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July 30, 2007

Chief Justice Wallace B. Jefferson  
Texas Supreme Court  
P.O. Box 12248  
Austin, Texas 78711-2248

Dear Chief Justice Jefferson:

I offer a suggestion for your consideration, in line with the ABA's current initiative and similar projects in several other states concerning legal malpractice insurance:

Legal malpractice insurance carriers estimate that well over 50 percent (perhaps higher than 60 percent) of Texas lawyers do not carry legal malpractice insurance. (Many years ago the State Bar conducted a survey that reached roughly the same result.) The absence of malpractice insurance, of course, sometimes injures clients who are left with no practical remedy when their lawyers make costly mistakes. The failure of so many Texas lawyers to carry malpractice insurance also results in a disparity and unfairness among lawyers and firms: uninsured lawyers obviously save that overhead expense in comparison with the many lawyers who carry malpractice insurance to protect both themselves and their clients.

(I handle both sides of the legal malpractice docket, and when a lawyer shows that he has no malpractice insurance, I almost never take a case, regardless of the wrongdoing. Similarly, on the defense side I have almost always settled very quickly claims against uninsured lawyers for little or nothing, regardless of how seriously the lawyer damaged the client.)

As noted in the enclosed article this month in the Los Angeles Times (Attachment 1), twenty states have adopted some form of malpractice insurance disclosure requirement. Only one state has mandatory legal malpractice insurance (Oregon). Some states—such as Ohio—require that a lawyer inform clients at the outset of the relationship whether the lawyer has malpractice insurance (see Attachment 2). Ohio Rule 1.4(c) provides in part:

(c) A lawyer shall inform a client at the time of the client's engagement of the lawyer or at any time subsequent to the engagement if the lawyer does not maintain professional liability insurance in the amounts of at least one hundred thousand dollars per occurrence

and three hundred thousand dollars in the aggregate or if the lawyer's professional liability insurance is terminated. The notice shall be provided to the client on a separate form set forth following this rule and shall be signed by the client.

(1) A lawyer shall maintain a copy of the notice signed by the client for five years after termination of representation of the client.

(2) A lawyer who is involved in the division of fees pursuant to Rule 1.5 (e) shall inform the client as required by division (c) of this rule before the client is asked to agree to the division of fees.

(3) The notice required by division (c) of this rule shall not apply to either of the following:

(i) A lawyer who is employed by a governmental entity and renders services pursuant to that employment;

(ii) A lawyer who renders legal services to an entity that employs the lawyer as in-house counsel.

Similarly, Pennsylvania Rule 1.4(c) provides:

A lawyer in private practice shall inform a new client in writing if the lawyer does not have professional liability of at least \$100,000 per occurrence and \$300,000 in the aggregate per year, subject to commercially reasonable deductibles, retention or co-insurance, and shall inform existing clients in writing at any time the lawyer's professional liability insurance drops below either of those amounts or the lawyer's professional liability insurance is terminated. A lawyer shall maintain a record of these disclosures for six years after the termination of the representation of a client.

Some other states have adopted a version of the ABA's "Model Court Rule on Insurance Disclosure," which the ABA House of Delegates approved in 2004 (see Attachment 3). That model court rule generally requires a lawyer to file a certification concerning insurance status with the state's highest court. Attachment 4 is an ABA table from June 20, 2007, showing the status of implementation of the ABA Model Court Rule and similar provisions.

This sort of proposal has pro's and con's, of course, as well as some complexity. However, it seems to me to be fair and reasonable for a client to know whether his or her lawyer has insurance. Protecting clients—at least to the extent of letting clients know whether their lawyer has insurance—would seem to be a worthy goal for our profession. Adopting a client-notice provision would not require any lawyer to buy insurance, but would let clients have access to what is unquestionably important information.

Chief Justice Wallace B. Jefferson  
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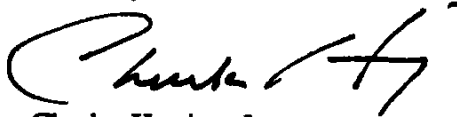
I have enclosed as Attachment 5 a few other pertinent materials, including a pro-con article from the debate on the ABA model court rule in 2004.

If the court decides to pursue this proposal, the court might consider setting up a task force to study the issue in detail, as the court has done with several other issues. I think it would be important to develop a consensus on this proposal among Bar leaders before going forward with any rule. I think that the issues are sufficiently complex that the matter requires careful analysis and, if possible, a carefully, methodically developed consensus. I understand that two current committees, one Bar committee and one supreme court committee, are studying possible disciplinary rule amendments generally, but that both of those committees are moving relatively slowly with that very large project, and I suspect that they would be unlikely to be able to devote the careful attention and time that this issue merits. If the court appoints such a task force, I would suggest that the group include recognized Bar leaders, representatives from one or more legal malpractice insurance carriers (e.g., Jett Hanna from TLIE), and representatives from both sides of the legal-malpractice docket (e.g., former Bar Presidents Broadus Spivey (plaintiffs) and David Beck (defense)).

You may well choose to reject this suggestion, and that's fine. I just wanted to mention it because I think it is a worthwhile project, and obviously the issue is currently receiving substantial attention from courts and bar associations across the country, as well as from the ABA.

I appreciate your considering this suggestion.

Sincerely,



Charles Herring, Jr.

Attachments

**ATTACHMENT 1**

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<http://www.latimes.com/business/la-fi-legal2jul02.1.1725780.story?coll=la-headlines-business>  
From the Los Angeles Times

## LAW

### Lawyers split on insurance proposal

*If the disclosure of malpractice coverage was mandatory, costs may rise but plaintiffs may select better.*

By Molly Selvin  
Times Staff Writer

July 2, 2007

California lawyers will have to tell their clients whether they carry malpractice insurance under a proposed rule that opponents say could add to the costs of going to court.

About 20% of the state's 150,000 lawyers don't have malpractice coverage, according to Jim Towery, chairman of the State Bar of California task force that drafted the proposed rule. Towery and others who support the rule said most clients want to know whether a prospective lawyer has insurance, or a history of complaints, but many fail to ask.

Opponents fear that requiring disclosure might effectively force all lawyers to buy such insurance and pass on the costs — up to \$9,000 a year — to clients.

Most of those who lack the insurance are sole practitioners who represent accident or consumer fraud victims.

"They're the people who really provide access to justice, as opposed to tall-building lawyers," said Diane Karpman, a legal ethics expert who predicted that some small practitioners would be put out of business.

The number of disgruntled clients who sue their attorneys is small relative to other types of civil lawsuits but the number of claims is rising, according to an American Bar Assn. study. For instance, legal malpractice cases worth \$2 million or more jumped 60% between 1996 and 2003, the latest year for which data are available. In most cases, clients ask for much less, but the number of claims under \$10,000 has risen too, by 8% in the same period.

Most legal malpractice claims result from personal injury and real estate cases, according to the study, and close to 70% of these suits were lodged against sole practitioners or members of firms with 10 lawyers or fewer.

