

PRO/CON

PROFESSIONAL LIABILITY INSURANCE DISCLOSURE

The Supreme Court of Texas has asked the State Bar Board of Directors to recommend whether Texas lawyers should be required to disclose whether they have professional liability insurance. To provide lawyers with arguments on both sides of this issue, the Texas Bar Journal is pleased to include the following "pro" and "con" articles.

For more information, go to www.texasbar.com/plidisclosure. Lawyers and members of the public may post comments to the State Bar blog (<http://blog.texasbar.com>), send an email to statebarpresident@texasbar.com, or mail written comments to State Bar of Texas, c/o Ray Cantu, P.O. Box 12487, Austin, TX 78711-2487. The Board of Directors will vote to make a recommendation to the Court during the Board's January 2010 meeting.

PRO: DISCLOSURE SHOULD BE REQUIRED

BY CHUCK HERRING

The Texas Supreme Court should follow the lead of the American Bar Association and 25 of the 29 states that have addressed the issue of disclosure of professional liability insurance status. The court should adopt a rule providing for private practitioners who choose not to carry insurance to disclose that fact.¹

Most Texas lawyers (63.8 percent) carry such insurance² and would not need to take any action in response to the rule. The rule would merely have uninsured lawyers disclose their insurance status. Moreover, the rule would not require any lawyer to buy insurance.³

The 25 states with a disclosure rule have adopted one of two versions. In the simpler version, the lawyer checks the appropriate box on the annual dues statement. The bar association then adds that information to the lawyer's online profile.⁴ In the other version, the lawyer provides written notice to the prospective client — as Texas lawyers now do concerning the grievance process. Either procedure is easy and cost-free.

The ABA adopted the model rule on insurance disclosure in 2004, after 11 states had already adopted similar rules. California first enacted the requirement, by statute, in 1988. Collectively, the 25 states with an insurance disclosure rule have well over 100 years of experience with this procedure. John Holtway, client protection counsel at the ABA Center for Professional Responsibility, monitors this issue nationally and indicates that those states have reported no significant problems with the rule.

The public overwhelmingly favors disclosure. The State Bar's scientific poll on the issue showed 70.4 percent public approval for disclosure. Moreover, 80 percent of the public respondents indicated that professional liability insurance is an important factor when hiring a lawyer. Adopting the rule would meet that perceived public need. Rejecting the rule would tarnish the image of Texas lawyers.⁵

Given that strong support among the voting public, it also appears likely that if the court does not adopt the rule, the Leg-

islature may mandate adoption. Former State Bar President and Insurance Disclosure Task Force Chair David Beck, who voted in favor of adopting a rule, noted the likelihood of legislative action. As he predicted, H.B. 2825, introduced during the legislative session, would have mandated the rule. The legislation did not move forward, principally because at the time it appeared that the Texas Supreme Court would act on its own. If the court does not, undoubtedly that legislation will resurface.

The ABA Standing Committee on Client Protection described the rule's purpose: "[T]o provide a potential client with access to relevant information related to a lawyer's representation in order to make an informed decision about whether to retain a particular lawyer."⁶ If an uninsured lawyer commits malpractice, the client usually has no practical remedy.⁷ And as the State Bar's poll showed, some consumers consider that insurance information to be very important.

Why do opponents object to the rule? At the Bar's Task Force meetings, three principal questions came up — with these responses:

1. *As a practical matter, won't the rule require all lawyers to buy insurance, thus making law practice more expensive for uninsured sole practitioners?*

The rule does not require any lawyer to buy insurance. Insurers contacted in states with such rules indicated that after adoption of a rule, they saw a modest increase in the percentage of insured lawyers, soon followed by declines to near pre-rule levels. No state with the rule has reported any significant problem, much less any decline or business difficulties among sole practitioners.⁸

2. *Isn't it unfair to require uninsured lawyers to disclose that status, when other professions do not?*

Since the ABA adopted the Canons of Professional Ethics in 1908, we lawyers have held ourselves to different, higher standards than other professions. Among the professions, our ethics rules are unique. As Chief Justice Wallace Jefferson stated in *Hoover Slovacek L.L.P. v. Walton*⁹: "In

Texas, we hold attorneys to the highest standards of ethical conduct in their dealings with their clients. ... Accordingly, a lawyer must conduct his or her business with inveterate honesty and loyalty, always keeping the client's best interest in mind."¹⁰ As the court also held in *Willis v. Maverick*,¹¹ "[A]n attorney is obligated to render a full and fair disclosure of facts material to the client's representation."

