have too much plaintiffs’ work, or you have too much whatever, or you had a claim, or whatever it is, and if it comes outside the box, then it goes—it likely goes to an underwriter who works at the brokerage, and they’ll take a look at it and they’ll go yea or nay. Maybe they’ll be some additional verbal contact; maybe not. But this stuff? You’re talking about premiums that are ridiculous. They’re nothing, and so the only way you make money is to make this as high volume and low touch as it can possibly be."^{85}

Some industry executives likened the experience to purchasing homeowners or automobile insurance. As one explained, solo and small firm lawyers “are typically forced to accept policies offered by the insurers that [they] approach, rather than, in the case of large law firms, being able to negotiate manuscripted policies. I mean, it’s just much more of a traditional insurance purchase.”^{86} Thus, the time spent on underwriting LPL insurance for most solo and small firm lawyers is also significantly different than it is for large law firms.

1. The Application

In order to obtain an LPL policy, lawyers must first complete an insurance application.\textsuperscript{87} The insurer uses the application to determine whether to write a policy, and if so, on what terms and at what price.\textsuperscript{88} A review of fourteen insurance applications for solo and small firms revealed that the applications that these practitioners complete in order to obtain

\textsuperscript{85} Interview with Insurance Executive # 4 (2014). Another insurer explained, “It can be done entirely online. It doesn’t happen often. . . . But it’s possible to go online, get a quote—pay for it, and be done in twenty-five minutes.” Interview with Insurance Executive # 6 (2014).

\textsuperscript{86} Interview with Insurance Executive # 2 (2015). Another executive, when asked if solo and small firm lawyers could negotiate over coverage responded, “Somebody applying for the sort of vanilla coverage from their state bar program? The person they would be calling would be like, ‘You want to do what? This is our form. . . .’ And it would be like calling your auto insurer and saying, ‘I want to negotiate the terms.’” Interview with Insurance Executive # 1 (2015).

\textsuperscript{87} \textit{Mallen}, supra note 81, § 6:1.

\textsuperscript{88} Id. § 6:3.
insurance coverage are fairly similar.\textsuperscript{89} The initial application usually ranges from four to six pages, with supplements.\textsuperscript{90} The applications ask, \textit{inter alia}, about the law firm’s size, longevity, locations, and malpractice insurance coverage history.\textsuperscript{91} They seek detailed information about the lawyers in the firm, including their disciplinary and malpractice claims histories, the firm’s “of counsel” relationships with other lawyers, and the number of support staff employed. The applications require the firm to identify all of the practice areas in which the firm engages and the percentage of time devoted to that practice area or revenue derived from it. Firms that work in higher risk practice areas, such as securities or intellectual property, are usually required to complete supplements that


\textsuperscript{90} The supplements are often required for subjects that suggest the possibility of elevated risk such as work performed in certain practice areas, equity interest in a client, and past claims against the firm. \textit{E.g.}, TEX. LAWYERS’ INS. EXCH., \textit{supra} note 89.

\textsuperscript{91} For example, the policies ask about how many years the firm has been continuously insured, whether the firm’s insurance was ever canceled, and whether it has ever purchased an extended reporting period (tail) option. \textit{E.g.}, AHERN INS. BROKERAGE, \textit{supra} note 89, at 1–3.
describe the lawyers’ experience and their practice in more detail.92

The applications also typically inquire about the firm’s office systems
and procedures, but the detail required varies.93 Almost all ask whether the
firm uses engagement letters at the outset of the relationship and
disengagement letters when the representation terminates.94 The
applications also ask about docket controls and procedures for detecting
conflicts of interest, with differing degrees of specificity.95 The
applications typically ask about other potential conflicts of interest, such as
whether firm lawyers have equity interests in their clients and whether
applicants engage in business ventures with clients or serve on the boards
of directors of firm clients.96 All but one of the applications asks whether
the firm has initiated lawsuits or arbitration against clients to collect unpaid
fees in the past few years.97 Many of the applications warn that materially
false statements in the application may lead to criminal and civil
penalties.98 Material omissions or false statements may result in loss of
coverage.99

2. Application Review

After receiving the insurance application from a solo or small firm, the
insurer reviews it to determine whether to offer coverage. As noted, many
commercial insurance companies give agents or brokers authority to write
LPL insurance for the company up to certain policy limits (e.g., five
million dollars) if the firm falls “within the box.” One insurance executive
explained:

What effectively the carrier does is what we call draw a box,

92 Some carriers may decline to insure lawyers who work in high-risk areas or may decline to
insure them in certain programs. See, e.g., TRAVELERS, supra note 89, at 1 (stating that application for
Travelers 1st Choice cannot be used if firm generates any billings from SEC work, class action work, or
patent work).
93 Only one of the applications does not ask questions about firms’ office systems and procedures.
See ISBA MUTUAL INS. CO., supra note 89.
94 See, e.g., AHERN INS. BROKERAGE, supra note 89, at 5; ALPS, supra note 89, at 3; FLA.
LAWYERS MUT. INS. CO., supra note 89, at 2. Some applications also ask whether the law firm uses
non-engagement letters when it declines representation. See, e.g., TEX. LAWYERS’ INS. EXCH., supra
note 89, at 3.
95 Some applications ask only one or two questions about docket controls. See, e.g., CNA, supra
note 89, at 3; ZURICH, supra note 89, at 3. Other applications ask more detailed questions about the
types of controls, such as whether two separate individuals enter the information into different systems
for the same matter, who calculates the dates, and how often the deadlines are cross-checked. See, e.g.,
THE HARTFORD, supra note 89, at 4.
96 See, e.g., AHERN INS. BROKERAGE, supra note 89, at 5; CNA, supra note 89, at 3; ISBA
MUTUAL INS. CO., supra note 89, at 3.
97 See, e.g., ALPS, supra note 89, at 3; THE BAR PLAN, supra note 89, at 2.
98 See, e.g., HANOVER INS. GROUP, supra note 89, at 8; THE HARTFORD, supra note 89, at 7–9.
99 The law in many jurisdictions gives the insurer the right to rescind the policy if the application
contains materially false representations. See MALLEN, supra note 81, § 6:2.
right? I'm the carrier. I don’t want to spend the time and the execution risk of distribution and procurement, but I want to evaluate risk in an aggregate basis, and carry it to my balance sheet. So I’ll go to an MGU\textsuperscript{100} facility and say, “Look, I’ll draw—here’s the box, right? And inside the box is, if it’s fewer than five lawyers, if they have just these areas of practice, if they’ve never had a claim over this amount and blah, blah, blah.” You know, you list these things, and if it fits that mold then what we call I’ve given you the pen. So I’ve effectively made the salesman an underwriter, as long as it fits in this box. And so then they run around and stuff everything that even remotely looks like that into the box.\textsuperscript{101}

If the firm indicates that it works in high-risk practice areas—such as plaintiffs’ medical malpractice work, securities, or class actions—it may fall outside the box and require further review.\textsuperscript{102} Very few LPL insurers conduct a more individualized review of the risks presented by most solo and small firms.

In the large law firm context, when underwriters assess the risk of writing a policy for a firm, they carefully review the firm’s attitude toward risk management. When asked what risk factors he looked at when writing policies for large firms, one insurance executive replied:

Big huge picture? Do they care? . . . [E]ssentially everybody now has volumes of risk management policies and procedures that attempt to eliminate systemic risk in practicing law, to the extent that can be done. . . . But my job is to determine whether that risk management manual lives in your law firm, whether you care about it as a management group or managing partner, and whether you communicate that, through your general counsel or your risk management partner, to the firm, and it matters to them.\textsuperscript{103}

This assessment is done through face-to-face meetings and multiple conversations with firm management.

This is not, however, the case with underwriting in the solo and small firm context, where underwriters lack the time or financial incentives to perform this type of review. The average annual cost for $100,000/$300,000 of LPL insurance for individual lawyers is $3,000 or

\textsuperscript{100} A “MGU,” or managing general underwriter, is an agent or broker that is vested with underwriting authority by a commercial insurance company.

\textsuperscript{101} Telephone Interview with Insurance Executive # 3 (2015).

\textsuperscript{102} See supra note 85 and accompanying text.

\textsuperscript{103} Interview with Insurance Executive # 4 (2014).
less in much of the United States.\textsuperscript{104} Given the low cost of insurance, it is not surprising that there are rarely face-to-face meetings between insurers and solo and small firm insureds to discuss their risk management practices—or anything else. LPL insurers instead rely heavily on the applications for their information about a firm’s risk management practices.

Unlike insurers of large law firms, LPL insurers of solo and small firm lawyers do not limit themselves to covering insureds who care about risk management or who employ sophisticated risk management systems. The insurers of solo and small firms have relatively minimal risk management requirements. At least one underwriter reportedly will not write coverage if a solo lawyer does not have an established backup attorney relationship or does not use engagement letters.\textsuperscript{105} Another insurer conditions coverage on having calendaring and conflict avoidance systems in place.\textsuperscript{106} Yet some LPL insurers do not decline coverage to solo and small firms that do not have good office systems in place, such as adequate conflicts-checking procedures.\textsuperscript{107}

As part of the underwriting process, insurers require solo and small firm lawyers to provide substantiating evidence to confirm the accuracy of only a few of the representations in the application. Lawyers are usually required to supply a copy of the firm letterhead so that insurers can confirm that all lawyers affiliated with the firm are identified in the application.\textsuperscript{108} A few underwriters require applicants to supply copies of

\textsuperscript{104} See, e.g., Daymon Ely, Survey Results: What About Them?, N.M. LAW., May 2012, https://daymonely.files.wordpress.com/2012/09/survey-results.pdf (stating that for the majority of New Mexico attorneys, premium is about $2,500 annually); Gary Gosselin, Going Bare: Not Carrying Malpractice Insurance Could Leave You and Your Firm Exposed, MICH. LAWYERS WKLY., Oct. 22, 2013, at 4 (premium for solo Michigan lawyer averages from $2,000–$3,500); Todd C. Scott, Attorney Malpractice Insurance: Who’s Got Your Back?, GPSOLO, Jan./Feb. 2014, at 38, 41 (2014) (stating that premiums can average from $1,500–$3,000 for experienced attorneys); Interview with Insurance Executive # 9 (2014) (stating that LPL insurance runs from $2,500–$4,000 in Connecticut); E-mail from Insurance Executive # 12 to author (July 16, 2015, 19:23 EDT) (on file with author) (stating that Arizona LPL insurance ranges from $1,500–$2,500 for mid-risk areas of practice and $3,000–$5,000 for high-risk areas); E-mail from Insurance Executive # 13 to author (June 16, 2015, 15:53 EDT) (on file with author) (noting that the average solo Pennsylvania lawyer with a $500,000/$1,000,000 policy, a $5,000 deductible, and five years of prior acts coverage pays an annual premium of $2,750). Premiums are higher in a few states, and are higher in all states for lawyers who practice in certain high-risk areas. See Levin, supra note 29, at 40 n.177–78. Premiums in the first year of practice can be substantially lower. See, e.g., Strong Start Program, LMIC, http://www.lmic.com/policies_offered/strong_start_program (offering a policy for new lawyers costing $500 for the first year).

\textsuperscript{105} Interview with Insurance Executive # 9 (2014).

\textsuperscript{106} Interview with Insurance Executive # 10 (2014).

\textsuperscript{107} Interview with Insurance Executive # 5 (2015).

\textsuperscript{108} See, e.g., THE BAR PLAN, supra note 89, at 1, 11; TEX. LAWYERS’ INS. EXCL., supra note 89, at 1, 5.
their engagement letters. Insurers may also check the firm’s website to see whether the information provided about the lawyers and the firm’s practice areas is consistent with the information on the application. Beyond that, little is done to check the accuracy of the information provided. One insurance executive explained:

Usually if the answers are clear, you take them at face value. Some of the stuff that we can verify through their website or through other pieces of their submission—you know, we’ve gotten pretty good at sniffing out something that just doesn’t seem to feel right. But there’s only so much you can do. And keep in mind, in the smalls and solos, it’s a volume exercise, right? And so if you’re talking about a large firm that’s paying hundreds of thousands of dollars in premium, you can invest almost as a forensic accounting exercise into figuring it out. There’s a point at which it becomes cost prohibitive to dig too deeply.