"There are so many ways that the lawyer can make an error," said Edith Matthai, a Los Angeles lawyer who generally represents other lawyers in malpractice cases.

Proponents of the rule, including lawyers who handle malpractice cases for plaintiffs, say the requirement would protect consumers whose claims are mishandled.

"Prospective clients should at least know that an attorney chooses to practice without insurance or is unable

to get it," said Robert Sall, a Laguna Beach lawyer.

In the '90s, Sall said, he represented an Orange County woman whose divorce lawyer "failed to take the most basic steps to protect the marital assets." The woman's estranged husband squandered hundreds of thousands of dollars before the divorce was final.

She sued the lawyer for malpractice, winning a \$450,000 judgment but collecting a tiny fraction of it because the lawyer, who had no liability coverage, filed bankruptcy. The woman, then in her 60s and with meager resources, had to move in with one of her children.

"There are victims here," Sall said.

Some lawyers feel uncomfortable carrying malpractice insurance. Newport Beach plaintiffs' lawyer Mary Shea has never been sued for malpractice but carried insurance for 10 years. Financial and philosophical reasons prompted her to let her policy lapse in 2005.

The premium took a big bite out of her income, she said, and she felt there was an inherent conflict of interest in relying on the same insurance companies she often sued on behalf of wronged clients to defend her if she herself was sued.

The American Bar Assn adopted a model insurance disclosure rule in 2004, and 20 states now embrace some form of it. Several others are considering proposals. The requirement was in effect in California between 1992 and 2000 but the Legislature let the rule sunset during an unrelated dispute over State Bar funding.

The proposed rule would have to be approved by the State Bar's Board of Governors and the California Supreme Court.

The State Bar's comment period closes Aug. 6. To submit comments, go to the State Bar's website at [calsb.org](http://calsb.org), click on "public comment" and search for "insurance disclosure."

*molly.selvin@latimes.com*

If you want other stories on this topic, search the Archives at [latimes.com/archives](http://latimes.com/archives).

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PARTNERS:



**ATTACHMENT 2**

**Ohio Rule of Professional Conduct 1.4(c)**

(c) A lawyer shall inform a client at the time of the client's engagement of the lawyer or at any time subsequent to the engagement if the lawyer does not maintain professional liability insurance in the amounts of at least one hundred thousand dollars per occurrence and three hundred thousand dollars in the aggregate or if the lawyer's professional liability insurance is terminated. The notice shall be provided to the client on a separate form set forth following this rule and shall be signed by the client.

(1) A lawyer shall maintain a copy of the notice signed by the client for five years after termination of representation of the client.

(2) A lawyer who is involved in the division of fees pursuant to Rule 1.5 (e) shall inform the client as required by division (c) of this rule before the client is asked to agree to the division of fees.

(3) The notice required by division (c) of this rule shall not apply to either of the following:

(i) A lawyer who is employed by a governmental entity and renders services pursuant to that employment;

(ii) A lawyer who renders legal services to an entity that employs the lawyer as in-house counsel.

**NOTICE TO CLIENT**

Pursuant to Rule 1.4 of the Ohio Rules of Professional Conduct, I am required to notify you that I do not maintain professional liability (malpractice) insurance of at least \$100,000 per occurrence and \$300,000 in the aggregate.

\_\_\_\_\_  
Attorney's Signature

**CLIENT ACKNOWLEDGEMENT**

I acknowledge receipt of the notice required by Rule 1.4 of the Ohio Rules of Professional Conduct that [insert attorney's name] does not maintain professional liability (malpractice) insurance of at least \$100,000 per occurrence and \$300,000 in the aggregate.

\_\_\_\_\_  
Client's Signature

\_\_\_\_\_  
Date

**Comments**

**Professional Liability Insurance**

[8] Although it is in the best interest of the lawyer and the client that the lawyer maintain professional liability insurance or another form of adequate financial responsibility, it is not required in any circumstance other than when the lawyer practices as part of a legal professional

association, corporation, legal clinic, limited liability company, or registered partners

[9] The client may not be aware that maintaining professional liability insurance is not and may well assume that the practice of law requires that some minimum financial responsibility be carried in the event of malpractice. Therefore, a lawyer who does not carry certain minimum professional liability insurance shall promptly inform a prospective client.

**TACHMENT 3**

# Conference Report

## ABA Annual Meeting

### Malpractice

#### ABA Delegates, in Close Vote, Approve Rule Requiring Lawyers to Report Insurance Status

**A**TLANTA—The ABA House of Delegates Aug. 9 narrowly approved a resolution under which lawyers would be required to disclose annually to their state bar regulators whether they carry professional liability insurance.

At the ABA Annual Meeting, held here Aug. 9-10, the delegates voted 213-202 to adopt a Model Court Rule on Insurance Disclosure offered by the Standing Committee on Client Protection, Section of Family Law, Standing Committee on Professional Discipline, and National Organization of Bar Counsel, as well as the state bars of New Mexico, Virginia, and Washington.

The proposal was adopted over the opposition of the ABA's Tort Trial and Insurance Practice Section (TTIPS) and the Standing Committee on Lawyers' Professional Liability, both of which insisted that the rule is misleading and full of holes.

Opponents also failed to convince the delegates to postpone a vote until a later meeting.

The ABA model—if adopted by states' highest courts—would require practicing lawyers to certify in their yearly registration with their state bar regulators whether the lawyer has and intends to maintain cover-

age under a professional liability insurance policy. The rule exempts government lawyers and in-house counsel for organizational clients.

The rule adopted by the House of Delegates differs slightly from the model that was drafted by the client protection committee.

At the urging of David J. Waxse, Kansas City, Kan., the delegates amended paragraph A of the model rule to require a lawyer to certify annually not only that the lawyer is currently covered by malpractice insurance but also that the lawyer "intends to maintain insurance during the period of time the lawyer is engaged in the private practice of law."

**Existing Rules.** The ABA rule doesn't plow virgin territory. Eleven states already have some sort of regulation governing lawyers' insurance. See 20 Law. Man. Prof. Conduct 206, 343.

Six states—Delaware, Illinois, Michigan, Nebraska, North Carolina, and Virginia—mirror the ABA rule in requiring annual disclosure of insurance status by lawyers on their bar registration statements.

Four others—Alaska, New Hampshire, Ohio, and South Dakota—call for direct disclosure of insurance status to clients. One jurisdiction, Oregon, has a statute requiring practicing lawyers to maintain malpractice insurance.