3. *Isn't the disclosure of "some" insurance misleading because insurance may not cover certain claims and coverage may terminate in the future?*

Of course insurance coverage issues can be complicated. However, inability to disclose comprehensive, complete information about current or future coverage is no reason to conceal uninsured status. The presence of insurance (or its complete absence) is material information. This is a classic situation in which the perfect should not defeat the good. As James Towery, past president of the California Bar and past chair of the ABA Standing Committee on Client Protection, said: "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 ... 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."¹²

The Texas Supreme Court should adopt a rule to require disclosure of uninsured status. The rule would not affect most Texas lawyers (who already have insurance), but it would meet the public's perceived need for such disclosure, improve our profession's image, and avoid legislative action. For lawyers who choose not to carry insurance, compliance would be simple and cost-free. The fundamental choice is between disclosure and concealment.

To borrow from the Texas Supreme Court's eloquent language in *Walton*: For Texas lawyers who strive to attain "the highest standards of ethical conduct in dealings with clients," this issue should be easy — Texas should adopt an insurance disclosure rule.

NOTES

1. The ABA model rule would require all private practitioners to disclose whether or not they maintain such insurance. However, some states (e.g., Pennsylvania) require only *uninsured* lawyers to make the disclosure. I prefer the latter approach.
2. The 2005 State Bar (self-reporting) survey reported that 63.8 percent of Texas private practitioner respondents indicated that they were insured. For firms of 11 or more lawyers, only 3.8 percent lacked insurance; for firms of 6 to 10 lawyers, 5.8 percent; for firms of 2–5 lawyers, 31.2 percent. However, 63 percent of sole practitioners indicated that they were uninsured.
3. Only Oregon requires lawyers to carry professional liability insurance. Some other states, such as Texas, require certain limited-liability entities (e.g., L.L.P.s) to carry professional liability insurance. Lawyer referral services also often require lawyer participants to carry insurance.

4. The Virginia bar's website received more than 25,000 hits the first week after posting that information. James E. Towery, *Should Disclosure of Malpractice Insurance Be Mandatory? Pro*, GP/Solo 31 (Apr./May 2003).
5. The Bar's online survey of Texas lawyers showed a majority of lawyer respondents opposed a disclosure rule. However, the survey did not inform the respondents of the strong public support for disclosure, the option to require disclosure only by uninsured lawyers, or the trouble-free experience in states that have the rule.
6. Report of ABA Standing Committee on Client Protection 1 (2004).
7. See, e.g., James E. Towery, *Should Disclosure of Malpractice Insurance Be Mandatory? Pro*, GP/Solo 31–32 (Apr./May 2003) ("[A] study is hardly necessary to demonstrate that client harm results from uninsured lawyers. ... [N]o one can seriously question that claims against uninsured lawyers are often abandoned, precisely because there is no available insurance.").
8. Here's a typical answer when clients ask about uninsured status: "Our state does not require lawyers to carry insurance. Most do, but many do not. Not having that expense permits me to provide more affordable fees."
9. 206 S.W.3d 557, 560–61 (Tex. 2006) (quoting from *Lopez v. Munoz, Hockema & Reed, L.L.P.*, 22 S.W.3d 857, 868 (Tex. 2000) (Gonzales, J., concurring)).
10. See also Tex. Disciplinary R. Prof. Conduct 1.03(b) ("A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.").
11. 760 S.W.2d 642, 645 (1988).
12. James E. Towery, *Should Disclosure of Malpractice Insurance Be Mandatory? Pro*, GP/Solo 32 (Apr./May 2003). Also, to minimize confusion if Texas adopts a rule requiring disclosure of whether a lawyer has insurance (as opposed to a rule requiring disclosure only if a lawyer does not have insurance), language could be added to the website or any required disclosure noting the possible limitations of insurance (e.g., "The fact that a lawyer carries professional liability insurance does not necessarily mean that the insurance policy will cover any particular claim that might arise against a lawyer. The scope of coverage and exclusions from coverage vary among different insurance policies. Also, the fact that insurance is in effect during an attorney-client relationship does not mean that the insurance will be in effect after the relationship ends.").

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CON: DISCLOSURE SHOULD NOT BE REQUIRED

BY BILL MILLER

In 2004, the American Bar Association's policymaking body, the House of Delegates, voted by a majority of 12 votes out of roughly 400 cast to adopt a model rule that would require attorneys to disclose to the highest court in their jurisdiction whether they carry professional liability insurance and make that information available to the public in the manner decided by that court.

The issue was brought before the Texas Supreme Court in July 2007 in a letter from Austin lawyer Chuck Herring to the Chief Justice suggesting that the Court consider the issue. The Supreme Court referred the matter to the State Bar of Texas, which created a task force to study the issue. The task force voted 6 to 5 against requiring such a disclosure and set forth the pros and cons in its June 2008 report. (See www.texasbar.com/plidisclosure.)