If there are no red flags that raise concerns on the face of the application, the insurers seemingly rely on the fact that coverage can be denied if the solo and small firm lawyers do not truthfully complete their applications.

3. Renewal

Lawyers who wish to continue their LPL coverage must complete an annual renewal application. Renewal applications are typically two to three pages and can be completed online. They primarily focus on

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109 See CNA, supra note 89, at 3; THE HARTFORD, supra note 89, at 5.
110 Interview with Insurance Executive # 3 (2015).
111 See MALLEN, supra note 81, § 6:9.
changes in firm membership, new discipline history, and possible claims that have not yet been reported to the carrier. They ask again about the practice areas in which the firm works and the percentage of gross billable dollars devoted to each area. The renewal applications also often ask whether the firm brought lawsuits against clients to recover fees in the past year. Some ask again about specific office procedures or risk management practices, while others simply ask whether there have been any changes in the applicant’s risk management practices since the last application.

Underwriting at the time of renewal is even more streamlined. One insurance executive explained:

> You know, we renew eighty plus percent of our accounts, and that means for multiple users, going through the underwriting process with them, there’s nothing new or unusual about the nature of their practice, and they just assume that nothing’s going to go awry. There aren’t going to be any claims, and they want to get through the process with as little pain as possible, ultimately paying as little as possible, and just knowing that there’s enough limit behind their exposure to make them feel secure.

Some insurers are working to achieve a “no touch” approach to renewal—in other words, eliminating the need for personal human interaction with most insureds.

Insurers typically only ask insureds for additional information during the renewal process if there has been a claim or a substantial change in practice areas, or other changes which may require more investigation. The executive quoted above explained:

> [I]f there’s been a claim, and we’re going to investigate that claim, and as far as the underwriting review at renewal, we’ll ask, “What steps have you taken to make sure this type of

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113 In some cases, they just ask whether there have been any percentage changes in the firm’s areas of practice during the policy period. See CNA, supra note 112, at 1.

114 See, e.g., FIRST INDEM. INS. GRP., supra note 112, at 2.

115 Some companies repeat a number of the risk management questions asked on the original application. For most companies, the questions are considerably streamlined. For example, CNA does not ask again about office practices and procedures, except with respect to engagement letters. CNA, supra note 112, at 1; see also ALLIED WORLD INS. CO., supra note 112, at 1.

116 See FIRST INDEM. INS. GRP., supra note 112, at 2; ZURICH, supra note 112, at 2. One carrier does not ask about risk management practices in the renewal application at all. See IRONSHORE, supra note 112.

117 Interview with Insurance Executive # 6 (2014).

118 Interview with Insurance Executive # 10 (2014).
loss doesn’t occur again?” And depending upon what their response is, we would withhold the right to say, “No, that's not satisfactory. I don’t think that’s going to satisfy us. Either come up with a better response, a better action, or we will reserve the right not to quote you.”

Depending upon the problem that arose, the insurer might ask the insured to institute a better conflicts-checking system or a more sophisticated calendaring system. In many cases, however, if there is no claim or substantial change in the firm, there may be no additional substantive communications between the insurer and the insured firm at the time of renewal, except to communicate the cost of the new premium and the fact that renewal has occurred.

C. Risk-Based Premium Pricing

The pricing of LPL insurance in the solo and small firm market and in the large firm market is also approached very differently. LPL insurance for large firms can cost hundreds of thousands of dollars and for very large firms, the premiums can run from $1.5 million to $2 dollars annually. Premiums for the large firms—at least in the commercial insurance company market—“are individually negotiated and explicitly risk rated.”

One insurance executive explained:

[If you’re talking about a one thousand person firm versus the sole practitioner, you wouldn’t even recognize them as the same transaction. For those very large firms, it’s very much kind of a financial contract, where often times there is retro-rating and retro-pricing. In other words, you see what the experience brings for a given year, and then you agree in advance that if the profit is more than X, some of it will be returned to the insured. If it’s less, the charge will go up for the next year. So it’s really more of a financial transaction than a sole practitioner, where for us they go online, fill out our renewal application, which is just a handful of questions, and in a matter of moments can have their quote delivered, placed, and paid for. And they’re charged based on our filed rates with the particular state that they live in.]

Thus, through the pricing of LPL insurance in the large firm market, there

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119 Interview with Insurance Executive # 6 (2014).
120 Interview with Insurance Executive # 7 (2015); Interview with Insurance Executive # 9 (2014); Interview with Insurance Executive # 10 (2014).
121 Baker & Swedloff, supra note 11, at 1284 n.35.
122 Id. at 1283.
123 Interview with Insurance Executive # 6 (2014).
can be substantial economic benefits to implementing good risk management practices and avoiding claims. This is not true of the pricing of insurance in the solo and small firm market, where underwriters’ premium pricing practices are much more opaque and there is no rebate for good claims experience.

Premium pricing for solo and small firm lawyers is largely based on the number of lawyers, their years in practice, office location, practice areas, claims history—and to a much lesser extent—risk management practices. With respect to location, one insurance industry executive explained:

[T]he risk from one state to the next is very different in the U.S., not just because the judicial environment is very different, but it is. That alone would be enough, but because lawyers play different roles in different types of transactions depending upon the state. For example, in South Carolina lawyers are very much engaged in a real estate transaction. In Montana and many other states, they’re not. Therefore if the lawyer has real estate as an area of their practice in South Carolina, it invites a totally different level of risk than if they have real estate as an area of practice in any one of a number of other states. And so where they are makes a big difference.

Another industry executive explained that the location of the firm also mattered because of differences in the jury pools: “There are always those counties around the country that were very scary for an insurance carrier because of the claims environment there, and the awards that came out of those places. So territory has a lot to do with it, from that perspective.”

LPL premium pricing is also based on the firm’s practice areas. Real estate, plaintiffs’ personal injury, and collections generate a substantial number of the claims, and result in higher premiums for lawyers who

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124 This is not the case for firms insured by Attorneys’ Liability Assurance Society (ALAS), a mutual insurer of firms of thirty-five and more lawyers, which charges all firms the same per lawyer rate, regardless of claims experience. Baker & Swedloff, supra note 11, at 1285. Nevertheless, ALAS requires certain risk management practices of its insureds in order to maintain coverage. Id. at 1284.
125 See Baker & Swedloff, supra note 11, at 1291 (“These basic elements—practice area and geography—along with the number of lawyers and past claim experience, remain the fundamental building blocks of solo- and small-law-firm LPL insurance pricing today.”).
126 Interview with Insurance Executive # 3 (2015).
127 Interview with Insurance Executive # 7 (2015).
practice in those areas. Certain practice areas, such as intellectual property and securities, are considered high-risk areas and some carriers charge heavy premium surcharges for insuring solo and small firm lawyers who practice in these areas or decline to write coverage altogether. Specialization by solo and small firm practitioners does not seem to affect premium pricing greatly, although according to insurance filings, some carriers insert specialization credits into their pricing. Specialization can also affect the willingness of some underwriters to provide LPL coverage to firms working in high-risk areas that they would not otherwise insure.

Claims experience also has some impact on premium pricing, but not for the reasons one might expect. One insurance executive referenced a study conducted several years ago indicating that there was not much correlation between past claims activity and future claims. Nevertheless, this executive explained that prior claims cause an insured’s rates to increase:

Because everybody does it, it’s a standard practice that industry uses. And it helps to fund and make sure that the law of large numbers works for everybody who’s getting insured. But it’s not necessarily justified, with respect to anticipating that that particular law firm is going to have continued claims activity. So they’re paying for past sins, basically, and not trying to fund for [the] future.

The solo and small firms’ risk management practices do not appear to greatly affect premium pricing. As noted, a few underwriters will decline to write coverage if a solo or small firm’s risk management practices are seriously deficient. Yet once the decision to insure is made, it is unclear how much a firm’s risk management practices affect premium pricing by most insurers in the solo and small firm market. As Baker and Swedloff reported, and some interviews confirmed, some LPL insurers have come to question the importance of a solo or small firm’s risk management

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129 Interview with Insurance Executive # 5 (2015); Interview with Insurance Executive # 6 (2015); Interview with Insurance Executive # 7 (2015); Interview with Insurance Executive # 9 (2014).
130 Interview with Insurance Executive # 8 (2015); see also MALLEN, supra note 81, § 20:24.
131 Interview with Insurance Executive # 8 (2015). A specialization credit is a rating factor that is assigned to distinguish the insured's characteristics from the average insured and reduces the cost of the insurance.
132 See supra notes 105–06 and accompanying text.
practices when pricing insurance. One insurance executive noted that his company used to center its law firm pricing around the adequacy or sophistication of the office systems, but stopped doing so because the carrier found there was not a strong correlation between reported office systems and claims history. When asked why he thought there was no strong correlation, he explained:

[Y]ou can arm a firm or a sole practitioner with the most sophisticated software imaginable, but if they don’t understand the essence of the statute of limitations provisions in a given state, it doesn’t matter how sophisticated their software is; they’re going to blow it. Same thing with a conflict—you can have a conflict system that touches every client you ever had, and every relative of every client in the community, and have that logged onto your conflict system. If you don’t check the conflict, or if you see that there's a potential conflict but you choose to ignore it because there's a fee in here, it’s not going to do you any good.

Another insurance executive essentially agreed, noting, “I would bet from books of business to books of business, the actuarial impact of risk management was negligible.”

The formulas carriers use to price insurance are treated like proprietary information. As one executive noted, “LPL? It’s all secrets. Nobody talks about anything. But the problem with that is that we all make decisions based on our own books of business, which statistically are all too small to make rational decisions.” Another executive explained:

Professional liability in general doesn’t have the kind of profit margins of some other kinds of coverage, but lawyers in particular, sort of famously. And they’re tough clients, and when they do have a claim they’re very good at extracting coverage from you for it. . . . And it’s also just that the underwriting community’s been sort of bad at figuring out where the risk is going to be and how big it’s going to be. And there’s not a lot of data, as you’ve discovered. It’s not

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135 Baker & Swedloff, supra note 11, at 1295–96. It should be noted that some of the same insurers may have participated in their study and in this one.

136 Interview with Insurance Executive # 6 (2014).

137 Id.

138 Interview with Insurance Executive # 7 (2015). He further noted, “I think the attorneys, especially the ones that have been around for a while, are into a mode of operating and, you know, the ones that are going to miss statutes are going to miss statutes, no matter how many risk management seminars they go to, and the ones that aren’t, aren’t, so some of it is just ingrained.” Id.

139 Interview with Insurance Executive # 4 (2014).
like standard lines.\textsuperscript{140}

New entrants often charge lower premiums to get a piece of the market “and don’t know how to price risk until they are three years into the business and then know what their claims rate is.”\textsuperscript{141} It is therefore not surprising that solo and small firms do not have a clear understanding of how insurers price their policies or how the firms might change their practices to reduce their premiums.\textsuperscript{142}

D. The LPL Policy

The typical LPL policy for solo and small firms is a claims-made policy, meaning it covers claims reported to the carrier during the policy period or any applicable extended reporting period.\textsuperscript{143} Most of the policies

\textsuperscript{140} Interview with Insurance Executive # 1 (2015).

\textsuperscript{141} Interview with Insurance Executive # 9 (2014). As a result, some underwriters reportedly enter the market and then leave it within a few years.

\textsuperscript{142} See infra notes 194, 196-97 and accompany text.

provide that the liability limits include the cost of defending the claim although under some policies, defense costs are not deducted from (are “outside”) the liability limits. Most policies include some coverage of the cost of lawyer discipline defense. The policies typically state that the policy is being issued in reliance on the truthfulness of the representations made by the insureds in the insurance application, and some state that material misrepresentations may render the policy void.

The LPL policies use exclusions to eliminate coverage of certain types of claims and extraordinary risks. For example, the policies exclude claims arising out of intentional, fraudulent, and criminal acts. The policies also exclude coverage of fines, sanctions, and punitive damages. The policies further exclude from coverage certain activities that are not clearly legal services such as lawyers acting as officers or directors of corporations and as ERISA fiduciaries. Many exclude coverage of legal services rendered to organizations in which the lawyer owns more than a minimal interest. The policies also typically exclude a few other specific acts that can give rise to lawyer liability, such as claims arising out of notarization of documents when the signatory is not physically present and sexual harassment claims.

