



ABA/BNA Lawyers' Manual on Professional Conduct

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25 Law. Man. Prof. Conduct 476 (September 2, 2009)

Malpractice

New California Rule Requires Attorneys To Inform Clients About Uninsured Status

The California Supreme Court Aug. 26 adopted a new rule of professional conduct that requires lawyers in private practice to notify clients if they lack malpractice insurance (*Order Adopting New Rule 3-410 of the California Rules of Professional Conduct*, Cal., No. S168443, 8/26/09).

California Rule of Professional Conduct 3-410, which takes effect Jan. 1, 2010, requires that the notice be provided in writing to all clients at the outset of a representation "whenever it is reasonably foreseeable that the total amount of the member's legal representation of the client in the matter will exceed four hours."

Bandwagon Effect

According to an ABA survey, there are now 25 U.S. jurisdictions that require disclosure of professional liability insurance.

Advocates of mandatory disclosure anticipate that California's action will encourage other states to follow suit. "I hope that the new rule will give a little impetus to other states to enact similar rules," said James E. Towery, who chaired the state bar's Insurance Disclosure Task Force.

Towery, who practices with Hoge, Fenton, Jones & Appel in San Jose, Cal., said in an interview with BNA that he views the insurance disclosure mandate as a client protection issue. Whether a lawyer is insured against malpractice liability is a material fact that prospective clients have the right to know, he stated.

Opponents of the new rule are less sanguine. "I call this the California Insurance Carriers Stimulus Bill," Diane L. Karpman, of Karpman & Associates in Los Angeles, told BNA. Karpman predicted that the court's action will force currently uninsured lawyers to buy expensive coverage, which will in turn drive up attorneys' fees that will price low-income clients out of the market for legal services.

Karpman said she agrees that the new California rule may trigger a "bandwagon effect" that could persuade other states to follow suit.

Four-Hour Cutoff

The new notification standard is triggered only when it is "reasonably foreseeable" to an attorney that the total amount of legal representation in a matter will exceed four hours. At one time, this was dubbed the "cocktail party" exception, to dispel concerns that lawyers would be compelled to write out a disclosure statement in social scenarios in which casual acquaintances might ask for a brief legal opinion. See 24 Law. Man. Prof. Conduct 271.

Paragraph (C) of the rule indicates that lawyers employed as in-house counsel or by a government entity are exempted when they act directly in that capacity. According to the accompanying comments, the exemption was included because an entity employing a lawyer “presumably knows” whether or not the lawyer is covered by liability insurance. The comments also state, however, that the exemption does not apply to “outside counsel for a private or governmental entity, or to counsel retained by an insurer to represent an insured.”

The rule also provides an exemption in paragraph(D) when lawyers provide legal services in an “emergency to avoid foreseeable prejudice to the rights or interests of the client.”Furthermore, paragraph (E) makes clear that a lawyer need not remind returning clients of the lawyer's lack of insurance.

Retooled Proposal

The new standard is rooted in the Model Court Rule on Insurance Disclosure, which the ABA narrowly approved in August 2004, although in requiring notification directly to clients California's rule differs from what the ABA rule recommends. See 20 Law. Man. Prof. Conduct 411; 20 Law. Man. Prof. Conduct 436.

In 2005, California Supreme Court Chief Justice Ronald M. George asked the California bar to look into the matter;Towery's task force spent two years drafting proposed rules that twice were circulated for public comment. See 23 Law. Man. Prof. Conduct 275.

The task force's original proposal envisioned both a rule of professional conduct requiring disclosure to clients and a regulation mandating disclosure to the bar. The proposal also would have directed the bar to lawyers' uninsured status on its website.

That proposal was rebuffed when the bar's board of governors deadlocked 8-8 and outgoing bar president Sheldon H. Sloan cast the tie-breaking vote against the measure. See 23 Law. Man. Prof. Conduct 531.

A newly elected board revisited the issue under the guidance of current president Jeffrey L. Bleich, see 24 Law. Man. Prof. Conduct 40, and the redrafted proposal sailed through by a vote of 16-4. See 24 Law. Man. Prof. Conduct 271.

State Survey

Of the 25 states that have adopted some form of rule on insurance disclosure, 18 have taken a stance consistent with the ABA model rule and require annual disclosure of insurance status by lawyers on their bar registration statements: Arizona, Colorado, Delaware, Hawaii, Idaho, Illinois, Kansas, Massachusetts, Michigan, Minnesota, Nebraska, Nevada, North Carolina, North Dakota, Rhode Island, Virginia, Washington, and West Virginia.

Seven states—Alaska, New Hampshire, New Mexico, Ohio, Pennsylvania, South Dakota, and now California—have inserted the disclosure regulation into their professional conduct rules and require lawyers to disclose directly to their clients that they do not maintain professional liability insurance, or a minimum level of malpractice coverage.

According to a list maintained by the ABA Standing Committee on Client Protection, most states providing for disclosure also make the information available to the public, usually on the state bar's website.

Four jurisdictions—Arkansas, Connecticut Florida, and Kentucky—have rejected a proposed mandatory insurance disclosure rule. A Texas bar task force recommended against such a rule, but the issue is still percolating in the court system.

Oregon remains the only jurisdiction that requires its lawyers to carry malpractice insurance. See Or. Rev.

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Stat. § 9.080. In 2008 the Virginia State Bar rejected a proposal that would have required lawyers in private practice to maintain professional liability insurance with specified minimum policy limits. See 24 Law. Man. Prof. Conduct 598.

by Lance J. Rogers

The ABA survey regarding state implementation of the Model Court Rule on Insurance Disclosure may be found on the bar group's website at http://www.abanet.org/cpr/clientpro/malprac_disc_chart.pdf.

California Approves Ethics Rule Mandating Disclosure When Attorney Lacks Malpractice Insurance

“Rule 3-410. Disclosure of Professional Liability Insurance

“(A) A member who knows or should know that he or she does not have professional liability insurance shall inform a client in writing, at the time of the client's engagement of the member, that the member does not have professional liability insurance whenever it is reasonably foreseeable that the total amount of the member's legal representation of the client in the matter will exceed four hours.

“(B) If a member does not provide the notice required under paragraph (A) at the time of a client's engagement of the member, and the member subsequently knows or should know that he or she no longer has professional liability insurance during the representation of the client, the member shall inform the client in writing within thirty days of the date that the member knows or should know that he or she no longer has professional liability insurance.

“(C) This rule does not apply to a member who is employed as a government lawyer or in-house counsel when that member is representing or providing legal advice to a client in that capacity.

“(D) This rule does not apply to legal services rendered in an emergency to avoid foreseeable prejudice to the rights or interests of the client.

“(E) This rule does not apply where the member has previously advised the client under Paragraph (A) or (B) that the member does not have professional liability insurance.”