

Malpractice Insurance Working Group
Subcommittee on Insurance Disclosure Rule
Report and Recommendations to the Malpractice Insurance Working Group

The Subcommittee on Disclosure makes the following recommendations and observations:

Recommendations

1. Maintain, without change, the disclosure requirements set forth in Rule of Professional Conduct 1.4.1 (previously Rule 3-410).
 - The disclosure is merely that a lawyer does not have legal malpractice insurance.
 - No requirement to disclose that a lawyer has malpractice insurance, or the type of malpractice insurance the lawyer has. We recognize that this all-or-nothing disclosure has limitations. For example, a lawyer may have insurance, but due to other claims during the claim year, money may not be available to a particular client. Nonetheless, we believe anything more complicated than disclosure of the existence or lack of insurance is likely to confuse clients.
 - We note the lack of data indicating that the disclosure rules incentivize lawyers to purchase insurance, so maintaining the rule cannot be justified on this basis. This is despite data from South Dakota – and to a lesser extent from Alaska and Virginia – that the incidence of malpractice insurance purchased by lawyers in those states increased after disclosure rules were implemented. Nonetheless, we believe there is value in disclosure, whether or not it incentivizes lawyers to purchase malpractice insurance.
2. Collect data on uninsured lawyers.
 - Ask lawyers about the insurance they carry, if any, and gather information about the size of the firm, the type of practice, the policy limits, etc.
 - For attorneys who report that they are uninsured, requires them to disclose how many months of a given calendar year such insurance was not in place.
 - Information about insurance can be required on annual registration forms.
 - This will help the State Bar gather data that it currently lacks, making any future decisions about insurance disclosure requirements, or even mandatory insurance, more data-based.
3. Collect data about the public's perception of legal malpractice insurance, including whether they have any assumptions about the likelihood of a lawyer carrying malpractice insurance, whether that is important to them and why, and what they understand about malpractice insurance.
 - Hire a professional survey company to collect this data.
 - This will provide information about how helpful disclosure actually is, and whether some more fulsome disclosure should be considered in the future.
4. Educate the public and lawyers about legal malpractice insurance by including information and FAQs on the State Bar website.

- Even if a client is told that a lawyer does or does not have insurance, that may not provide enough information. At a minimum, the client could be educated about what questions to ask the lawyer and what the answers may mean to the client.
 - This could be combined with additional educational outreach by the State Bar.
 - Various groups in the insurance market could be enlisted to contribute to the lawyer materials and subsequently disseminate it to lawyers.
5. Require lawyers without malpractice insurance to certify to the State Bar (either annually or every two or three years) that they have complied with the disclosure requirements.
 - The State Bar can audit compliance.
 6. Require lawyers who are not insured to report any judgments against them for legal malpractice.
 7. Require uninsured lawyers to report settlements for professional negligence above a threshold amount.
 8. Require lawyers who have unsatisfied legal malpractice judgments against them to report that information to the State Bar.
 - This will help the State Bar gather data on the existence and prevalence of unsatisfied judgments.
 - The State Bar also could suspend lawyers with unsatisfied judgments (although doing this would make it less likely lawyers would self-report).
 - Determine other sources to monitor such judgments
 9. Require lawyers who are uninsured to complete programs that provide educational tools and self-assessment for practice management and risk reduction.

Other recommendations considered

1. Require disclosure of the lack of insurance on an attorney's State Bar website profile page.
 - The current disclosure rule requires the disclosure to be made at the time the client engages the lawyer's service. There is an argument that this is too late, as the client already has invested time in meeting and deciding on a particular lawyer, without knowing about the lack of insurance. But there is no evidence that this is a problem, or that earlier disclosure would be helpful.
 - Other methods of mandatory disclosure also are possible, including (1) disclosure to the State Bar, with access available to the public only on request; (2) disclosure on the lawyer's website; and (3) disclosure in all written communications with client (*see* South Dakota).
2. Require the disclosure be made in a separate document, and not in the actual engagement agreement.
 - This would ensure that the disclosure does not get lost among the many other disclosures in sometimes lengthy engagement agreements.
 - The State Bar could provide the form of the disclosure based on its finding from the survey of the public.
 - But this elevates the malpractice disclosure above other important disclosures in the engagement agreement, including, for example, disclosures about conflicts of interest.

3. Require lawyers without legal malpractice insurance to take an additional four hours of MCLE on risk management issues.
 - Modeled after the Illinois “proactive management- based regulations” (PMBR)

Conclusion

With an appropriate disclosure rule, which can be improved after additional information is collected, clients will have sufficient information to make informed decisions about which lawyer(s) to hire, and there will be no need to implement a mandatory insurance program that could have unintended, negative consequences, and for which there is insufficient data justifying its need.