Unlike large firms, solo and small firms usually are unable to choose

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144 See, e.g., ALPS, supra note 143, at 1; OHIO BAR LIAB. INS. CO., supra note 143, at 7. In addition, under many of the policies, the insured must pay the deductible if the underwriter expends money to defend the insured, although a few companies only require that the deductible be paid if an indemnity payment is made. Compare ISBA MUT. INS. CO., supra note 143, at 5, with THE BAR PLAN, supra note 143, at 1 (illustrating the differences in policy language regarding whether deductibles must be paid when defense costs are incurred).

145 See, e.g., FLA. LAWYERS MUT. INS. CO., supra note 143, at 5; TRAVELERS, supra note 143, at 2.

146 See, e.g., ALPS, supra note 143, at 14; CNA, supra note 143, at 12.

147 The policies also sometimes use their “Definitions” section to accomplish the same objective. See, e.g., ALPS, supra note 143, at 4 (defining “Claim” in the policy’s Definitions section to exclude discrimination, sexual harassment, and bodily injury claims).

148 See, e.g., FLA. LAWYERS MUTUAL INS. CO., supra note 143, at 8; MINN. LAWYERS MUT. INS. CO., supra note 143, at 3. Many exclude claims for bodily injury and property damage. See, e.g., ALPS, supra note 143, at 4; CNA, supra note 143, at 7; see also MALLERY, supra note 81, § 2:43.

149 One exception is Texas Lawyers Insurance Exchange, which covers exemplary damages. Important Considerations, TEX. LAWYERS’ INS. EXCH., http://www.tlie.org/purchasing-insurance/important-considerations/ [https://perma.cc/WSM9-SHSN].

150 See, e.g., MINN. LAWYERS MUT. INS. CO., supra note 143, at 4. Some policies cover activities on non-profit boards while others do not.

151 See, e.g., TRAVELERS, supra note 143, at 6; see also Susan Saab Fortney, Legal Malpractice Insurance: Surviving the Perfect Storm, 28 J. LEGAL PROF. 41, 46–47 (2004) (noting that LPL policies do not typically cover lawyers who are acting in some capacity other than as lawyer).

152 See, e.g., IRONSHORE INDEMNITY, INC., supra note 143, at 5; TEX. LAWYERS’ INS. EXCHANGE, supra note 143, at 2.

153 See, e.g., IRONSHORE INDEMNITY, INC., supra note 143, at 5; OHIO BAR LIAB. INS. CO., supra note 143, at 6.

154 See, e.g., ALPS, supra note 143, at 4; PROASSURANCE, supra note 143, at 4.
the lawyers who will defend them in malpractice actions. Some carriers do, however, permit their insureds to select from a pool of lawyers, or agree to consult with the insured about the choice of counsel. Most of the LPL policies that could be located online provide that the insurance company must obtain the lawyer’s consent to settle. Under some policies, however, the insured’s consent to settle is not required.

As the preceding description indicates, there can be some important differences in the actual monetary value and terms of the LPL policies sold to solo and small firm lawyers. Yet some LPL insurers did not believe that these lawyers understood their policies. As one explained:

Well, I would think that it’s probably true for any kind of insurance that people don’t really understand their policies. I hope we’ve gotten across to most people the claims-made aspects of it, but even then we sometimes get claims that are reported that kind of show they didn’t, or they’re hoping. And of course, some provisions don’t come up in the discussion that there can be some exclusions that come into play. . . . [W]e try to educate people on the nature of the policies, but how much attention is paid when the basic mindset is, “I don’t want to have a claim?” [Laughs] Hard to say.

If lawyers do not understand their policies, this raises questions about whether the policy terms actually regulate lawyer behavior.

E. Insurance Risk Management Services

Insurers offer a range of risk management services to solo and small firm lawyers. These services are not only offered to reduce claims experience, but as a marketing tool. The services typically take the form

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155 See, e.g., ISBA MUT. INS. CO., supra note 143, at 1 (“The Company has the right to appoint counsel . . . as we deem necessary.”); OHIO BAR LIAB. INS. CO., supra note 143, at 4 (“The Company shall have the sole right to name defense counsel to represent the Insured.”).

156 See, e.g., PROASSURANCE, supra note 143, at 3.

157 See, e.g., ALPS, supra note 143, at 2; TEX. LAWYERS’ INS. EXCH., supra note 143, at 2.

158 See, e.g., CNA, supra note 143, at 1; ISBA MUT. INS. CO., supra note 143, at 1; PROASSURANCE, supra note 143, at 3; MINN. LAWYERS MUT. INS. CO., supra note 143, at 1. Nevertheless, the policies also include a “hammer” provision, which states that if consent is withheld, the carrier’s liability is typically limited to the amount for which the plaintiff would have settled plus the cost of defense up to the date the settlement offer was declined. See MALLEN, supra note 81, § 2:41.

159 See, e.g., FLA. LAWYERS MUT. INS. CO., supra note 143, at 5; TEX. LAWYERS’ INS. EXCH., supra note 143, at 2.

160 Interview with Insurance Executive # 5 (2015).

161 Interview with Insurance Executive # 1 (2015); Interview with Insurance Executive # 7 (2015).
of newsletters about best practices to avoid claims,\textsuperscript{162} forms on a website (e.g., sample engagement letters, sample checklists),\textsuperscript{163} articles, case summaries, web tutorials, and hotlines for lawyers to call when they have questions or problems.\textsuperscript{164} Some underwriters provide continuing legal education (CLE) programs and a few offer a premium discount to lawyers who participate in risk management or ethics CLE.\textsuperscript{165}

The risk management services offered to solo and small law firms are different than the services offered by insurers in the large firm context, where insurers provide tailored services. As one risk management lawyer observed:

\begin{quote}
[N]o one’s going to go and do a two-hour CLE for a solo practitioner on his own, whereas I go to a large law firm, and I’ll do a very targeted designed program for the needs of that law firm that the insurer will often pay for, or contribute to. Similarly, no one’s going to pay for us to write an engagement letter specifically tailored to the practice of a solo practitioner. There are products they can access that the insurers pay for that are tailored for small firms, and others that they can buy, particularly from bar association practice management and solo and small firm sections. But no insurer is going to pay for an audit of an individual practitioner, or even of a small firm. No one’s going to help them write their engagement letter. They’re going to have to look at standardized forms.\textsuperscript{166}
\end{quote}

This lack of tailoring of risk management offerings for small firms may reduce the likelihood that solo and small firm practitioners will utilize insurers’ risk management services.

Many LPL insurers do not have good data indicating how much their

\textsuperscript{162} Some carriers send out newsletters in email blasts while others make them available on their websites.


\textsuperscript{166} E-mail from Anthony E. Davis, Partner, Hinshaw & Culbertson LLP, to author (Feb. 5, 2016, 9:45 EST) (on file with author).
risk management services are utilized by their insured solo and small firm lawyers. The extent to which risk management offerings are utilized may depend, in part, on the extent to which they are advertised. In some programs, there are reportedly thousands of lawyers using the risk management portion of the insurers’ websites, while in other programs, only a small number of lawyers do so. The risk management hotlines do not appear to be heavily used by solo and small firm lawyers. Occasionally, solo and small firm lawyers call for help on office practices such as engagement letters, docket control, and file retention. More often, lawyers call the hotline to discuss problems that have arisen or mistakes that have been made.

III. MALPRACTICE INSURANCE FROM THE LAWYERS’ PERSPECTIVE

The reports by LPL insurers about their underwriting, risk-based pricing, contract design, and risk management efforts provide useful context for understanding the role they may play in informally regulating solo and small firm lawyers. This Section attempts to deepen our understanding of the influence of LPL insurers by examining lawyers’ perspectives and experiences. In order to do so, this Section draws on surveys of solo and small firm lawyers and interviews with Connecticut lawyers about their experiences with LPL insurers and related topics.

A. The Lawyers’ Experience

For most of the interviewed Connecticut lawyers, LPL insurance is a fact of life, but not one to which they give much thought. It is a “necessary evil” or a “common sense” part of doing business or simply necessary for “peace of mind.” Especially for lawyers who do real estate work and are required to maintain LPL insurance, “I think you look at it as something you have to have. Whether you want to pay the premium or not,

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167 One insurer reported, however, that recipients opened almost 30% of the company’s newsletters. Interview with Insurance Executive # 5 (2015).
168 Interview with Risk Management Counsel # 1 (2014).
169 One individual who handled calls from solo and small firm lawyers in insurance programs indicated that he might talk to 200 lawyers a year in a 10,000-to-15,000-lawyer program. Another insurer estimated no more than 100 calls came in each year to his company, which insured a comparable number of solo and small firm lawyers. Interview with Insurance Executive # 3 (2015).
170 Interview with Insurance Executive # 5 (2015).
171 One executive estimated that more than 50% of the calls are due to specific problems that had arisen, rather than for advice concerning office management practices. Id.
172 When asked how much LPL insurance was on his mind, one lawyer responded, “It’s not. I sign up for it. I make sure it’s an A-rated or a good rated company to begin with. . . [A]nd then we go forward.” Interview with Attorney # 2 (2015).
173 Interview with Attorney # 3 (2015); Interview with Attorney # 4 (2015); Interview with Attorney # 16 (2015); Interview with Attorney # 30 (2015).
you’ve got to have it if you want to stay in business.’’

For virtually all of the interviewed lawyers, if they think about malpractice insurance, it is mainly when they renew their insurance, unless they need to report or defend a claim.\footnote{174 Interview with Attorney # 4.}

Many of the interviewed solo and small firm lawyers also do not give much thought to their choice of LPL insurers. One lawyer observed, “disproportionately, it’s interesting to have the risk be so high, but the thought process in how to get the insurance to be such a quick and minimal decision.”\footnote{175 Interview with Attorney # 2 (2015).} These lawyers simply want to be able to obtain their insurance “as quickly and painlessly as possible.”\footnote{176 Interview with Attorney # 14 (2015).} As one lawyer explained—echoing the responses of several others—her decision not to shop around for another carrier was because, “I can get [the renewal form] done in an hour. The rates are reasonable. So I’m not going to spend a day of my time shopping to change, to save three hundred bucks on my malpractice.”\footnote{177 Interview with Attorney # 3 (2015).} A few lawyers expressed a sense of loyalty to their carrier, especially if the lawyer felt that a prior claim was handled well. For a small cohort, however, cost is a substantial factor and will cause them to shop around regularly.

As indicated by the LPL insurers, the oral communications between solo and small firm lawyers and their insurers during the underwriting process are often brief. Lawyers’ initial contact with the insurer may occur online, when they complete an application or seek a quote.\footnote{178 See, e.g., Apply Now, N.Y. State Bar Ass’n, http://www.mybarinsurance.com/nysba/lawyers-professional-liability/apply-now/ [https://perma.cc/7NSC-SSEU]; Apply Online, CNA, https://www.lawyersinsurance.com/spn1/lawyerspbc/lawWAR/static_html/apply.html [https://perma.cc/9NYX-TG8V].} While solo and small firm lawyers report that they typically have subsequent oral communications with insurers at some point during the initial underwriting process, they are usually brief. One Connecticut lawyer, when asked whether he spoke with his current insurer when he first applied for coverage two years earlier, recalled:

A: Yes, I did. Yes, I did. They usually call you. Usually it’s a computer, an email, that solicit. I respond back and say, “Yes, I’m interested in speaking with someone.” Someone calls. I get a
quote.

Q: [A]t the time that you got this new coverage, how long did you speak to the person?

A: Under five minutes.

Q: Okay. And do you recall anything about the conversation other than talking about price?

