

A Look at Reporting Malpractice Insurance Coverage

by

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The ABA will be considering at their mid-year meeting this summer a proposal from the Standing Committee on Client Protection to adopt a Model Rule on Reporting Financial Responsibility. (See sidebar [below] for proposed rule.)

The ABA proposal contemplates a rule requiring lawyers to certify to the highest court of their jurisdiction whether they are engaged in the private practice of law and, if so, whether they are covered by professional liability insurance with certain specified minimum levels of coverage or, alternatively, have another form of adequate financial responsibility available to satisfy professional liability claims.

The proposed rule also calls for reporting any final unsatisfied malpractice judgments against the lawyer or the lawyer's firm. In the last few years several states have proposed or have added rules requiring attorneys to report, either to the court or to their clients, whether they carry minimum levels of malpractice insurance. Only two states have adopted rules requiring attorneys to carry malpractice insurance.

Oregon requires attorneys in private practice to carry malpractice insurance and Nevada recently amended its Rules of Professional Conduct to require attorneys who advertise as specialists to carry at least \$500,000 of malpractice insurance.[Ftn1](#)

South Dakota, Alaska,[Ftn2](#) Ohio[Ftn3](#) and New Hampshire[Ftn4](#) all require attorneys to notify clients in writing if they do not carry a specified minimum level of malpractice insurance. South Dakota amended both its communication and advertising rules in 1999 to require disclosure of whether the lawyer carries malpractice insurance. Alaska amended its communication rule to require written disclosure in 1999 and also requires the disclosure in their already mandatory written fee agreements. Ohio enacted its disclosure rule in 2001, and New Hampshire adopted a separate rule requiring disclosure in 2003.

A disclosure rule is pending in Illinois. In 2002, the Illinois Attorney Registration and Disciplinary Commission did a survey and determined that only 60 percent of the state's solo practitioners carried professional liability insurance, 96 percent of attorneys in firms of two to 10 lawyers had insurance, and 99.2 percent of attorneys in firms of 11 or more lawyers carried insurance. In South Dakota 97 percent of all private practice attorneys now carry malpractice insurance. The Michigan Supreme Court, on its own initiative, has ordered a reporting of malpractice insurance coverage to gauge the need for a disclosure rule there.

Four other states, Virginia, North Carolina, Delaware and Nebraska, now require annual certification regarding whether an attorney carries malpractice insurance. Virginia was the first state to mandate reporting and places the information on the state bar's Web site. In 2002, the site generated about 25,000 hits. The public may also call the bar to obtain the information. Following the enactment of the reporting rule in Virginia, the number of uninsured attorneys fell from 40 percent to 10 percent.

Delaware, North Carolina and Nebraska enacted their reporting rules in 2003, but they have not yet made the information available to the public. North Carolina and Nebraska hope to have the information on which attorneys carry malpractice insurance available on their Web sites by the summer of 2004. Once they have collected it, Delaware will make the information available to those who call and request it.

While hard data is difficult to come by, anecdotal information indicates that some Minnesota legal consumers with valid malpractice claims are without a remedy because a significant number of attorneys do not carry malpractice insurance. To what degree does the profession have a responsibility to protect consumers of legal services from the malpractice of its practitioners? Reporting of coverage is certainly not a panacea. Is it a step in the right direction?

The MSBA Rules of Professional Conduct Committee reviewed and commented on the ABA proposed rule, which will probably be presented at the mid-year meeting this summer. Its comments can be found at <http://www2.mnbar.org/committees/rules/aba-comments-finresp.pdf>.

[1] Nevada Sup. Ct. Order No. 350 (Dec. 18, 2003); Rule 196, subd. 4 and Rule 198, subd. 3(b)(iii).

² www.touchngo.com/lglcntr/ctrules/profcon/htframe.htm

³ www.sconet.state.oh.us/Rules/professional/

⁴ www.courts.state.nh.us/rules/pcon/index.htm

Proposed Model Rules on Reporting Financial Responsibility

A. The purpose of this Rule is to make information available to the public about the financial responsibility for professional liability claims of each active lawyer admitted to practice law in [jurisdiction]. Each lawyer shall, upon admission to practice law in [jurisdiction], and with each subsequent annual registration statement, submit the certification required in this Rule.

B. Every active lawyer shall certify to the [highest court of the jurisdiction] on or before [July 31 or December 31 of each year]: 1) whether the lawyer is engaged in the private practice of law; 2) if so engaged, whether the lawyer is currently covered by professional liability insurance with limits of not less than \$100,000 per claim and \$300,000 policy aggregate ^{covering} generally insurable acts, errors and omissions occurring in the practice of law, other than an extended reporting endorsement; 3) if the lawyer is so engaged and is not covered by professional liability insurance in the above minimum amounts, whether the lawyer has another form of adequate financial responsibility and describing same with reasonable particularity; 4) whether there is any unsatisfied final judgment(s) against either the lawyer, or any firm or professional corporation in which the lawyer has practiced, for acts, errors, or omissions (including, but not limited to, acts of dishonesty, fraud or intentional wrongdoing) arising out of the performance of legal services by the lawyer, including the date, amount and court where the judgment(s) was rendered; and 5) 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 in-house counsel and does not represent clients outside that capacity.

C. The foregoing shall be certified by each active lawyer admitted to practice law in [jurisdiction] in such form as may be prescribed by the [highest court of the jurisdiction] and shall be made available to the public by such means as may be designated by the [highest court of the jurisdiction].

D. Any active lawyer 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.

E. Definitions.

1. "Another form of adequate financial responsibility" means funds, in an amount not less than \$100,000, available to satisfy any liability of the lawyer arising from acts or omissions by the lawyer or other persons employed or otherwise retained by the lawyer. The funds shall be available in the form of a deposit in trust in a [jurisdiction] trust company of cash, bank certificate of deposit or United States Treasury obligation, a bank letter of credit or a surety or insurance company bond.