The Texas Supreme Court's Grievance Oversight Committee also considered the disclosure issue, but instead of rejecting the proposal, recommended that:

- Minimal acceptable amounts of insurance be adopted by the State Bar (including any deductible or self-insured retention amounts that have to be paid as a condition of coverage);

- At the time a client is engaged, a lawyer not maintaining the minimal insurance amounts be required to disclose that fact to the client in writing;
- If during the representation a lawyer's policy that meets the minimal standards lapses or terminates, the lawyer must notify his or her clients of that fact; and
- The notice provided to the client must be signed by the client, returned and maintained by the lawyer.

Mandating insurance disclosure sounds like a simple concept. However, mandating that lawyers disclose to clients a) whether we have insurance and possibly b) how much coverage we have (or mandating that we carry a minimal amount) is not as simple as it seems. Moreover, as a practical matter, it does not promote consumer protection as its proponents argue.

Ask any lawyer who deals with insurance coverage issues and they will tell you that coverage issues are often complex and cannot be determined without knowing all of the facts and considering all of the contractual issues involved in the application for insurance and the policy.

It may be easy to tell a client, a potential client, or the State Bar that on Nov. 1, 2009, a particular lawyer had professional liability insurance. However, that does not mean that a client's malpractice issue will be covered by that professional liability insurance. Such a statement may actually be misleading to the client. Indeed, even when the ABA House of Delegates voted in 2004, both the ABA Tort Trial and Insurance Practice Section (TTIPS) and the ABA Standing Committee on Lawyers' Professional Liability sought to defeat the model rule, now adopted, because both groups believed that the rule was "misleading and full of holes." See, ABA/BNA Lawyers Manual on Professional Conduct: ABA Annual Meeting Conference Report, Vol. 20, No. 16, p. 411.

Proponents of professional liability insurance disclosure claim the issue is about consumer protection. However, such a call to arms in the name of public protection fails to consider the underlying nature of malpractice insurance and makes false assumptions about the purpose of such insurance. The State Bar, the Texas Supreme Court, and the Legislature have not mandated that maintaining insurance is a requirement for possessing a law license. Yet by requiring a disclosure of whether a lawyer chooses to carry professional liability insurance, a second class of attorneys would be created: "good" lawyers who have insurance and "bad" lawyers who don't. This is simply wrong. Whether a lawyer chooses to maintain the protection afforded by insurance has no relation to whether he or she is a good lawyer. It is a business judgment. Creating a disclosure requirement would create the public perception that there are good and bad lawyers.

Some lawyers may choose, like doctors, accountants, dentists, and other professionals, not to maintain insurance because they believe — rightly or wrongly — that it deters lawsuits. In fact, Mr. Herring's 2007 letter to the Supreme Court says as much. He states:

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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.

Whether to maintain professional liability insurance is a business decision by the attorney (or doctor, or accountant, or electrician, or plumber) and should not be the subject of disclosure absent a requirement that insurance be maintained as a condition of holding a license. In reality, the decision to maintain professional liability insurance is not for the benefit of a possibly harmed client; it's to protect the lawyer or firm purchasing the insurance. It's a private contract and should stay private absent consent of the insured or the requirements of disclosure mandated by the Texas Rules of Civil Procedure after commencing litigation.

Second, and more important, merely telling a client that a firm or lawyer has professional liability insurance does not mean that there will be any coverage for a client's damages regardless of what the coverage limits of the policy are. Requiring disclosure, either as indicated in the ABA model rule or as suggested by the Supreme Court's Grievance Oversight Committee, will only mislead clients about whether insurance might be available. Indeed, proponents suggest disclosure is needed because consumers assume lawyers have insurance, but telling the client that a lawyer has professional liability insurance that ultimately may not provide any coverage to the client's claim is just as misleading, if not more so. Worse, requiring disclosure as a disciplinary rule may be creating additional disciplinary matters or lawsuits every time an insurer — not the lawyer or the client — makes a decision to deny coverage on a claim.