#### Model Court Rule on Insurance Disclosure Adopted by ABA House of Delegates

"Model Court Rule on Insurance Disclosure

**"RULE — INSURANCE DISCLOSURE**

"A. Each lawyer admitted to the active practice of law shall certify to the [highest court of the jurisdiction] on or before [December 31 of each year]: 1) whether the lawyer is engaged in the private practice of law; 2) if engaged in the private practice of law, whether the lawyer is currently covered by professional liability insurance and intends to maintain insurance during the period of time the lawyer is engaged in the private practice of law; and 3) whether the lawyer is exempt

from the provisions of this Rule because the lawyer is engaged in the practice of law as a full-time government lawyer or is counsel employed by an organizational client and does not represent clients outside that capacity. Each lawyer admitted to the active practice of law in this jurisdiction who reports being covered by professional liability insurance shall notify [the highest court in the jurisdiction] in writing within 30 days if the insurance policy providing coverage lapses, is no longer in effect or terminates for any reason.

"B. The foregoing shall be certified by each lawyer admitted to the active practice of law in this

jurisdiction in such form as may be prescribed by the [highest court of the jurisdiction]. The information submitted pursuant to this Rule will be made available to the public by such means as may be designated by the [highest court of the jurisdiction].

"C. Any lawyer admitted to the active practice of law who fails to comply with this Rule in a timely fashion, as defined by the [highest court in the jurisdiction], may be suspended from the practice of law until such time as the lawyer complies. Supplying false information in response to this Rule shall subject the lawyer to appropriate disciplinary action."

**'Lawyer-Friendly' Rule.** In urging passage of the Model Court Rule on Insurance Disclosure, Robert D. Weiden of Seattle, who chairs the ABA's Standing Committee on Client Protection, told the delegates that this rule was the "most lawyer-friendly" version the committee had come up with after four years of work.

This version, he noted, mandates disclosure only of the fact whether a lawyer has malpractice insurance or not, and only to bar regulators. Earlier versions circulated by the committee would have required disclosure of minimum coverage amounts, direct disclosure to clients, and reporting of any unsatisfied judgments against the lawyer.

The version adopted by the delegates does not force lawyers to obtain insurance or to maintain any particular level of coverage. On the other hand, in its written report the client protection committee "recommends that each jurisdiction adopting the Model Court Rule decide if it wants to include, in its version of the Rule, minimum limits of professional liability coverage."

Furthermore, the final proposal is a model court rule, not an ethics rule, and thus does not call for a lawyer's professional discipline for noncompliance. However, the client protection committee observed in its report that existing Model Rule of Professional Conduct 8.4(c), on dishonesty, would permit discipline of lawyers who provide false information about their insurance. In addition, the model court rule provides that a lawyer may be suspended from practice until the lawyer submits the required insurance information.

Weiden said it was appropriate to put the burden on lawyers to reveal whether they are insured. "We shouldn't expect clients to initiate an inquiry about insurance coverage," he told the delegates.

The rule itself does not say that lawyers must discuss their insured status with potential clients. However, paragraph B specifies that once a lawyer's insurance status is reported to the state bar, such information "will be made available to the public by such means as may be designated" by regulators.

The committee's report suggests that lawyers' insurance status could be posted on the state bar's Web site, or disclosed over the telephone when a client or prospective client calls.

**Insurance ≠ Coverage.** Opponents of the proposal called it "well intentioned" but argued that the model falls short of its objective.

This rule "does not achieve the goal of protecting clients," said Dianne K. Dalley of Portland, Ore., a delegate from the TTIPS Section. The proposal will not help clients determine whether the matter in their representation is covered by their lawyer's insurance, she contended, because it leaves a number of questions unanswered, such as:

- What are the coverage limits?
- What are the deductibles?
- What are the exclusions?
- What are the quality and financial integrity of the insurance company?

Similar points were raised by Benjamin H. Hill IV, of Tampa, Fla., who added: "Simply put, saying you have insurance is not the same as saying you have coverage." Hill spoke on behalf of the Standing Committee on Lawyers' Professional Liability.

"To simply tell a client that a lawyer has insurance as of a certain date is a misleading statement that creates substantial confusion," Hill stated.

Another speaker, Pamela A. Bresnahan of Annapolis, Md., worried that the rule will put some lawyers in a bad light over something that may be beyond their control. "In this insurance market," she observed, "there is no assurance that you will have insurance, because you can be nonrenewed or cancelled." This is not always the fault of the lawyer, she added.

**States' Experiences.** But two speakers from states that already have malpractice insurance disclosure rules told the delegates that the rules work and that they are needed.

Stephen L. Tober, Portsmouth, N.H., said that the insurance disclosure rule in his state produced information revealing that half of the lawyers there do not have insurance—a "startling situation," he remarked.

According to Leslie W. Jacobs, a member of the ABA Board of Governors from Cleveland, "Ohio has lived with a variation of this proposal, and there have been no problems." Jacobs noted that Ohio's rule, more stringent than the ABA proposal, requires lawyers to certify whether they have a specified level of coverage. Clients need be informed only if the lawyer does not maintain the stated level.

Of the ABA version, Jacobs said "[t]he advantage of a disclosure rule is that most people prefer to have coverage and although this doesn't mandate coverage it will encourage coverage."

He also pointed out that in previous years the ABA has passed measures that would require lawyers to maintain malpractice coverage as a condition of participating in lawyer referral services.

As for opponents' contention that acquiring information about an attorney's insured status at the time of registration may mislead clients regarding the current status of the lawyer's coverage, Jacobs responded that clients should not be left in the dark about whether a lawyer has any insurance at all.

"Everyone in the world knows that a policy can lapse or be cancelled," he said. "But does that mean that we should not require disclosure that we have chosen not to have coverage?"

**Vote Now.** Although the vote to adopt the model rule was close, an earlier motion to postpone further debate was defeated by a lopsided margin: 175 in favor, but 265 against.

Favoring postponement, Tom Bolt of St. Thomas, V.I., argued that the model rule was "not ready for prime time," especially in light of the opposition from TTIPS and the Committee on Lawyers' Professional Liability.

But apparently reflecting the majority's thoughts, delegate Lucian T. Pera, Memphis, Tenn., said that the time for discussion was over and that the House of Delegates should not give up its leadership position on this topic.

Noting that the proposed text of the model rule was circulated among all ABA entities in 2003, Pera said that the client protection committee took into account all comments it received, then produced a final version that "even if it isn't perfect" is a well-thought-out standard for states to follow.

**ATTACHMENT 4**

AMERICAN BAR ASSOCIATION  
 STANDING COMMITTEE ON CLIENT PROTECTION

STATE IMPLEMENTATION OF  
 ABA MODEL COURT RULE ON INSURANCE DISCLOSURE

	Requires Disclosure Directly to Client (5) (AK, NH, OH, PA and SD)	Requires Disclosure On Annual Registration Statement <sup>1</sup> (15) (AZ, DE, ID, IL, KS, MA, MI, MN, NE, NV, NM, NC, VA, WA and WV)	Considering Adoption (5) (CA, NY, ND, UT and VT)	Information Made Available to Public	Other Info (See also, Oregon: Professional liability insurance mandated)
AK	Alaska Rules of Professional Conduct, Rule 1.4			N/A	
AZ		Supreme Court Rule 32(c), effective January 1, 2007. <a href="http://www.supreme.state.az.us/rule/ramd_pdf/R-04-0025.pdf">http://www.supreme.state.az.us/rule/ramd_pdf/R-04-0025.pdf</a>		Yes. State Bar of Arizona website.	
AR					On January 21, 2006 the House of Delegates of the Arkansas Bar Association voted not to adopt a disclosure rule.
CA	←		California's proposed new insurance disclosure rules are available on the State Bar of California's public comment page at <a href="http://calbar.ca.gov/statc/calbar/calbar_generic.jsp?cid=10145&amp;n=8560">http://calbar.ca.gov/statc/calbar/calbar_generic.jsp?cid=10145&amp;n=8560</a> 1 The comment deadline is August 6, 2007.		