A: Limits [of coverage] and price.¹⁸⁰

The Connecticut survey also revealed that the majority of lawyers who were primarily responsible for completing the initial application with their current carriers did not have lengthy conversations with their agent, broker, or carrier during the underwriting process. Eight percent of these lawyers had no such oral communications at the time they first applied for insurance with their current carrier.¹⁸¹ About 25% reported that their conversations ranged from one to ten minutes and 20% had conversations that ranged from eleven to twenty minutes.¹⁸² The Arizona survey results were roughly consistent with the experience of the Connecticut lawyers.¹⁸³

If the lawyers ask the insurers questions, they are most often about how to complete the application form or for recommendations about deductibles and coverage limits.¹⁸⁴ One insurance executive observed:

[W]e’re dealing with lawyers, so you would think they would be real technically-oriented in coverage issues, and it’s usually not that. It’s just the bigger picture items, like how much should I have? How much does it cost? Those kind of issues, rather than what does it cover? What are some exclusions? What are, you know, things to be aware of? What’s a claims-made policy? It’s usually not those kind of

¹⁸⁰ Interview with Attorney # 2 (2015).
¹⁸¹ The survey asked those individuals, “At the time that your firm initially applied for lawyer professional liability coverage, how much time, if any, did you spend orally communicating with your firm’s insurance agent, broker or underwriter”? (emphasis in original).
¹⁸² Of the remaining Connecticut lawyers, 15% spoke with an agent, broker, or underwriter for twenty-one to thirty minutes, and 12% did so for over thirty minutes. About 20% of these lawyers could not recall whether they had any oral communications when they applied for insurance.
¹⁸³ While the Connecticut lawyers’ survey response options were broken into ten-minute intervals, the Arizona lawyers’ response options were broken into twenty-minute intervals. Among the Arizona lawyers who were primarily responsible for handling the initial insurance application, 18% reported that they had not had any oral communication at the time they initially applied for insurance, 23% reported that their conversations lasted one to twenty minutes, and 8% did not recall whether they had any conversation. It is notable, however, that 16% reported that they talked with their insurer for more than an hour at the time they initially applied for insurance.
¹⁸⁴ See Interview with Insurance Executive # 1 (2014); Interview with Insurance Executive # 4 (June, 30, 2014); Interview with Insurance Executive # 5 (2015); Interview with Insurance Executive # 9 (June 23, 2014); Interview with Insurance Executive # 10 (2014).
questions that you would think lawyers, with their background and training and detail-orientation, should be honed in on. 185

The interviewed Connecticut lawyers who had oral communications with insurers at the time they initially applied for insurance also reported that they rarely discussed topics such as the coverage terms or their office systems. 186

The Connecticut lawyers—like the insurance executives—indicated that the oral communications between the insurer and the insured at the time of renewal were even less frequent. 187 One Connecticut lawyer, when asked whether he had had an oral conversation with his insurer when he had last renewed his coverage replied:

I don’t think so. They send me a packet every year, about 30 days or 60 days before I have to submit it. I usually do it right away, and I send it back with the check. I send it back, and then I think I get a letter from them with what the premium is, and then I send a check in. And then I get another letter saying, “Here’s your policy. It’s in effect.” 188

Another attorney, when asked whether he spoke with an insurer at the time of renewal recalled:

No. It says fill out this application, which essentially asks what percentage of your practice is dedicated to what areas of the law? Have any claims been made against you over the past year? Have you any reason to believe one may be made? . . . It’s about two pages, three pages long. [My support staff] types it up, I look at it and make sure we’ve answered them honestly. And we send it in along with a copy of my letterhead. And I get back a couple months later what the

185 Interview with Insurance Executive # 10 (2014).
186 In contrast, 45% of the surveyed Connecticut lawyers (a total of 223) who indicated that they were the person responsible for completing the initial insurance application with their current carrier responded that they had orally communicated with their agent, broker, or underwriter about their firm’s office systems or procedures. The reason for the difference between the responses of the interviewed and surveyed lawyers is unclear. Of these same surveyed lawyers, 14.7% (thirty-three total) also reported that they could not recall whether they had oral communications with their insurers when they initially applied for coverage. It is possible that some survey respondents were not carefully focusing on the question about oral communications. During the interviews, when lawyers were asked about oral communications with insurers, some immediately considered the questions about office systems and procedures on the LPL application. It is likely that some survey respondents were not carefully distinguishing between written communications (e.g., the application) and oral communications.
187 See supra notes 117, 120 and accompanying text.
188 Interview with Attorney # 6 (2015).
Consistent with these reports, 36% of the Connecticut surveyed lawyers who handled the renewal of their firm’s LPL insurance reported there was no oral communication with their insurer at the time of their most recent renewal. Another 34% spoke with their insurer for ten minutes or less.

The insured lawyers’ lack of personal connection with—or consciousness of—their insurance carrier could be seen in the fact that eight of the twenty-six interviewed Connecticut lawyers who handled LPL insurance for their firms could not identify their carrier. This may be due, in part, to the fact that most of the Connecticut lawyers dealt with agents and brokers when purchasing their insurance, and not directly with the underwriter. In addition, some solo and small firm lawyers are price sensitive and a few change carriers frequently. One such attorney, when asked how long he had been with his current carrier responded, “It’s not really like that. We have an agent, and the agent finds the best deal or the deal de jour. . . . And so I’ve probably had seven or eight different carriers, because it doesn’t usually last more than two or three years.” Although this was not a common practice among most of the Connecticut lawyers who were interviewed, the frequency with which some lawyers switch carriers reduces the chances that they will develop a relationship with the carrier that would cause them to reach out with questions or for help with their risk management efforts.

The interviewed lawyers’ responses also suggested that insurers’ risk-based pricing does not effectively encourage the adoption of sound risk management practices by solo and small firm insureds. Most of the interviewed Connecticut lawyers did not know what factors affected the pricing of their LPL premiums except the numbers of lawyers in the firm, their practice areas, and their claims history. Most of them were also generally aware that there were high-risk practice areas (e.g., securities) that affected premiums, and some—but not all—were aware that the areas in which they practiced (e.g., real estate) resulted in higher premiums than other practice areas. Only two of the interviewed lawyers believed that the quality of their office systems directly affected premium pricing. Not

189 Interview with Attorney # 5 (2015).
190 There appear to be differences, however, among the carriers. One NABRICO executive reported conversations with more than 90% of the company’s insureds at the time of renewal.
191 See Baker & Swedloff, supra note 11, at 1280.
192 Interview with Attorney # 25 (2015).
193 None of the interviewed Connecticut lawyers practiced securities law or intellectual property law. It is possible that LPL insurers more explicitly communicate to lawyers who practice in those areas that they must adopt sound risk management practices if they wish to obtain coverage at an affordable price.
194 A few lawyers identified other factors that they thought affected their premiums such as the length of time they had practiced law and their grievance histories.
surprisingly, then, most of the interviewed lawyers do not improve their office practices or systems because they think it will lower their premiums. Moreover, as one lawyer explained:

[H]onestly, at the company they would have no idea whether I did or not. . . . I have changed some of my practices so I can stay on bank lists and things, but not for the insurance companies, because they’re not overseeing me anyway. I mean [laughs], I could probably tell them whatever I wanted to because they’re not coming here to see me. Maybe they will in the future, but they haven’t. I’ve never had anybody visit my office from the insurance company.195

LPL insurers in this market also do not effectively use premium pricing to encourage specialization, even though lawyer specialization may promote more competent representation and result in fewer mistakes. While some insurers include specialization as a factor when computing rates,196 the solo and small firm Connecticut interviewees were unaware that this occurs. Likewise, when one insurance executive was asked whether lawyers were aware that there might be a premium benefit from specializing, he replied,

[M]y guess is no, because for one thing, it’s not something that anybody kind of advertises. It’s not because we want to keep it a secret; it’s just not part of what we think would help sell. And I don’t think there’s any standard. Everybody’s got their kind of secret sauce.197

It also does not appear that LPL insurers do much to discourage solo and small firm lawyers from “dabbling” in practice areas, except in securities or other high-risk areas. Dabbling can occur either when lawyers routinely devote a very small portion of their practice to a particular practice area (e.g., a practice that is mostly devoted to family law but is 2% real estate) or when they occasionally work in an area in which they have no previous experience. Many solo and small firm lawyers do not dabble. For other lawyers, however, if they can make money from devoting a small amount of their practice to certain types of work—or if they simply wish to be able to provide the service to their clients—they are not deterred by the insurance premiums from doing so.198 The insurers also do not appear to be discouraging solo and small firm lawyers from working in unfamiliar areas

195 Interview with Attorney # 8 (2015).
196 See supra note 131 and accompanying text.
197 Interview with Insurance Executive # 3 (2015).
198 Only one lawyer I interviewed had stopped performing real estate work because she was doing very little of it and realized it adversely affected her premiums. This was a Massachusetts lawyer I interviewed when pre-testing the interview questions.
on a one-off basis (except high-risk work identified in the exclusions), because the policies do not exclude coverage if a firm takes on work in a new practice area during the policy year.

For the most part the interviewed Connecticut lawyers decide on their practice areas and then stay within them because of their desire to perform their work competently or to avoid malpractice liability—not due to concerns that dabbling might affect their insurance coverage or premiums.199 One Connecticut lawyer noted that it was not LPL insurance that caused the lawyer to decline work, but rather “I declined the work because I don’t have enough knowledge. I’m not arrogant [enough] about it to pursue an area of law that I’m not familiar with.”200 Another Connecticut lawyer explained:

My law partner took a piece of paper like this when I first started and he trained me, and he said to me, “This is your box, right now, of things you know how to do. Don’t step outside your box unless you know what you’re doing.” So that’s the metaphor that I’ve used to try to practice law. I try to refer—you can make much more off of a third of a fee [that] someone else does with a great deal of practice experience, than you can off of a mistake.201

At the same time, this lawyer noted that he had taken on more sophisticated and controversial cases without concerns about his malpractice insurance premiums stating, “insurance did not stop me from getting into the [high profile] cases. It didn’t stop me from getting into larger value personal injury cases or workers’ compensation cases. I don’t consider insurance when I do that.”202

The Connecticut lawyers also do not seem to consider the potential impact on their LPL insurance of suing their clients for unpaid fees, even though insurers’ applications routinely ask whether lawyers have recently sued clients for fees.203 This may be because affirmative answers on the

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199 Only two out of twenty-six of the interviewed Connecticut lawyers reported that they dropped, changed, or limited the areas in which they practice because of concerns about how working in a particular area would affect their malpractice premiums. One of the two did not do securities work because he assumed the cost of LPL insurance to cover securities work was high.

200 Interview with Attorney # 8 (2015); see also Interview with Attorney # 18 (2015) (“[N]ot so much the cost of [insurance], but just the potential of being sued by a client, keeps me away from things I’m not 100 percent competent with.”).

201 Interview with Attorney # 2 (2015).

202 Id.; see also Interview with Attorney # 22 (2015) (“For the cost of the increased premium, probably would not be a deterrent if we thought we had some opportunity to earn some decent money in a particular area, right?”).

203 See supra note 97 and accompanying text; see also MALLEN, supra note 81, §7:15.
applications do not—as far as lawyers know—affect LPL premiums.\textsuperscript{204} Slightly more than one-third of the interviewed Connecticut lawyers had sued a client for unpaid fees.\textsuperscript{205} The predominant reason why other interviewed Connecticut lawyers did not sue clients for fees was not due to concern about how such suits might affect their LPL insurance, but because of the relatively low payoff. As one lawyer explained, “[S]ometimes it just doesn’t even pay to go after them, with the assets that they may or may not have. We’ve definitely gotten burned in the past with that, and it’s just not worth the firm’s time in pursuing those cases.”\textsuperscript{206} The interviewed Connecticut lawyers are aware that suing a client for fees can result in a counterclaim for malpractice, and this deterred a few of them from suing. Their concern focused on dealing with the malpractice claim itself rather than its impact on their LPL insurance coverage or premiums.\textsuperscript{207}

Even when the Connecticut lawyers had additional contact with LPL insurers because of malpractice claims, those interactions did not seem to affect lawyer conduct going forward. Eleven of the interviewed lawyers had either reported a possible claim to their insurers, been in a firm that had been sued, or had themselves been sued for malpractice. None of these lawyers indicated that they had been influenced by their LPL insurer to handle their practices differently due to that experience. Some of them were not even sure whether the claim had adversely affected their premiums. While some insurers reported that they may require firms that report claims to change their office practices,\textsuperscript{208} the interviewed lawyers did not report that they had been asked or required to do so. Instead, they said that in some cases that they had learned on their own from the mistakes that they had made and adjusted their behavior accordingly.\textsuperscript{209}

\textsuperscript{204} Based on the insurers’ reports, lawyers’ perceptions appear accurate. The exception would be if a claim for fees were brought that resulted in a counterclaim that would be covered under the policy. Some insurers also noted that numerous suits may raise questions about the financial stability of the firm.