Determining whether an attorney or firm eventually has insurance to cover a claim depends upon a coverage determination that cannot be made until the actual facts of a particular situation are developed — not at the time of engagement. Consider the notice requirements of most policies once an insured believes that it may have a claim. If there is a determination that the attorney or firm failed to give proper notice of the claim under a claims-made policy (thereby potentially destroying coverage), does the client then have a separate, hindsight-driven claim against the attorney or firm for falsely or negligently disclosing it had coverage (or failing to disclose it did not), presumably arguing that the disclosure was a significant issue leading to the client's selection of the firm? Should taking or failing to take some action required by the policy result in a violation of the disciplinary rule as well? The Grievance Oversight Committee recommended that the proposed rule would be violated if the firm knew or "should have known" the "deductible or self-insured retention cannot be paid in the event of loss," adding another possible cause of

action against a firm that fails to properly disclose. Consider claims-made vs. occurrence policies or tail policies. The difference may affect any coverage a client may have the benefit of. Must a notice be sent for failure to get a tail policy for a lawyer who has left the firm? What happens when lawyers switch firms? Remember that claims-made policies require the event and the claim to be made in the same policy year. If they don't fall in the same year there may be no coverage. If the lawyer had some notice of a problem and did not disclose it in the renewal application, there may be no coverage. Does the issuance of a reservations of right letter on a former client's claim also trigger the duty to inform the lawyer's remaining clients that coverage under that policy may be in doubt?

In other words, do these coverage issues merely concern the insurer and the insured in the client's lawsuit for malpractice or, with the proposed disclosure professional responsibility rule, does it also wear the clothes of a grievance committee complaint? Or is it a misrepresentation or fraud in the inducement? These are truly difficult questions. The various combinations of coverage issues and, under the proposed disciplinary rule, additional ethical violations, are as endless as the defenses to coverage in the insurance policy. This may, in part, explain why large numbers of Texas lawyers don't carry malpractice insurance. See Mr. Herring's letter to the Supreme Court.

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If the goal here really is to protect consumers, and insurance coverage is the way to do that, why not have the rules prohibit attorneys from handling any matter over which they did not have professional liability insurance coverage in excess of the damages claimed in the litigation or the value of the transaction being worked on (plus attorney's fees, costs, etc.)? What good is a malpractice claim in a \$20 million lawsuit if the mandated minimal acceptable amount of insurance is only \$100,000? Likewise, following the logic of those asserting the public's need for this information in making informed choices about their lawyer, wouldn't the public be better protected if the Bar or Supreme Court simply participated in a public education program to advise clients that they had a right to make inquiry of the lawyer about her insurance? Should lawyers without insurance be required to disclose their net worth to the client as well? Lawyers don't do that. Doctors don't do that. Accountants don't do that. No other profession or occupation is required or compelled to disclose such information absent being compelled as part of litigation.

One of the major arguments in favor of a disclosure is the perceived need to have a better-informed client before he or she hires the lawyer. Both the State Bar's task force report and the Supreme Court's committee report suggest disclosure addresses the client's "right" to know whether the lawyer they are consid-

ering (or, more likely, just retained, since that is when the disclosure would happen under the Grievance Oversight Committee's recommendation) has professional liability insurance. However, this argument ignores that a client has *always* had the right to ask about their attorney's insurance coverage. Indeed, many clients do ask about their attorney's insurance before deciding to choose an attorney. Shouldn't the State Bar or the Supreme Court simply do more to educate the public about their right to ask about insurance instead of setting up additional bureaucratic reporting requirements for Texas lawyers?

Lawyers are not cars. There is no practicable way to set a "minimum coverage amount" given varying law practices that realistically takes into consideration the possible damages to different clients in different representational settings purely to protect lawyers' clients from lawyers' mistakes. Again, the false premise underlying the disclosure issue is that insurance is maintained for the benefit of the client whose lawyer commits malpractice. It is not. Professional liability insurance, when it is acquired, is for the benefit of the insured. The insured should be deciding what risks they want to take and the amount of coverage, if any, they should have.

There are other reasons not to support the insurance disclosure issue. For instance, the increased cost to solo and small-firm lawyers may affect access to justice or increase costs to clients. Other reasons are addressed in the various reports available on the State Bar website. In the end, insurance disclosure appears to be just another tool for litigious clients and their lawyers to use after a problem has occurred. Yet, if malpractice has occurred, the aggrieved party can file suit and move under the Rules of Civil Procedure for discovery of the limits of any applicable liability policy. Clients can ask if the lawyer has insurance coverage at any time — before, during, or after the representation. Clients, in my firm's experience, do in fact ask about insurance coverage. The State Bar can certainly put out information to educate the public without the necessity of the Supreme Court creating a system that will potentially involve the grievance processes and create the clear perception of good and bad lawyers. Indeed, that's the underlying incentive to get lawyers to buy insurance. The Supreme Court stigmatizes those who don't buy it. However, educating the public would potentially prevent the vast confusion that will occur when clients are led to assume that the mere existence of an insurance policy means that there is, in fact, coverage, and that in the event of malpractice that there will be an insurance payment. Of course, if the Supreme Court does adopt a disclosure rule, the insurers will probably get more business and those lawyers prosecuting and defending legal malpractice claims may have less reason not to take the case or to settle so quickly.

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