	<b>Requires Disclosure Directly to Client</b> (5) (AK, NH, OH, PA and SD)	<b>Requires Disclosure On Annual Registration Statement<sup>1</sup></b> (15) (AZ, DE, ID, IL, KS, MA, MI, MN, NE, NV, NM, NC, VA, WA and WV)	<b>Considering Adoption</b> (5) (CA, NY, ND, UT and VT)	<b>Information Made Available to Public</b>	<b>Other Info</b> (See also, Oregon: Professional liability insurance mandated)
<b>DE</b>		Registration Form		Yes. <a href="http://courts.delaware.gov/Courts/Courts/Supreme%20Court/2007AnnualRegistration.doc">http://courts.delaware.gov/Courts/Courts/Supreme%20Court/2007AnnualRegistration.doc</a>	
<b>ID</b>		Idaho Bar Commission Rule 302(7), effective October 1, 2006			
<b>IL</b>		Amended Illinois Supreme Court Rule 756		Yes <a href="http://www.iardc.org/malpracticeinfo.html">http://www.iardc.org/malpracticeinfo.html</a>	
<b>KS</b>		Supreme Court Rule 208A		Yes, by means designated by the Court.	
<b>KY</b>					On or about November 14, 2006 the KY Sup. Ct. rejected the adoption of a disclosure rule.
<b>MA</b>	Rule 4:02 Effective Sept. 1, 2006. <a href="http://www.mass.gov/courts/courtsandjudges/courts/supremejudicialcourt/rule402amended.pdf">http://www.mass.gov/courts/courtsandjudges/courts/supremejudicialcourt/rule402amended.pdf</a>			Yes.	

	Requires Disclosure Directly to Client (5) (AK, NH, OH, PA and SD)	Requires Disclosure On Annual Registration Statement <sup>1</sup> (15) (AZ, DE, ID, IL, KS, MA, MI, MN, NE, NV, NM, NC, VA, WA and WV)	Considering Adoption (5) (CA, NY, ND, UT and VT)	Information Made Available to Public	Other Info (See also, Oregon: Professional liability insurance mandated)
MI		Administrative Order No. 2003-5, dated August 6, 2003		No. For statistical purposes only.  12,782 lawyers - Malpractice Insurance Not Needed 17,170 lawyers - Malpractice Insurance is Maintained (79%) 4,623 lawyers - Malpractice Insurance not maintained (21%)	
MN		Rule 6 of the Rules of the Supreme Court on Lawyer Registration. Annual Reporting of Professional Liability Insurance Coverage (Effective October 1, 2006) <a href="http://www.courts.state.mn.us/documents/0/Public/Clerks_Office/July%202006%20Lawyer%20Registration%20Amend.doc">http://www.courts.state.mn.us/documents/0/Public/Clerks_Office/July%202006%20Lawyer%20Registration%20Amend.doc</a>		Yes.  Rule 7. Access to Lawyer Registration Records	
NE		Rules Creating, Controlling, and Regulating Nebraska State Bar Association, Article III, Membership, paragraph (f).		Shall be made available to the public.	
WV		Amended Supreme Court Rule 79 (Adopted September 13,		Yes. It will be part of the lawyer's public	

	<b>Requires Disclosure Directly to Client (5)</b> (AK, NH, OH, PA and SD)	<b>Requires Disclosure On Annual Registration Statement<sup>1</sup> (15)</b> (AZ, DE, ID, IL, KS, MA, MI, MN, NE, NV, NM, NC, VA, WA and WV)	<b>Considering Adoption (5)</b> (CA, NY, ND, UT and VT)	<b>Information Made Available to Public</b>	<b>Other Info</b> (See also, Oregon: Professional liability insurance mandated)
		2005 and effective November 13, 2005)		record available by phone or email inquiry.	
<b>NH</b>	New Hampshire Rules of Professional Conduct, Rule 1.17. (Disclosure of Information to the Client)			N/A	
<b>NM</b>		Amended Rule 17-202(A) of the NMRA of the Rules Governing Discipline		No: for internal use by the NM Bar and Supreme Court only.	
<b>NY</b>			Under consideration.		
<b>NC</b>		North Carolina-Rules and Regulations, Subchapter A, Organization of the North Carolina State Bar, Section .0204, Certificate of Insurance Coverage		On the Bar's website: <a href="http://www.ncbar.com/home/member_directory.asp">http://www.ncbar.com/home/member_directory.asp</a> and <a href="http://www.ncbar.com/InsuranceDisclosure.asp">http://www.ncbar.com/InsuranceDisclosure.asp</a>	
<b>ND</b>			On June 14, 2007 the General Assembly of the State Bar Association of North Dakota approved a resolution to send a malpractice disclosure rule to the North Dakota Supreme Court. <a href="http://www.court.state.nd.us/court/news/sbandmal.htm">http://www.court.state.nd.us/court/news/sbandmal.htm</a>		
<b>OH</b>	Ohio Code of Professional Responsibility,			N/A	Lawyers who hire themselves out to do research and writing for other lawyers need not

	Requires Disclosure Directly to Client (5) (AK, NH, OH, PA and SD)	Requires Disclosure On Annual Registration Statement <sup>1</sup> (15) (AZ, DE, ID, IL, KS, MA, MI, MN, NE, NV, NM, NC, VA, WA and WY)	Considering Adoption (5) (CA, NY, ND, UT and VT)	Information Made Available to Public	Other Info (See also, Oregon: Professional liability insurance mandated)
	Amended DR 1-104 (Disclosure of Information to the Client)				comply. (Ohio Supreme Court Bd. of Commissioners on Grievances and Discipline, Op. 2005-1, 2/4/05).
OR					All lawyers required to maintain professional liability insurance.
	Pennsylvania adopted RPC 1.4(c), effective 7/1/2006. <a href="http://www.sopc.org/OpPosting/Supreme/out/50drd_attach.pdf">http://www.sopc.org/OpPosting/Supreme/out/50drd_attach.pdf</a>			N/A	
SD	South Dakota Model Rules of Professional Conduct, Rule 1.4 (Communication)			N/A	SD has 7 years of certification to the Supreme Court - 97% have at least \$100,000 in coverage, together with name and policy number of the policy. Over the past 7 years, the percentage has never dropped below 96% nor been higher than 97.5% in any given year.
UT			Rule 1.4 Proposed Amendment - Disclosure of Malpractice Insurance Rule 1.4. Communication.  <a href="http://www.utahbar.org/news/archives/2005/07/index.html">http://www.utahbar.org/news/archives/2005/07/index.html</a>		
			On December 28, 2006 the Civil Rules Committee proposed that the Vermont Supreme Court consider adoption of a rule requiring insurance disclosure, not in the Vermont Rules of Professional Conduct, but as		