\textsuperscript{205} Eleven of these lawyers had sued a client for fees. A few others indicated that they were paid in ways that guaranteed their fees were paid in full so unpaid fees were not a problem. In contrast, 91% of Arizona solo and small firm lawyers who responded to the survey indicated that they had not sued a client to recover fees in the past three years. The difference may be because the Arizona State Bar provides for voluntary fee arbitration. Lawyers and Legal Fees – Fee Disputes, STATE BAR OF ARIZ., http://www.azbar.org/lawyerconcerns/lawyersandlegalfees-Feedisputes/ [https://perma.cc/79JA-SK8N].

\textsuperscript{206} Interview with Attorney # 20 (2015).

\textsuperscript{207} As one lawyer who had never sued a client for fees explained, “[Y]ou learn very quickly that any time you sue a client for a fee, their defense is that you committed malpractice. . . . [W]e’d rather just write it off, rather than get into that sort of headache.” Interview with Attorney # 29 (2015).

\textsuperscript{208} See supra note 119 and accompanying text.

\textsuperscript{209} For example, one lawyer reported that he had learned “[n]ot to let things fall through the cracks. This was discovery that I let fall through the cracks. Not to trust other lawyers to do the right
When asked directly toward the end of the interviews whether they thought the process of applying or reapplying for malpractice insurance affected the conduct of their practice, the vast majority of the lawyers unequivocally responded “no.” For example, one lawyer when asked that question responded, “No. No. It’s something we need to have, so we would be stupid not to have it to begin with. So I don’t see it as affecting us at all.” Another lawyer, who had been practicing law almost twenty years responded, “So far it hasn’t, no. I mean, honestly, it’s a very effortless process. . . . So the fact that I have had this carrier forever, and it’s just a two-page application that I have to fill out, and I send it in, and they send it back—it works for me! [Laughs]” Yet another, when asked whether there was anything on the application forms that made him think about his office practices and change them responded, “Nah. . . . [I]t’s sort of like when you go to the doctor and they’re like, ‘Do you have AIDS? Do you have hepatitis?’ And you got to go through all those things and go no, no, no, no, and check it down.”

B. Where LPL Insurers May “Regulate” Lawyer Conduct

Notwithstanding the reports by Connecticut lawyers suggesting that LPL insurers have little impact on their conduct, there is evidence that some insurers’ practices positively influence lawyer behavior. For instance, premium pricing and policy exclusions deter some solo and small firm lawyers from practicing in high-risk practice areas that may be difficult to handle competently in a small firm. One of the interviewed lawyers did not do securities work “because I’d have to get a securities rider on my malpractice policy” and “I assume it would be too costly.” Another lawyer was careful not to tread into that area and made clear in writing that the work he was doing for clients was not securities work.

Another area in which insurers affect some lawyer conduct is in the use and content of engagement letters. The Connecticut Rules of Professional Conduct require that lawyers advise clients in writing of the thing and not screw a colleague, which is what happened in that case as well.” Interview with Attorney # 1 (2015).

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210 Interview with Attorney # 21 (2015).
211 Interview with Attorney # 20 (2015).
212 Interview with Attorney # 25 (2015). For further evidence that LPL insurers have only a modest impact on lawyers, see James Moliterno & John Keyser, Why Lawyers Do What They Do (When Behaving Ethically), 4 ST. MARY’S J. LEGAL MALPRACTICE & ETHICS 2, 29–40 (2014). The article reports on survey responses by a small number of Virginia lawyers as to why they engage in certain ethical conduct such as having conflicts-checking procedures. The desire “[t]o satisfy the requirements of our malpractice carrier” was not a major reason why lawyers engaged in such conduct. Id. at 29.
213 Interview with Attorney # 19 (2015).
214 Interview with Attorney # 5 (2015).
scope of the representation and the basis or rate of the fee for which the client is responsible.215 A few years ago an LPL insurer in Connecticut began asking lawyers at the time of application and renewal to provide a copy of their engagement letters, because the insurer discovered during the claims process that lawyers would often just “check off the box” indicating that they used engagement letters even when they did not. This insurer also sometimes asks lawyers to incorporate changes into their engagement letters, which a few of the interviewed Connecticut lawyers said that they had done.

The vast majority of the interviewed Connecticut lawyers reported that they use engagement letters with all or virtually all new clients. For some of these lawyers, the questions on the insurance application about whether they use engagement letters reminded them of the need to use engagement letters with all new clients.216 As one lawyer explained, “I don’t send fee agreements and disengagement letters because of [the insurer’s actions]. I learned to send them, and when [the insurer] said it, it reinforced it.”217 Another lawyer looked at the elements of the form engagement letter posted on the insurer’s website to make sure they were included in his own letter because “I’m concerned that if heavens forbid I am ever sued, I don’t want to give them an out for not covering me. It’s all contract law. So I need to be sure I’m holding up my end of the bargain in this contract.”218 A small number of lawyers indicated that they started using disengagement letters at the end of a matter because of the question about disengagement letters on the LPL insurance applications.

Although not common, a few of the interviewed lawyers had instituted new office practices because of their dealings with LPL insurers. One such lawyer, when asked whether he had changed his office practices either to make himself a more desirable insured or because he was asked by an insurer to do so, responded that his firm had created “statute of limitation ticklers” in the form of a log book and started using “drop letters” designed to make sure that clients know that the firm would not be representing them and was encouraging them to find another attorney.219 Another

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215 CONN. RULES OF PROF’L CONDUCT r. 1.5 (b).
216 One lawyer who reported that he used engagement letters with 95% of his new clients noted, “they ask you about the letters, so I try to be, probably, more diligent about doing the retainer letters, where I might have been a little lax. I’m not perfect at it, and I’m not 100 percent, but I think I’ve gotten better because of that. . . . I know that they require you to do that.” Interview with Attorney # 17 (2015).
217 Interview with Attorney # 27 (2015). Another lawyer indicated that the renewal application questions made the lawyer a bit more careful to ensure that people understood whether he was representing them. Interview with Attorney # 24 (2015).
218 Interview with Attorney # 5 (2015). Only a very few of the interviewed lawyers used the insurers’ online sample as a model for their own letters. Most had obtained the language for their letters from other sources.
219 Interview with Attorney # 2 (2015).
lawyer said that questions on the insurance application had caused the firm to change its file-keeping practices. He explained, “you have to respond to the questions, so you want to be—don’t want to just lie on the thing, so [you] kind of modify your practices, because obviously that’s something that they take into consideration.”

The risk management services offered by insurers seemingly have only a modest impact on insured solo and small firm lawyers. As noted, all LPL insurers provide some risk management services to their insureds, although some offer substantially more than others. Almost half of the interviewed Connecticut lawyers were not aware that such services were being offered by their insurers. One such lawyer, who was insured by a carrier that provides robust risk management services, gave the following fairly typical response:

Q: Do you know of any risk management services, things that they offer you to try to help you avoid liability?
A: No.
Q: Forms?
A: No.
Q: You don’t know whether they have them?
A: I don’t know whether they have them, no.
Q: Do they send you any newsletters or anything?
A: I don’t know. They might. They might. [Laughs] I might look at it and just toss it. If they do, I don’t read it.

Only 40% of the surveyed Connecticut lawyers were aware that their LPL insurers offered risk management services. This is roughly comparable to the results of the Arizona survey, which revealed that 44% of the respondents were aware that their insurers offered such services. About 31% of the surveyed Connecticut lawyers had used one or more of

220 Interview with Attorney # 17 (2015).
221 Similarly, several lawyers who were insured by a carrier that provides a premium discount for participating in a CLE seminar on risk management and ethics were unaware of the discount.
222 Interview with Attorney # 11 (2015).
223 The survey question asked, “Does your professional liability insurance agent, broker or underwriter offer your firm loss prevention (or “risk management”) materials or services such as CLE, forms, a hotline, etc.?” Among the remaining Connecticut lawyers, 40% did not know whether their insurer offered risk management services, and 19% said that their insurer did not offer such services.
224 Of the 196 Arizona lawyers who answered a similar survey question, 44% responded “yes,” their insurers offered such services, and 56% responded “no.” The Arizona lawyers were not given the option of indicating that they did not know whether their insurers offered risk management services.
their insurers’ risk management services. The most used service was insurer-sponsored CLE, which was used by approximately 17% of the Connecticut lawyers. The next most used risk management service was newsletters and articles on insurers’ websites, which were used by 15.6% of the Connecticut lawyers. Only 7.7% of the surveyed Connecticut lawyers had used their insurers’ advice hotlines. The frequency of use of these risk management services is not known.

A small number of the interviewed lawyers reported that the process of applying for or renewing LPL insurance positively affects their thinking or conduct. One lawyer initially responded, “I probably don’t think about it,” but then allowed, “I mean, when they come out with a new form and a new question, if I haven’t had that procedure, that would make me think, okay, I have to do that.” For another lawyer, the renewal process is also a reminder because,

It makes us go and review the [office] policies, I guess. It makes us go back and look at the letters, and how we take a case from beginning to end, and question whether or not there’s a more efficient way to do it, a safer way to do it.

A third lawyer noted:

I’ve been doing this for X number of years. By the same token, that in itself presents a risk to me, because you can’t become complacent. So it always has you thinking about: are you doing the right things? So I think by having to go through this process annually, it’s something [like] a slap in

225 Of the Connecticut insured lawyers who were aware that their insurers offered risk management services, 76% had used the services. Similarly, among the surveyed Arizona lawyers, 75% of the lawyers who were aware of the services had used them.

226 This seems especially low in view of the fact that CNA, the largest LPL insurer in Connecticut, offers a premium discount to its insureds who attend its CLE. A somewhat higher percent of Arizona survey respondents had attended insurer-sponsored CLE (24.4%). This may be because at the time of the survey Connecticut, unlike Arizona, did not require its lawyers to participate in CLE.

227 One insurer reported almost 30% of its emailed newsletters were opened by insureds, see supra note 167, which is more frequent than suggested by the Connecticut data. This insurer was a NABRICO company that writes insurance in a single state and its newsletters may be viewed as more useful to the insured lawyers because they are tailored to the laws of that state.

228 One lawyer, who said it took him four hours to complete the renewal application, reported a less positive reaction. He noted, “it’s always basically the same information, every year. And I start thinking about, well, there’s these other lawyers that don’t have it. I’m not a Rockefeller, so I don’t have a lot of exposure. . . . Maybe I should skip the insurance and forget about real estate.” Interview with Attorney # 15 (2015).

229 Interview with Attorney # 6 (2015). That same lawyer recalled, however, a communication from the insurer about including language in an engagement letter he believed would be problematic under Connecticut law—so he declined to do so.

230 Interview with Attorney # 2 (2015).
the face to make sure that I’m doing the right thing.\textsuperscript{231}

These descriptions suggest that LPL insurers encourage at least some solo and small firm lawyers to reflect on how they can improve their office procedures to avoid malpractice claims.

\textbf{IV. LAWYERS’ ATTITUDES ABOUT MALPRACTICE CLAIMS}

LPL insurers seemingly have only a modest impact on the conduct of insured solo and small firm lawyers. This is not surprising, as most insurers lack incentives to invest heavily in the vetting and regulation of these insureds. Another reason why LPL insurers’ impact is not greater, however, may be because many solo and small firm lawyers seemingly are not very concerned about malpractice.

How concerned are Connecticut solo and small firm lawyers about malpractice claims? The majority of the surveyed Connecticut lawyers are seemingly not that concerned. When asked “in the course of your day-to-day work life, how concerned are you about the possibility of a malpractice claim being filed against you?” 44% of Connecticut insured lawyers responded that they were “hardly concerned” and 14% were “not at all concerned.” Only 11% of these lawyers were “very concerned” and 32% were “somewhat concerned.” About one-third of the surveyed Connecticut lawyers reported that they or someone in their firms had been threatened with a malpractice action, and this group was significantly more concerned about malpractice claims than other lawyers.\textsuperscript{232}

The Connecticut lawyer interviews suggest some reasons why many lawyers do not seem very concerned about malpractice claims. Some lawyers are not that concerned because they do not view the financial stakes as high. One insured lawyer said:

\begin{quote}
No one I know is overly concerned, or even concerned about it at all, and a lot of people I know don’t even have insurance at all. Nobody cares. What happens is you as the lawyer do what you do, and if you make a mistake, well, you try to correct it. And a lot of times that’s how it resolves. So you give somebody their retainer back, or you pay whatever their damages were, or whatever the case is. For the solo or small
\end{quote}

\textsuperscript{231} Interview with Attorney # 5 (2015). Yet another explained that “I think it’s forced me to have some like introspection.” Interview with Attorney # 9 (2015).