	<b>Requires Disclosure Directly to Client</b> (5) (AK, NH, OH, PA and SD)	<b>Requires Disclosure On Annual Registration Statement<sup>1</sup></b> (15) (AZ, DE, ID, IL, KS, MA, MI, MN, NE, NV, NM, NC, VA, WA and WV)	<b>Considering Adoption</b> (5) (CA, NY, ND, UT and VT)	<b>Information Made Available to Public</b>	<b>Other Info</b> <i>(See also, Oregon: Professional liability insurance mandated)</i>
			part of the Rules for Licensing of Attorneys. In adopting the rule, consideration should be given to requiring disclosure of the liability limits and deductibles of the coverage.		
<b>VA</b>		<b>Rules of the Virginia Supreme Court, Part 6 § 4 Paragraph 18. Financial Responsibility</b>		<b>Yes, on Bar's website: (See, <a href="http://www.vsb.org">www.vsb.org</a>, under the headings Public Information, Attorney Records Search, Attorneys without Malpractice Insurance).</b>  <hr/> <b>Total Members Answering PL Questions: 25,921 - FY2005</b> <b>Private Practice - No Insurance: 1,892 (11%)</b> <b>Private Practice - With Insurance: 14,703 (89%)</b>	<b>The Virginia State Bar Council, at its meeting on February 18, 2005, is expected to consider for approval, disapproval, or modification, proposed amendments to Part Six: Section IV, Paragraph 18 of the Rules of the Supreme Court of Virginia, issued by the Lawyer Malpractice Insurance Committee.</b>  <b>The proposed amendments were approved by the Lawyer Malpractice Insurance Committee on October 27, 2004. The changes would add to the existing requirement that active members of the bar report each year on their dues statement whether or not they have malpractice insurance, a further requirement that they notify the bar within 30 days in event their liability insurance coverage lapses or terminates, unless it is simply a situation in which a change in carriers occurs with no lapse in coverage. The reason for the change is</b>

	<b>Requires Disclosure Directly to Client</b> (5) (AK, NH, OH, PA and SD)	<b>Requires Disclosure On Annual Registration Statement<sup>1</sup></b> (15) (AZ, DE, ID, IL, KS, MA, MI, MN, NE, NV, NM, NC, VA, WA and WV)	<b>Considering Adoption</b> (5) (CA, NY, ND, UT and VT)	<b>Information Made Available to Public</b>	<b>Other Info</b> (See also, Oregon: Professional liability insurance mandated)
					the provide something closer to real time information to members of the public about bar members who do not have malpractice insurance, rather than having this information updated only once a year at the time the annual dues statement is returned.
<b>WA</b>		<b>Admission to Practice Rule 26 - Insurance Disclosure. (Effective July 1, 2007)</b> <a href="http://www.courts.wa.gov/court_Rules/proposed/2005Dec/APR26.doc">http://www.courts.wa.gov/court_Rules/proposed/2005Dec/APR26.doc</a> .		Yes.	
<b>WV</b>		<b>State Bar By-Laws - Article III (A) - Financial Responsibility Disclosure</b> <a href="http://www.state.wv.us/wvsca/rules/ArticleIII.htm">http://www.state.wv.us/wvsca/rules/ArticleIII.htm</a>		Yes.  ... shall be made available to the public by such means as may be designated by the West Virginia State Bar.	

Copyright © 2007 American Bar Association. All rights reserved. Nothing contained in this chart is to be considered the rendering of legal advice. The charts are intended for educational and informational purposes only. We make every attempt to keep these charts as accurate as possible. If you are aware of any inaccuracies in the charts, please send your corrections or additions and the source of that information to John Holtaway, (312) 988-5298, [jholtaway@staff.abanet.org](mailto:jholtaway@staff.abanet.org).

**ATTACHMENT 5**

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# GP|Solo

ABA General Practice, Solo & Small Firm Division

Volume 20, Number 3  
April/May 2003

Should Disclosure of Malpractice Insurance Be Mandatory?

Pro

By James E. Towery

James E. Towery is a past chair of the ABA Standing Committee on Client Protection and past president of the State Bar of California. He is a shareholder in the firm of Hoge, Fenton, Jones & Appel in San Jose, California.

If you apply to the state where you live for a vehicle registration, virtually every state will require that you show proof of financial responsibility, usually in the form of proof of insurance. Similarly, apply to your state for a contractor's license, and again, you will be required to show proof of insurance. The reason for these requirements is simple and common sense: To obtain a state license, you must demonstrate that you have the ability to protect the public if anyone is injured by your negligence in your use of that license.

However, if you apply to your state for a license to practice law, you will have to pass a bar exam and demonstrate good moral character, but you will not be required to prove that you have malpractice insurance. And if you are negligent in using your license to practice law, and, as a result, one of your clients is injured, well, that's the client's tough luck.

This is one of the dirty little secrets of the legal profession: No state (except for Oregon, more on that later) requires that lawyers in private practice demonstrate proof of financial responsibility. One of the ironies of the situation is that many clients no doubt presume that all lawyers are required to carry malpractice insurance. Clients often discover the fallacy of that assumption for the first time when they attempt to sue their uninsured lawyers.

However, there has been an encouraging trend recently, led by state supreme courts rather than by bar associations. That trend is the adoption in several states of rules of professional conduct that require a lawyer who lacks professional liability insurance to disclose that fact to every client.

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Although the organized bar has taken an ostrich-like approach to this issue, the problem of uninsured lawyers is a real one. Estimates vary, but most experts in legal malpractice insurance believe that one-third or more of American lawyers in private practice are uninsured. The question then becomes, is this a problem that needs to be addressed? Surprisingly, the response from the organized bar has largely been that the problem should be ignored.

#### The Oregon Model of Mandatory Insurance

Of all the jurisdictions, only Oregon has squarely addressed the issue. Since 1978, Oregon has had mandatory malpractice coverage for all lawyers in private practice, through the Oregon State Bar Professional Liability Fund. This fund affords minimal levels of \$300,000 coverage per occurrence, at a current premium of slightly more than \$2,000 per year. Oregon's fund has worked well and protected clients of all Oregon lawyers from the risk of uninsured losses.