\textsuperscript{232} This was consistent with the responses to the Arizona survey, in which 36% of the lawyers said they or a lawyer in their firms had been threatened with a malpractice action.

\textsuperscript{233} Among the 209 Connecticut insured lawyers in this category, 16% were very concerned, and 37% were somewhat concerned about the possibility of a malpractice action. Only 8% were not at all concerned. A chi-squared analysis revealed a p-value of 0.000 when comparing this group with other lawyers who had not received threats.
practitioner, you’re also talking about minimal risk. We’re not handling JP Morgan’s account. We’re not working with Donald Trump. Even if we screw up, it’s a couple hundred dollars or a couple of thousand dollars, it’s just not end of the world type of stuff, you know? 234

Another reason—although one rarely mentioned by the interviewed lawyers—is that these lawyers are not that concerned because they are covered by LPL insurance. This is not, however, a complete explanation. Connecticut uninsured lawyers appear even less concerned about malpractice claims than insured lawyers. 235 The reasons for this difference are not clear. 236

Before proceeding, however, it is worth considering the possibility that many Connecticut insured solo and small firm lawyers are not that concerned about malpractice claims because they carry LPL insurance. This could present a moral hazard problem for insurers if the incentives for insureds to behave responsibly are removed by insurance. 237 This does not appear to be a significant problem with these insured lawyers. They typically have deductibles on their coverage so they have some “skin in the game.” 238 Moreover, some of the Connecticut lawyers indicated that they do not want to be sued for reasons apart from the financial cost. For a few of the interviewed lawyers, their concerns about their reputations far outweighed their concerns about malpractice actions. One such lawyer explained:

You never want to have a client saying, “You’ve done something wrong.” You just don’t. Again, especially around here, because word is going to spread fast. . . . But again, it’s more on me: who am I? Not to put down this profession, but if I was a garbage man, I’d be the same way: this is how I conduct my business. If I’m a carpenter: this is how I conduct my business.

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234 Interview with Attorney # 25 (2015).
235 It must be noted that only 28 uninsured lawyers responded to the Connecticut survey. Only one of these lawyers (4%) was very concerned about malpractice claims and 14% were somewhat concerned. Of the remainder, 46% were hardly concerned and 36% were not at all concerned. In contrast, among insured lawyers, 11% were very concerned and 32% were somewhat concerned about malpractice claims.
236 Lawyers who buy LPL insurance may, as a group, be more concerned about malpractice risk than those who do not. It is also possible that the threat of malpractice is more salient for lawyers who carry insurance because they are reminded annually when they complete their renewal applications of the ways in which malpractice can occur. Another possibility is that uninsured lawyers are not as concerned about malpractice claims because they are less likely to be sued for malpractice due to the fact that they are uninsured. See Levin, supra note 29 Error! Bookmark not defined., at 33–36. Even if they are sued, they are likely to be judgment proof. Id. at 32 n.142.
237 Baker & Siegelman, supra note 13 Error! Bookmark not defined., at 169.
238 Virtually all LPL policies include some deductible. Mallo, supra note 81, § 2:13.
my business. I’m not going to cheat anybody out of anything. So I think a lot of it—I’m sure there are attorneys out there who say, “Oh, we’ve got insurance. Don’t worry about it.” But for someone like me, it’s on me first. Yeah, we may have insurance that covers it, but it’s not going to cover [me], reputation-wise.\textsuperscript{239}

Another reason why many Connecticut lawyers were not that concerned about malpractice claims appears to be that some simply do not think they will be sued. They believe they have implemented good office practices that will protect them. One such lawyer explained:

I don’t worry about it on an ongoing basis, ever, because I like to think that I’ve put into place standard operating procedures that protect us against that. So we have double booking systems for statutes of limitations, and we try to make sure that everybody knows what’s on everybody else’s calendar, so that you don’t run into problems of missing something, failing to show up for something.\textsuperscript{240}

Cognitive biases such as overoptimism and overconfidence may also cause some lawyers to believe that they will not face malpractice claims.\textsuperscript{241}

The Connecticut lawyer interviews provide only limited insight into the thinking of the lawyers who are very concerned about malpractice. One such lawyer, when asked how often she thought about malpractice liability, responded, “Every time somebody walks in the door.”\textsuperscript{242} This experienced lawyer, who had previously had a malpractice claim brought against her firm, added, “I think it’s just one of those sort of end-of-career things. It’s like I just want to get out clean.” Some lawyers’ concerns about malpractice were handled by engaging in “best practices.” As one lawyer explained, she employs:

[M]y best practices, always, because I don’t want to cut corners, because I never want it to come back to bite me. So I

\textsuperscript{239} Interview with Attorney # 21 (2015).
\textsuperscript{240} Interview with Attorney # 11 (2015).
\textsuperscript{241} The overoptimism bias causes people to be unrealistic about their futures. See Neil D. Weinstein, \textit{Unrealistic Optimism about Future Life Events}, 39 J. PERSONALITY & SOC. PSYCHOL. 806, 807–08, 814 (1980). It leads people to believe that they can control uncontrollable events and to overestimate the extent to which their actions can guarantee a certain outcome. \textit{Id.} at 814; Roland Bénabou & Jean Tirole, \textit{Self Confidence and Personal Motivation}, 117 Q. J. ECON. 871, 874 (2002). Overconfidence causes people to be more confident in their judgments than is warranted by existing facts. It may cause people to think they are making good choices and to not reconsider how to approach a decision that has been previously made. Max H. Bazerman & Don A. Moore, \textit{Judgment in Managerial Decision Making} 37 (7th ed. 2009); Jeffrey Rachlinski, \textit{The Uncertain Psychological Case for Paternalism}, 97 NW. U. L. REV. 1165, 1220 (2003).
\textsuperscript{242} Interview with Attorney # 14 (2015).
think for the most part, people are aware of it, and don’t want
to ever expose themselves to it. So I think that it just sort of
becomes second nature in how you run your practice,
because now you do all the right things because you have to,
because you’re scared.  

For many lawyers, however, malpractice liability was only “in the back of
all of our minds to be concerned about. But day to day, no. I think day to
day, it’s getting what we need to get done to bring money in the door,
business in the door, keep the practices going.”

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<tr>
<th>Concern about Malpractice</th>
<th>Concern about Discipline</th>
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<tr>
<td>Very Concerned</td>
<td>11%</td>
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<tr>
<td>Somewhat Concerned</td>
<td>32%</td>
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<tr>
<td>Hardly Concerned</td>
<td>44%</td>
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<tr>
<td>Not at All Concerned</td>
<td>14%</td>
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Connecticut solo and small firm lawyers are somewhat more
certain about a discipline grievance than a malpractice claim, although
the difference is not statistically significant. At first blush, this seems
surprising. One might expect that lawyers would be less concerned about a
discipline grievance, as the most common lawyer discipline sanction is a
reprimand, while a malpractice judgment can result in substantial
financial liability and increased insurance premiums. As one insured
lawyer explained, however, “What I’m really worried about isn’t
judgments against me, because I have no money anyway. What I’m really
worried about is my license.”

Several lawyers noted that it was easier to
file a disciplinary grievance, which can be done without an attorney, than
to bring a malpractice action. One lawyer explained:

I think it’s just easier for someone to fill out an application
with the Statewide Disciplinary Counsel. And it’s
embarrassing. I mean, it’s a public docket that goes on the
Judicial Court website. Everybody looks at it! [Laughs] It’s

243 Interview with Attorney # 28 (2015).
244 Interview with Attorney # 15 (2015).
245 A chi-squared test revealed the p-value to be 0.127, indicating no statistical difference.
http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/2014_sold_final_results.authcheckdam.pdf [https://perma.cc/VB8W-FGK7]. In
addition, even when a grievance is filed, sanctions are often not imposed. See Levin, supra note at 1550.
247 Interview with Attorney # 1 (2015).
right here on the home page. You look at it; you see who’s been grieved. And you don’t know what the details are, because the details aren’t posted. But it’s—yeah. I would say that’s probably more concerning to me than a malpractice lawsuit. To me, for malpractice, for a client to go to that extent, you really have to screw up, is the way I look at that.\footnote{Interview with Attorney # 20 (2015).}

Another lawyer who was also more concerned about a discipline grievance than a malpractice claim observed:

Yeah, and I shouldn’t be. And now having practiced enough, I mean, malpractice claim? I have insurance. That’s the way I look at it. And I’m not a negligent person, so if it’s a judgment issue—if I make a mistake, it’s a judgment issue. It won’t be because I just didn’t do the thing I was supposed to do. It was because I made a misjudgment on something, or I didn’t have enough knowledge to make the proper judgement on something. . . . Could something happen or something lapse? I had to file and no one knew about it, or forgot about it? It’s possible. Those things happen to people. . . . The concept of a disciplinary issue, someone calling me a bad attorney, someone saying I violated rules of professional conduct, would be more upsetting to me probably than someone claiming I committed malpractice, unless I really did commit malpractice. [Laughs]\footnote{Interview with Attorney # 22 (2015).}

These lawyers may also be more conscious of—and concerned about—discipline grievances than malpractice claims because they hear and read much more about lawyer discipline than they do about malpractice. It is easy to learn about public lawyer discipline sanctions because they are published on court websites, in legal publications, and sometimes in the popular press.\footnote{See, e.g., Disbarments, CAL. B. J. (June 2015), http://www.calbarjournal.com/June2015/AttorneyDiscipline/Disbarments.aspx [https://perma.cc/N7HC-PJ9L]; Michael F. Romano, Professional Discipline Digest, CONN. LAW., Nov. 2015, at 9–10; Matthew Kauffman, Attorney Suspended for Impersonating Fellow Lawyer, HARTFORD COURANT (July 31, 2015), http://www.courant.com/news/connecticut/hc-lawyer-elder-suspended-p-20150731-story.html [https://perma.cc/LH6W-AW8B].} Many solo and small firm lawyers are also aware that they are more likely to be subject to discipline than other lawyers.\footnote{See Leslie C. Levin, The Case for Less Secrecy in Lawyer Discipline, 20 GEO. J. LEGAL ETHICS 1, 6 (2007).} In contrast, it is much harder to learn about malpractice claims,
which are often abandoned or settled, and are rarely the subject of media attention unless they involve substantial damages. The interviewed Connecticut lawyers often did not know other lawyers who had been sued for malpractice. They were also unaware of the likelihood of receiving a legal malpractice claim during a lawyer’s career.

V. INSURERS THAT REGULATE SOME SOLO AND SMALL FIRM LAWYERS

The interviews with Connecticut lawyers unexpectedly revealed that there is another insurer that informally regulates the conduct of some solo and small firm lawyers more effectively than LPL insurers. Title insurers regulate some real estate lawyers, not through insurance they sell to the lawyers, but because those lawyers wish to act as title agents. As title agents, these lawyers perform title searches, issue title insurance for title companies, and disburse closing funds derived from real estate transactions. In return, they earn a substantial percentage of the title-insurance premiums. Lawyers can often serve as title agents while also representing their own clients (typically buyers) for an additional fee in the same real estate transaction.

A bit of background about title insurance is necessary. Title insurers issue a title insurance policy in connection with real estate transactions, typically for the benefit of the purchaser or lender. Title insurance makes the title insurer, under the policy, strictly liable for losses resulting from title defects not identified at the time of the closing.