However, there are sound reasons to question whether Oregon's model would work well in other jurisdictions. The Oregon fund was established at a time when the insurance markets were far more favorable than they are today. Approximately 7,000 lawyers in private practice are covered by the Oregon fund. It is unlikely that this model would work as well in a state like California, which has more than 120,000 lawyers in private practice and a far greater diversity in types of practice and risk levels. The concern is that if proper insurance underwriting were used in a mandatory plan in a state like California, premium levels would be prohibitive for many lawyers, especially those in solo or small firms or those with limited incomes from their legal practice.

#### Mandatory Disclosure of Lack of Insurance

An alternative approach to the issue of uninsured lawyers is to require such lawyers to disclose to their clients their lack of insurance. California first adopted this approach in 1988 by including such a disclosure in written fee contracts, as required by California Business and Professions Code Sections 6147 (contingent fee contracts) and 6148 (hourly and other fee contracts). As originally enacted, the California statute required an affirmative disclosure by all attorneys as to whether they carried malpractice insurance. In the early 1990s this was amended to require a written disclosure only by those attorneys who lacked insurance. The California statute worked well, with a minimum of complaints from lawyers. However, that statutory requirement sunsetted at the end of 2000, and it has not yet been reenacted.

In 1999 the Supreme Courts of Alaska and South Dakota broke new ground in this area. Both courts adopted modifications of their Model Rules of Professional Conduct that mandated disclosure of the lack of malpractice insurance. In Alaska, for example, Model Rule 1.4 regarding communications was amended to require that a lawyer notify a client in writing if the lawyer had no insurance or insurance of less than \$100,000 per claim or \$300,000 annual aggregate, or if the lawyer's insurance was terminated. The South Dakota rule amended Rule 1.4 to

require a similar communication to clients as a component of a lawyer's letterhead.

Anecdotally, it must be reported that, after the adoption of these rules in Alaska and South Dakota, the lawyers reacted in a predictable fashion. A significant number of lawyers who had previously been uninsured obtained malpractice insurance shortly before the effective date of the new rules. In other words, the new rules provided a positive incentive for uninsured lawyers to obtain insurance, so that they would not be required to make to clients the disclosure of lack of insurance.

In April 2001, Ohio joined this trend. The Supreme Court of Ohio voted (in a 5-2 decision) to amend the Code of Professional Responsibility to require lawyers who lack malpractice insurance to notify their clients of that fact using a standard form. The New Hampshire Supreme Court adopted a similar rule, which became effective on March 1, 2003, requiring disclosure to clients of lack of insurance. The Nebraska Supreme Court is also studying a proposed rule. In addition, the Virginia Bar has a rule requiring that lawyers report to the state bar whether they have malpractice insurance. In 2002 the Virginia Bar decided to put that information online to make it more accessible to the public. More than 25,000 hits were received on the bar's website within the first week after that information was posted.

As a result of the movement of these various courts to require mandatory reporting, in 2000 the ABA Standing Committee on Client Protection decided to propose a similar amendment to the ABA Model Rules. The Standing Committee requested that the Commission on Evaluation of the Rules of Professional Conduct (Ethics 2000) include such a provision in the Ethics 2000's general overhaul of the ABA Model Rules, but Ethics 2000 declined the invitation. After encountering some opposition from other ABA entities and a general lack of support, the Standing Committee on Client Protection elected not to forward any such proposal to the ABA House of Delegates.

#### Objections to Mandatory Reporting

As the debate on this issue of mandatory reporting has spread during the past several years, opponents have voiced a variety of objections to the concept. Some objections are philosophical, others are technical in nature.

One of the most frequent objections is to question the need for such a rule. Where is the evidence that uninsured lawyers are currently harming clients? Where is the evidence of malpractice judgments that are uncollectible owing to lack of insurance?

It is a fair criticism that no study exists providing data on these points. The entity within the ABA that most logically could conduct such a study, the Standing Committee on Lawyers' Professional Liability, has never conducted one.

However, a study is hardly necessary to demonstrate that client harm results from uninsured lawyers. Without question, lawyers who lack insurance commit malpractice, just as do those with insurance. And no one can seriously question that claims against uninsured lawyers are often abandoned, precisely

because there is no available insurance. If you doubt this, simply ask any lawyer in your community who handles plaintiff's legal malpractice claims about the subject. Such a lawyer will tell you that in evaluating whether to file such a claim, a threshold issue is whether the lawyer is insured. If the claim is modest (i.e., with potential damages of \$100,000 or less), many plaintiff's malpractice lawyers will elect not to file suit; the risk that any judgment will prove to be uncollectible, in light of how difficult these claims are in other respects, simply makes such claims not worth pursuing. It is difficult to count claims never pursued owing to lack of insurance.

Another objection to mandatory reporting is the suggestion that client security funds already address the issue. That is simply not the case. Client security funds have a more limited purpose: to reimburse clients when lawyers steal money. The rules of client security funds do not permit reimbursement for simple acts of negligence by a lawyer. Malpractice claims are the only manner by which a client can seek redress for simple acts of negligence.

One technical objection is that mandatory disclosures don't include the nuances of the adequacy of the legal malpractice carrier or the issue of when a diminishing limits policy (where liability coverage diminishes as expenses of defense are incurred) causes coverage to fall below a certain level. It is true that such nuances are not covered by many of the mandatory disclosure rules. Certainly such factors should be considered in drafting disclosure rules. However, these are not compelling arguments for failing to address the problem at all. An imperfect solution to the problem of uninsured lawyers is better for the public than no solution at all.

**Conclusion**

Law school professors commonly offer the warning, "Allow me to frame the question, and I will dictate the answer." In the debate over mandatory reporting rules for uninsured lawyers, much depends on how the question is framed.

Supporters of mandatory disclosure frame the question as follows: When a client hires a lawyer, is the lawyer's lack of insurance a material fact that the client is entitled to know? It is difficult to fashion a persuasive argument that clients are not entitled to that information. Lawyers operate under a state license and have a monopoly on practicing law. With that monopoly go certain obligations. Full disclosure to clients of material information regarding their representation is certainly one of those obligations. And if you don't believe that most clients would consider information about lack of insurance to be material, I suggest you put that question to a cross-section of your own clients. You may be surprised by the response.

Con

By Edward C. Mendrzycki

Edward C. Mendrzycki chairs the ABA Standing Committee on Lawyers' Professional Liability. Formerly a litigation partner at Simpson, Thacher & Bartlett in New York, Mendrzycki is currently of counsel to the firm. He wishes to acknowledge

Glenn Fischer, Assistant Staff Counsel to the Committee, for his assistance in preparing this article. Mandatory disclosure rules address a problem they cannot really solve. Should a lawyer's failure to disclose his or her insured status violate the canons of professional ethics? While several states have answered "yes" to this question, others are actively debating it. In this writer's view, an ethical rule requiring lawyers to disclose whether they have malpractice insurance may sound like a good idea on its face, but, realistically, it provides no actual protection mechanism for clients, while engaging a disciplinary response to a challenge that does not truly involve legal ethics.

But let us first approach the issue with some frankness; having malpractice insurance is almost always better than not having it. Even if you do not need it, it certainly cannot hurt you. We learn early in our careers that we are expected to supply "both a belt and suspenders" to our clients when practicing our craft. Of all professionals, lawyers are probably the most aware that there are no guarantees in life and that things can and do go wrong. In fact, our clients often seek our services specifically to help prevent the things that can and do go wrong, or to help deal with the consequences when a lack of foresight leads to a hard lesson learned by hindsight. Many times we advise our clients to obtain insurance to cover their automobiles, their businesses, their homes, and their lives. Should lawyers not follow their own advice?

The answer is, of course, they should. But "should" is not the equivalent of an ethical "shall." And that is the real question at hand, whether our code of ethics should require lawyers to have insurance or to inform their clients when they do not. That is the question that requires a negative answer.

Before explaining that answer and the reasons behind it, it is important to have a basic understanding about the nature of lawyers' professional liability (LPL) insurance. LPL insurance is not the same as many other types of insurance lawyers recommend their clients buy to protect their homes, cars, and other interests. At the outset, then, a client's understanding of what it means when a lawyer "has insurance" is very likely to be inaccurate. In point of fact, many practicing lawyers do not fully understand the nature and scope of their professional liability coverage.

LPL policies are "claims-made" policies, meaning that coverage is triggered only if a claim is actually made during a particular policy period (typically one year). This sounds simple enough, but consider that claims are rarely made in the same year that a negligent act occurred. Because of the nature of the work many lawyers perform (real estate, probate and estate planning, and protracted litigation, to name a few) errors may not be discovered until many years after they occurred.

Therefore, if a lawyer has insurance on the day he or she commits an error, it does not necessarily mean that same coverage (or any coverage) will be in effect when a claim is made years later. If the original LPL insurance policy was not renewed, it does not matter that the lawyer was insured at the time the error was made. In addition, even if a lawyer purchased a new or different policy from the one in force at the time of the error, coverage will be excluded unless the replacement

coverage specifically covers "prior acts," or errors that occurred before the inception of the new policy. To make matters even more complicated, coverage can also depend upon the interplay of a number of other factors, such as the size of the deductible (it is not uncommon for some policies to have minimum deductibles of \$5,000), the number and nature of prior claims (LPL policies are subject to limits of liability), the size of claims, and the type of malfeasance alleged (intentional acts are generally not covered).

Because the existence of a policy today may have no real impact on events surrounding coverage for a claim that is made sometime in the future, disclosure of that insurance policy to a potential or existing client may not amount to much useful knowledge. It may even be harmful. Giving the public the impression that they are almost unquestionably protected by insurance, when they may not be, is likely to cast the profession in a bad light. In the eyes of many, lawyers already have a reputation for "working the system" to avoid responsibility for their clients' actions as well as their own. Why contribute to this perception, especially when one of the purposes behind a mandatory disclosure rule is to instill greater confidence in the legal profession?

But besides being potentially misleading, there is an even more fundamental problem with a mandatory disclosure rule. It invokes the disciplinary system to solve a problem that is neither moral nor ethical in nature. Ethics rules, in general, exist both as a set of practice guidelines and as an enforcement mechanism to protect clients from potential abuse by lawyers. But can LPL insurance coverage really stop the types of abuses the ethical rules are meant to prevent? LPL insurance typically will not cover the most flagrantly blameworthy types of conduct lawyers are capable of—intentional acts of misconduct or behavior that, in the legal field, would typically support a disciplinary charge (such as lying to or stealing from clients). On the contrary, LPL insurance, by and large, only covers lawyers for their acts of negligence, but negligence generally has little to do with an attorney's moral character and conduct, and it is these that disciplinary rules are intended to monitor.

The truth is that neither the purchase of insurance nor the failure to purchase insurance implicates the ethical tenets described in the Model Rules. Buying insurance is unquestionably a "best practice" in most situations, but a best practice that is aspirational and does not necessarily involve an ethical underpinning. Quite simply, there is no tenable link between insured status and conduct requiring discipline. Although purchasing insurance may be a sound business practice, it does not implicate the traditional notions of morally "right" and "wrong" behavior that the disciplinary rules were designed to address. There is no empirical evidence or objective data to show that a lawyer who has insurance is more likely to act ethically than a lawyer who has no insurance.

And this is an important point when it comes to those lawyers who choose not to carry insurance or who choose to be self-insured. A mandatory disclosure rule is a distinct disadvantage to those lawyers whose practices function on a fixed or very limited budget, or on a part-time or limited-scope-representation basis. These lawyers may choose to be uninsured because they choose their cases and clients specifically to avoid risk. Many of

these lawyers offer services to particularly underserved segments of society because they can do so inexpensively without sacrificing quality. If these lawyers are now forced to purchase expensive insurance policies in order to remain competitive (or in the market at all), it could potentially drive them out of their established practice area or the legal field altogether. This is because of a fear that the potential client will draw some negative inference about their abilities to deliver quality representation based upon their uninsured status. In effect, the lack of insurance becomes a stigma (manufactured by the profession) that has almost no bearing on a lawyer's ability to effectively serve a particular client.

We should not lose sight of the fact that professional liability insurance is generally purchased to protect the covered lawyer. And, although insurance may provide an injured client with a source of compensation in the event that a lawyer commits malpractice, there is no objectively verifiable data indicating that malpractice claims are significantly more prevalent among uninsured attorneys than among insured attorneys. There is hardly a strong enough impetus to warrant invoking the disciplinary system as an enforcement mechanism; it is not as if the profession is facing a widespread epidemic of malpractice. Even if it were, having insurance will not eliminate the source of either substantive or administrative errors. Only education, conscientious risk management, and loss-prevention techniques will accomplish that.

There is no empirical evidence showing that simply stating that a lawyer is uninsured offers any useful information to a client who is making a decision whether to hire counsel. In fact, it may be of no use at all, unless the lawyer launches into a lengthy explanation of the type described above about the nature of LPL coverage. There are many other "material" facts that are probably more important in determining whether a client hires a particular lawyer, such as a lawyer's past disciplinary history, how much experience a lawyer has in a particular area of law, and the generally high investment of money and time that litigation requires. No one proposes making these disclosures mandatory, although they are likely to have a significant impact on the overall outcome of the representation.

Educating the public to inquire intelligently about the significance of LPL insurance is likely the better approach. We accept the principle of caveat emptor in all manner of other business transactions, and hiring a lawyer should be no different. Merely stating on one's letterhead, or in one's retention agreement, that the firm does not carry liability insurance is not a productive dialogue. And if clients do not know or care to inquire about insurance, how can we be assured that they will truly grasp the import of the mandatory disclosure required by the rules?

Overall, a mandatory disclosure rule would fail to address the problem it tries to solve. And, at the same time, it would confound the very purpose it is meant to serve. To many of our clients, the law is complex and nebulous, and there is no need to further complicate the attorney-client relationship or negatively affect the perception of the profession.