Title insurance companies began to appear in the late nineteenth

252 See ABA PROFILE, supra note 128, at 17.
253 Even the insurance executives I interviewed could not provide this information. At most, they could identify the annual frequency of claims per one hundred lawyers they insured. The Connecticut and Arizona surveys revealed that about one-third of the lawyers reported that they or someone in their firm had been threatened with a claim. See supra note 232 and accompanying text.
256 See John L. McCormack, Overview of the Title Insurance Industry, 11 THOMPSON ON REAL PROPERTY § 93.01 (1999). The policies are usually issued when there are property transfers or property refinancings.
257 Id.
century and eventually created a national market for their policies.\textsuperscript{258} By the mid-twentieth century, as lenders realized that title insurance made mortgage paper more marketable, lenders began to require borrowers to obtain title insurance.\textsuperscript{259} These developments threatened the work of lawyers, as parties to real estate transactions had previously relied on lawyers’ title searches and their opinions to assure that the purchaser was acquiring good title. As a result, lawyers in some states formed bar-related title insurance companies for which they acted as title agents.\textsuperscript{260} This enabled lawyers to continue to be involved in assuring good title, and to issue title insurance policies.\textsuperscript{261} Lawyers also serve as title agents for commercial title insurance companies such as Chicago Title Insurance Company and First American Title.\textsuperscript{262}

Title insurers regulate their lawyer title agents through the agent-application process, through their contract with the agent, and through their extensive risk management efforts. Title insurer regulation of lawyer conduct is important because real estate is one of the practice areas that generates the most malpractice claims against solo and small firm lawyers.\textsuperscript{263} Many lawyer defalcations also occur in connection with real estate transactions.\textsuperscript{264} While title insurers function differently than LPL insurers in important ways, title insurers merit discussion because they present an interesting contrast to LPL insurer regulation, and provide an example of how lawyer regulation by insurers might more effectively

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\textsuperscript{258} D. BARLOW BURKE, LAW OF TITLE INSURANCE § 1.01 (2000).
\textsuperscript{259} Id.
\textsuperscript{260} There are currently seven bar-created title companies in the United States operating in fourteen states. About Bar-Related Title Insurance, NABRITI, https://perma.cc/33AD-95AM. Some are in large states such as Florida, Illinois, and Ohio. The first such company was formed in 1948. Id.
\textsuperscript{263} See ABA PROFILE, supra note 128, at 11 (reporting that almost 15% of malpractice claims came from real estate). Although the ABA Profile only reports on claims received by some carriers, see supra note 128, participating companies include CNA and most of the NABRICO companies. Consequently, the Profile provides a good indication of the source of claims reported to the companies most likely to insure solo and small firm lawyers.
occur.
Not all real estate lawyers are title agents. Likewise, not all title agents are lawyers. The focus here, however, is on lawyer title agents. Unlike LPL insurers, which have an insurer-insured relationship with lawyers, title insurers and title agents have a principal-agent relationship. Title insurers are usually responsible for the errors of their title agents, but lawyer title agents also face liability exposure when they make errors. They must maintain coverage under their LPL policies or purchase separate Errors and Omissions or other liability insurance in order to act as agents.

One title insurer the interviewed Connecticut lawyers frequently mentioned was Connecticut Attorneys Title Insurance Company (CATIC), a bar-related title insurance company. CATIC was established in 1965 after members of the Connecticut Bar Association’s Real Property section petitioned the Connecticut legislature to create a corporation that insured real estate titles. CATIC’s business is the issuance of title insurance, but its mission is also, in part, to promote “the essential role of independent legal counsel in real estate transactions.” Today, CATIC issues title insurance in six states through its attorney title agents. Eight of the interviewed Connecticut lawyers acted as title agents for CATIC.

Title insurers—including bar-related companies like CATIC—require their agents to engage in certain office practices to reduce the title insurers’ risk of loss. At the time of the interviews in early 2015, Connecticut real estate lawyers were anticipating a tightening of these requirements later

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265 There are about 35,000 lawyer title agents who issue policies for bar-related title insurers. About Bar-Related Title Insurance, supra note 260. It is not known how many lawyers work as title agents for other title insurers.

266 Many LPL policies cover services rendered as title agents. See MALLEN, supra note 81, § 7:13; see also TRAVELERS, supra note 143, at 5 (defining “Professional Services” to include “Title Agent”); TEXAS LAWYERS’ INS. EXCH., supra note 143, ¶ 1.15(d) (defining “Professional Services” to include legal services performed when acting on behalf of a title insurance company).


268 Other title insurers in Connecticut include Chicago Title Insurance Company, Fidelity National Title Insurance Company, and Old Republic National Title Insurance Company. Title insurance can only be sold by a licensed attorney in Connecticut unless the title insurance agent held a valid title insurance license on or before June 12, 1984. 1984 Conn. Pub. Acts 84-403.

269 The Connecticut General Assembly did so by Special Act 339. At its inception, CATIC was formed as a mutual insurance company and shared space with the Connecticut Bar Association.


272 Another interviewed lawyer was a title agent, but did not specifically mention CATIC.
that year because of the new obligations imposed on lenders and settlement service providers (including closing attorneys) by the Dodd-Frank Wall Street Reform and Consumer Protection Act and the Consumer Financial Protection Bureau.\(^{273}\) Under the new regulations, lenders are subject to substantial fines for closing errors,\(^ {274}\) including those caused by their title insurers. In response to the new requirements, the American Land Title Association (ALTA), to which CATIC and most title insurers belong, issued “best practices” for closing agents which address not just real estate closing documents, but also title agents’ office practices pertaining to internet security, escrow controls, and document preservation.\(^ {275}\) The title companies were “cautioning all the attorneys that [the best practices were] going to be something that you’re going to have to comply with in order to get the lenders to allow you to do real estate closings for them.”\(^ {276}\)

Even before the implementation of the new requirements, title insurers carefully vetted title agent applicants. Title insurers are not only concerned about errors in title searches and related documentation, but also about the proper handling of funds their agents receive in the course of the real estate transaction.\(^ {277}\) Title insurers require lawyers who seek to become title agents to complete an application that focuses on their competence and financial responsibility.\(^ {278}\) The inquiry is more extensive in some respects than it is during the LPL application process. For example, title insurers ask for more information about the lawyer’s real estate experience than LPL insurers\(^ {279}\) and ask for detailed descriptions of their maintenance of

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\(^{274}\) The Consumer Financial Protection Bureau can impose civil penalties of $5,000 per day, per violation for noncompliance, $25,000 per day for reckless violations, and $1 million per day for knowing violations of the requirements. 12 U.S.C. § 5565(b)(2) (2012).


\(^{276}\) Interview with Attorney # 17 (2015).

\(^{277}\) Theft of these funds by title agents is a significant problem in the title insurance industry. Some of the most severe claims involve defalcations. A.M. BEST METHODOLOGY, supra note 254. For a description of some of the ways in which theft occurs in this context, see NAIC, TITLE ESCROW THEFT AND TITLE INSURANCE FRAUD 5 (2013), http://www.naic.org/store/free/TET-OP.pdf [https://perma.cc/UL6D-VQ54].

\(^{278}\) The description that follows is based on a review of lawyer- title agent applications and lawyer title agent agreements that could be located online.

\(^{279}\) While LPL insurers ask that a real estate supplement be completed in addition to the regular application if a firm engages in real estate work, the focus of the form is on the type of work performed rather than on the lawyers’ experience with real estate work. See, e.g., ALPS Lawyers Professional Liability Application Real Estate Supplement – Maine, ALPS, http://www.alpsnet.com/media/774020/me_pcic_alpsfappapplicationrealestate_4-14-14.pdf [https://perma.cc/HRF9-CQ97].
escrow accounts. LPL insurers do not ask much (if anything) about escrow accounts because they do not cover lawyer defalcations under their policies. Lawyers seeking to become title agents are also required to provide detailed personal financial information. They must further provide substantiation in the form of a credit check, a criminal background check, and personal references.

Unlike LPL insurers of solo and small firm lawyers, title insurers actively monitor their lawyer title agents. These lawyers must make all of their documentation and escrow accounts available for inspection upon request. One lawyer explained:

[W]e have pretty strict control by the title insurance companies. They come and audit our escrow accounts. At least, they usually come like once a year. I maintain my accounts. We have to reconcile the accounts. I do it on a monthly basis. So I think in some ways I could almost see—I'm under a lot of scrutiny with that. I think if I didn't have that—I'll be honest with you—not that I'm lazy. I'm certainly not lazy, but I think maybe the malpractice stuff I would notice a little more, but I'm so under scrutiny as it is, I think it almost falls under some of that type of thing I'm required to do already.

Another lawyer explained, “[W]e have a rep, a personal rep, who makes the rounds in person every few months, checks in on us.”

Title companies provide additional risk management services to its

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281 See MALLEN, supra note 81, § 2:43 (noting that policies do not typically cover dishonest, criminal or willful acts).

282 See ATTORNEYS’ TITLE FUND SERVS., LLC, supra note 280, at 2; Sub-Agency/Approved Attorney Application Checklist, GA. FUND, http://www.gafund.com/?q=node/55 [https://perma.cc/3YAG-74L7].


285 Interview with Attorney # 8 (2015).

286 Interview with Attorney # 13 (2015).
lawyer-agents through email blasts, conferences, seminars, webinars, and phone contact.287 The Connecticut lawyers appeared very responsive to these efforts. Some of these lawyers obtained their engagement letter language from CATIC or revised their letters as advised by CATIC. When asked how he kept up to date on best practices in real estate, one lawyer responded:

Our title insurance carriers—we use both CATIC and Fidelity, and they are inundating us constantly with emails [laughs] about seminars. So I typically would send my paralegal, and we just went to one a few months ago. Real estate is undergoing a huge change right now. . . . So that’s pretty much how we remain in sync with what needs to go on in the real estate market, is through our title carriers.288

Another lawyer explained, “when email comes from CATIC or something, we’ll kind of scan it, and then we’ll say, ‘Okay, we need to look at this and make sure it’s in compliance.’”289 The same lawyer noted that the title companies “send out like kind of, new regulations: ‘This is the new thing; make sure you’re in compliance,’ and that kind of thing. So they’ll send kind of like flash things, and we always do what they tell us.”290

The risk management services and frequent contact between the title insurer and the lawyers leads to a relationship that helps lawyers avoid mistakes. As one lawyer explained:

One area I’m a little bit weaker in is I don’t do probate law. So I’ll get a closing where the title has several probate issues that I’m not as familiar with, so I’m very, very careful. So I just will call, and they have several attorneys working at the company, so I’ll just consult them. And they’re very knowledgeable on title issues, so I’ll make sure that I at least get at least one person to back me up. In fact, they’re—I’ll usually get an email or a letter. They’re the ones insuring the title, so that attorney is giving me the advice, and I’ll probably hang it on them [laughs] if it’s wrong.291

In some cases, their counterparts at the title insurance companies are effectively practice advisors. A solo lawyer who was a CATIC title agent said, “[name omitted] over there is my rock. If I have some kind of issue—

288 Interview with Attorney # 12 (2015).
289 Interview with Attorney # 13 (2015).
290 Id.
291 Interview with Attorney # 8 (2015).
because I don’t have anybody else to bounce it off of—so if I have an issue, I’m on the phone with him.”

The lawyer title agents viewed the questions and oversight by LPL insurers as light as compared to the requirements imposed by the title companies. As one lawyer explained when asked whether the process of applying for and renewing LPL insurance had affected his office practices:

You know, again what they ask me is lenient, in some ways, compared to what the banks are now requiring of us. So I would say no. I’ll be honest with you; I would say no. I have so many requirements that have come out with the Dodd-Frank Act, and the requirements the banks are imposing. In fact, one of the reasons I actually merged with my partners—the regulations are becoming tighter and tighter on us as real estate attorneys. So that's where my fear is, I’d say. Less so with the questions related to malpractice insurance.

Another lawyer, when asked whether title insurers had more impact on how she practiced law than LPL insurers, replied:

Yeah, probably, because I have much more dealings with the underwriters at the title company than I do at the malpractice carrier. So if I have a question regarding a title, I always float it up to underwriting at the title company to tell me what to do. . . . I’ll talk to the underwriters at the title company once a month, if not more often. I’ll reach out to them for a general question in reference to real estate. And you know what? I feel more comfortable doing that than I would my malpractice carrier, because somehow you look at that—that’s why the hotlines are anonymous, you know? Not tipping yourself off to getting in trouble, where they’re going to drop you off, and say, “Forget it. We don’t want you anymore.”