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July 18, 2003

Disclosure of Malpractice Insurance Should Be Mandatory

Filed under: pre-06-2006 — David Giacalone @ 1:26 am

Robert Ambrogio's LawSites blog (7/17/03) points to an illuminating article from *GPSolo Magazine* (April/May 2003) entitled "Should Disclosure of Malpractice Insurance Be Mandatory?" It's a pro and con piece by James E. Towery and Edward C. Mendrzycki.

Towery's "pro" argument is comprehensive and persuasive. His short history of laws and rules on the topic is quite useful, and his description of the organized bar's reaction to such proposals is quite dispiriting (but not at all surprising). Most clients simply presume their lawyer has malpractice insurance, but Towery notes that "most experts in legal malpractice insurance believe that **one-third or more of American lawyers in private practice are uninsured.**" Towery (a past chair of the ABA Standing Committee on Client Protection and past president of the State Bar of California) makes far too many good points to catalogue them all here, but his final thoughts are worth quoting and contemplating:

*When a client hires a lawyer, is the lawyer's lack of insurance a material fact that the client is entitled to know? It is difficult to fashion a persuasive argument that clients are not entitled to that information. Lawyers operate under a state license and have a monopoly on practicing law. With that monopoly go certain obligations. Full disclosure to clients of material information regarding their representation is certainly one of those obligations. And if you don't believe that most clients would consider information about lack of insurance to be material, I suggest you put that question to a cross-section of your own clients. You may be surprised by the response.*

*On the other hand, there appears to be far too much "con" in Mendrzycki's counterpoint statement. Mendrzycki, who chairs the ABA Standing Committee on Lawyers' Professional Liability, worries that the issue is just too complicated to be explained to clients and that a rule would create a problem by stigmatizing lawyers who don't have malpractice insurance, or driving them out of practice. Mendrzycki stresses that disclosure is simply not a proper issue for an ethics rule, merely because clients would want to know that information. Among his scarier excuses for opposing the disclosure requirements are:*

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1. "Although purchasing insurance may be a sound business practice, it does not implicate the traditional notions of morally "right" and "wrong" behavior that the disciplinary rules were designed to address."

2. "We accept the principle of *caveat emptor* in all manner of other business transactions, and hiring a lawyer should be no different." [editor's note: !!! ]
3. "To many of our clients, the law is complex and nebulous, and there is no need to further complicate the attorney-client relationship or negatively affect the perception of the professio

As Towery explains, and HALT has reported, (*ABA Punts on Mandatory Malpractice Insurance*, Spring 2003 Legal Reformer, at 3), an ABA Committee did once propose the adoption of a Model Rule making disclosure of the lack of malpractice insurance mandatory, but many other Committees objected, and *Ethics 2000* rejected the notion, and failed to include the requirement in the new Model Rules.

**UPDATE (10-27-03):** See [Declarations & Exclusions Blog](#) *Should Clients Bear the Risk When Attorneys Risk Going Bare?* for a discussion on informing the client when an LRIS lawyer drops his malpractice insurance.

**UPDATE (10-31-03):** The October '03 edition of *Ethics and Lawyering Today* reports that Michigan, Nebraska, and North Carolina have adopted rules requiring disclosure of malpractice insurance coverage (or the lack thereof), "bringing the total number of states with disclosure rules to eight (plus one with a mandatory insurance requirement)."

**Update (Feb. 22, 2006):** For information on activity in several states on this issue, see our post "[the Arkansas Bar Association irks me.](#)"



The *Disclosure of Malpractice Insurance Should Be Mandatory* by *David Giacalone*, unless otherwise expressly stated, is licensed under a [Creative Commons Attribution-NonCommercial-No Derivative Works 3.0 License](#).

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# The Disciplinary Board of the Supreme Court of Pennsylvania

## **New Liability Insurance Disclosure Rule Exceeds ABA Standards**

**Addition to Rules of Professional Conduct requires that attorneys without liability insurance tell new clients that they aren't covered.**

(Lemoyne, Pa.) - The Pennsylvania Supreme Court Disciplinary Board announces an amendment to the Pennsylvania Rules of Professional Conduct for attorneys requiring lawyers to inform new clients in writing if the lawyer does not have professional liability insurance.

Now in effect, rule 1.4 (c) says, "A lawyer in private practice shall inform a new client in writing if the lawyer does not have professional liability insurance of at least \$100,000 per occurrence and \$300,000 in the aggregate per year, subject to commercially reasonable deductibles, retention or co-insurance, and shall inform existing clients in writing at any time the lawyer's professional liability insurance drops below either of those amounts or the lawyer's professional liability insurance is terminated. A lawyer shall maintain a record of these disclosures for six years after the termination of the representation of a client."

Liability insurance helps protect clients from financial loss due to attorney malpractice. Many in the legal community consider it professional and responsible to have liability insurance, which protects an attorney's clients.

"We believe that communication between attorneys and their clients is vital to the continued growth of the Pennsylvania legal profession," Gary Gentile, chair of the Disciplinary Board, said. "The rule exceeds the American Bar Association's model rule and puts Pennsylvania ahead of the curve when it comes to attorney-client relationships."

This rule is based on the ABA's Model Rule on Financial Disclosure. According to ABA statistics, Pennsylvania is one of five states (Alaska, New Hampshire, Ohio and South Dakota) to require disclosure directly to the client. There are 14 other states that require attorneys to disclose their lack of malpractice insurance on annual registration statements including Arizona, Delaware, Idaho, Illinois, Kansas, Massachusetts, Michigan, Nebraska, Nevada, New Mexico, North Carolina, Virginia, and West Virginia.

According to Gentile, a common misconception is that the new rule makes liability insurance mandatory. "This new rule does not require Pennsylvania attorneys to have liability insurance; that is still a decision for the individual attorneys. The new rule simply requires that they inform new clients if they don't have insurance."

A complete copy of the Pennsylvania Rules of Professional Conduct can be accessed on the Disciplinary Board's

web site at [www.padb.us](http://www.padb.us).

The Disciplinary Board is an independent agency that consists of 16 members, 14 attorneys and two non-lawyers from across the state. It assists the Supreme Court in carrying out its exclusive jurisdiction over the licensing, discipline of attorneys in Pennsylvania. The members meet regularly to decide cases, policies and board administrative matters.

The Disciplinary Board's goals are to protect the general public, maintain a high standard of integrity in the legal profession, and safeguard the reputation of the courts of Pennsylvania. The Disciplinary Board was created by the Supreme Court of Pennsylvania to review conduct and assure compliance by all attorneys to the Pennsylvania Rules of Professional Conduct. For more information about the Disciplinary Board please visit [www.padb.us](http://www.padb.us) For information on this press release contact Nathan Pigott at (717) 975-2148 or [npigott@hersheyphilbin.com](mailto:npigott@hersheyphilbin.com).

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For questions or comments regarding the website, please contact us at [comments@padisciplinaryboard.org](mailto:comments@padisciplinaryboard.org).