Title insurer oversight has probably become even more rigorous since the interviews, as ALTA best practices recommend that title insurers use third parties to assess, on-site and on a bi-annual basis, title agents’ compliance

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292 Interview with Attorney # 18 (2015). Another lawyer noted, “We also are always talking to them for various reasons, because whatever issue comes up, we just want to make sure. So we call the attorneys all the time.” Interview with Attorney # 13 (2015).

293 Interview with Attorney # 8 (2015). This same lawyer observed, “[T]he malpractice—I mean, I’ve never been offered any risk assessment or anything like that. I’m fortunate because I have the banks all over my back [laughs], and I have the title companies all over my back. But in some ways, that forces you to do things or think about things at risk, and things like that. But yeah, [LPL insurers] could do a better job of that.” Id.

294 Interview with Attorney # 24 (2015).
with the title insurers’ written policies and procedures.\textsuperscript{295}

Title insurers’ efforts to regulate their lawyer title agents in order to reduce the risk of loss resemble—but in some ways go beyond—the efforts of large firm LPL insurers to regulate their insureds. As previously noted, large firm LPL insurers closely review law firms’ office practices and attitudes towards risk management when deciding whether to write the insurance.\textsuperscript{296} They may contact their insureds several times in a year. In this respect, the closer vetting and outreach by large firm LPL insurers and title insurers are similar. In addition, however, title insurers regularly audit lawyers’ escrow accounts. There is also more personal contact with the individual solo and small firm attorneys (an impossible task for insurers of large firms), as the title companies regularly visit the offices of lawyer title agents and effectively encourage those lawyers to reach out to them for advice.\textsuperscript{297}

At the same time, the Connecticut lawyer interviews indicated that CATIC’s frequent email and other communications about changing laws and other developments, and CATIC’s continuous efforts to improve the practices of its lawyer title agents, resemble the activities of some specialty bar associations. Some specialty bars provide daily email updates of the law, training sessions for its members, and attorney listservs and advisors to promote competent practice.\textsuperscript{298} These activities engender a strong positive connection to the organization.\textsuperscript{299} Indeed, the apparent responsiveness of lawyer title agents to the title companies’ efforts (especially CATIC’s)—and their positive views of those efforts—also resemble lawyers’ very positive reactions to some specialty bars. The interviewed lawyers seem to appreciate these efforts and see them as a way to improve their practices. More research would be needed to determine whether this attitude exists toward commercial title insurers, or is limited to bar-related title insurers like CATIC. The Connecticut lawyers’ reports suggest, however, that through the requirements imposed by title insurers, and through monitoring and education, title insurers regulate their lawyer agents in ways that promote responsible conduct.


\textsuperscript{296}See supra notes 31, 103, and accompanying text.

\textsuperscript{297}In contrast, individual lawyers in a large firm are less likely to reach out to LPL insurers, not only because they may not know whom to contact, but because they often have in-house ethics counsel who can answer questions about professional responsibility rules and colleagues who can answer practice-related questions.


\textsuperscript{299}See Levin, Specialty Bars, supra note 298, at 204.
CONCLUSION

The study results suggest that LPL insurers have a modest influence on the professional conduct of solo and small firm lawyers. For example, LPL insurers deter some Connecticut lawyers from practicing in very high-risk areas. LPL insurers can also influence a few discrete office practices, like the content of engagement letters or their frequency of use. Some insured lawyers adopt other risk management practices that they learn from LPL insurers. It is not clear from the study, however, how many lawyers actually do so.

It is possible that LPL insurers have some additional impact on insured lawyers that the lawyers did not think to mention and that I failed to explore. For example, I did not ask the lawyers directly whether policy language excluding coverage of lawyers’ activities when they sit on boards of directors discouraged them from sitting on boards. It is also possible that lawyers are unaware of the impact of insurers on some of their decisions. For instance, LPL insurers’ efforts to encourage the adoption of calendaring and conflicts-checking systems—which date back to the 1980s—may have gone on for so long that lawyers no longer attribute their adoption of these systems to LPL insurers. The importance of such systems may have since become part of lawyers’ general understanding of what they need to do to avoid malpractice liability. It is therefore possible that LPL insurers have influenced the conduct of solo and small

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300 See supra notes 213-14 and accompanying text.
301 See supra notes 216-18 and accompanying text.
302 See supra notes 219-20 and accompanying text.
303 During the lawyer interviews, I explored directly how certain application questions and policy terms might affect the lawyers. I also inquired about lawyers’ understanding of premium pricing to determine whether pricing seemed to affect lawyer conduct. Toward the end of the interview, I asked a “clean up” question about whether the process of applying for or renewing their policies affected them in any way. I then explained my research focus and invited them to offer insights about topics I might have missed. It is still possible, however, that during the interviews, the lawyers did not consider all of the ways in which LPL insurers affected their thinking or conduct.
304 Four of the interviewed lawyers made references that suggested that they were aware of application questions about serving on boards or possible exclusions in their policies. Two of those lawyers noted that they sat on the boards of not-for-profit organizations. The exclusions may deter some lawyers from sitting on for-profit boards unless the board has its own E & O insurance policy. It is also possible, however, that other lawyers personally bear the risk of loss or acquire separate coverage for this activity.
firm lawyers, but in ways that are no longer discernible.

It is also possible that LPL insurers have more influence on solo and small firm lawyers in some other states. Especially in Oregon, where all lawyers are insured by the Oregon Professional Liability Fund, or in states where much of the solo and small firm market is serviced by a NABRICO company, LPL insurers may have a greater ability to informally regulate lawyer conduct than in other states. The fact that the NABRICO companies are bar-related and have provided insurance in the jurisdiction for decades might generate more lawyer trust and responsiveness to insurers’ efforts. Furthermore, some NABRICO companies that operate in a single state may provide risk management information that is more focused on the laws of those states, and may therefore be more utilized by insured lawyers. Future research would be needed to determine whether these insurers have more influence on the conduct of their insured lawyers than could be found in this study.

The preliminary evidence suggests, however, that the conditions do not exist for most LPL insurers to do more than modestly influence the conduct of most solo and small firm lawyers. A sizable minority of these lawyers do not carry LPL insurance. Insured lawyers are not likely to modify their behavior to obtain premium reductions, since they do not have a sufficient understanding of premium pricing to determine how they might do so. The failure of LPL insurers to have a meaningful discussion with most lawyers about their firms’ risk management practices make it less likely that lawyers will change their office practices due to their insurers’ efforts. So does the fact that LPL insurers do not, for the most part, check on firms’ office procedures to confirm whether they actually maintain the office systems they report. The lack of personal connection between LPL insurers and insureds—at least as reported by the Connecticut lawyers—also makes it less likely that most solo and small firm lawyers will reach out to those insurers for advice about ways to

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308 See supra note 57 and accompanying text.

309 In addition, the fact that the applications are submitted electronically may reduce the likelihood that some lawyers are accurately reporting their office practices. Research suggests that respondents are less likely to answer honestly when they sign a document electronically. See Eileen Y. Chou, What’s in a Name? The Toll E-Signatures Take on Individual Honesty, 61 J. EXPERIMENTAL SOC. PSYCHOL. 84, 85 (2015) (suggesting that as compared to handwritten signatures, “e-signatures . . . do not exert the same symbolic weight in subsequent decision making, and in turn can abet dishonesty”).
reduce their risk of loss.

At the same time, LPL insurers have little motivation to do more to regulate solo and small firm lawyers. As noted, the premiums are relatively low, the indemnity payments are not usually high, and so LPL insurers lack the financial incentives to invest much time or effort in these insureds. Close review of the applicants’ office practices by visiting the firm or through other means is not economically feasible. Nor is it necessary when the insurer can deny coverage if the insured makes material misrepresentations on the application. Similarly, it would be very expensive for insurers to provide individualized risk management services that would actually be utilized by their insureds. Insurers lack incentives to do this when the payoff is so uncertain.

One inexpensive step that insurers could take to promote more responsible insured lawyer behavior would be to be less opaque about their premium pricing. If lawyers knew that there were steps they could take that would reduce their LPL premiums, they could consider whether to change the way they do business to obtain lower premiums. For example, one of the most common reasons for malpractice claims is failure to know or failure to apply the law. Insurers could encourage lawyers to avoid these mistakes by making lawyers aware that specialization will positively affect the way in which their premiums are calculated. Likewise, insurers could use premium pricing to discourage lawyers from “dabbling” by charging a surcharge for dabbling and being transparent about the pricing. Some solo and small firm lawyers are already price sensitive when it comes to LPL insurance and may modify their behavior if they had more information. If LPL insurers could identify other measures that reduce the likelihood of claims—and make insureds aware that premium reductions are available for lawyers who implement these steps—they might further influence lawyer conduct.

LPL insurers might also further influence lawyer behavior by requiring more information or evidence in the application demonstrating that lawyers have implemented the risk management practices that they claim to have in place. As noted, a few insurers have started to require that lawyers produce a copy of their engagement letter to demonstrate that they have one and that it contains appropriate language. Other simple requests for additional information might improve lawyers’ practices. For example, even though most LPL applications ask whether solo lawyers have plans for “back up” if they become incapacitated, more than 60% of the interviewed Connecticut solo lawyers had not designated another lawyer to serve as

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310 See ABA PROFILE, supra note 128, at 21.
311 See supra notes 136-38 and accompanying text.
312 See ABA PROFILE, supra note 128, at 18.
313 See supra note 191-92 and accompanying text.
back up. This may be due, in part, to the fact that the biggest insurer of solo and small firms in Connecticut asks on the application if the solo lawyer has procedures in place in the event of incapacitation, but does not ask specifically about a “back up” lawyer. Simply asking for the names of “back up” lawyers, which a few insurers already require on their applications, might encourage more solo lawyers to create such arrangements.

LPL applications that require more thoughtful and systematic reflection about the firm’s office-management systems might also encourage improvements in those systems. As previously noted, a small number of the interviewed Connecticut lawyers indicated that their annual renewal applications cause them to reflect on the adequacy of their office systems and procedures. These responses might become more common if LPL insurers required more meaningful self-assessments of the firms’ office systems on their application and renewal forms. Susan Fortney and Tahlia Gordon found evidence that the use of self-assessment questionnaires by certain law firms in Australia to determine whether they have in place “appropriate firm management systems” prompts some firms to revise and implement their management systems. These firms are required by the Office of the New South Wales Legal Services Commissioner (OLC) to evaluate their policies and management systems, rate the firm’s compliance with ten objectives of sound legal practice. Because these self-assessments are not completed in the context of insurance applications, but rather are required by the OLC, the firms may have improved their procedures not because of self-reflection, but because of concerns about a regulatory audit. Nevertheless, that study raises the possibility that firms’ engagement with a well-designed self-assessment questionnaire may lead them to improve their office systems.

Lawyers’ experiences with title insurers demonstrate what more effective insurer regulation of solo and small firm lawyers looks like. In that relationship, lawyers have strong financial incentives to conform to the title insurer’s requirements. Title insurers also have strong incentives to carefully monitor the lawyers, because of the substantial liability exposure and potential loss of business associated with their title agents’ mistakes.

314 See, e.g., THE HARTFORD, supra note 89, at 4; ZURICH, supra note 89, at 3.
315 See supra notes 228-31 and accompanying text.
317 Id. at 153, 163. The “legal practitioner director” of an incorporated legal practice is required to complete the self-assessment form. The director is also supposed to use the self-assessment process to improve the firm’s practices. Id.
318 Id. at 153.
319 See id. at 180.
Similarly strong economic incentives are not present for solo and small firm LPL insurers to regulate lawyers to the same degree. Likewise, insured solo and small firm lawyers lack financial incentives to willingly participate in that level of regulation. Nor are they likely to welcome such efforts by insurers that they do not always trust. LPL insurers unquestionably belong on the list of factors that influence the conduct of solo and small firm lawyers to behave as responsible and competent professionals. But other factors appear to have a more substantial impact on lawyers’ conduct.

320 LPL insureds, unlike title agents, do not receive substantial ongoing financial payments that would incentivize them to comply with external insurer requirements or to work closely with LPL insurers in order to demonstrate that they are employing best practices.

321 See, e.g., supra note 294 and accompanying text.