Law Offices of Michael J Siegel

♦♦♦

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February 22, 2006

Mr. Saul Bercovitch
State Bar of California
180 Howard St
San Francisco, CA 94105

Re: Proposal of requiring disclosure of non-insurance

Dear Mr. Bercovitch:

(Please excuse me if I have misspelled your name.) I was directed to write to you by Jim Towery. I had spoken to Jim a few weeks ago about a proposed Rule of Professional Conduct to require attorneys to disclose to their clients if they did not care malpractice insurance.

As I expressed to Jim, I am concerned that a "one-size-fits-all" approach would not be appropriate in all circumstances--especially mine. I am a sole practitioner with a "niche" practice: I represent crime victims applying for assistance from the state-run Victim Compensation Program. The state pays my legal fees, which are capped by statute at $500 per claim [see Gov. Code Sec. 13957.7(g)], and average about $200 per claim. Since my fee is based on the amount the Victims Program pays to or for a claimant, I often receive less than $100 on a case, and it is not unusual for me to be paid nothing.

In light of the low amount I receive, and the fact that in my 31 years of practice there has been not a single claim of malpractice, I determined several years ago that carrying malpractice insurance was not financially feasible as well as not necessary.

There are several problems with the task force proposal. For one thing, I have tens of thousands of current and formal clients. I count as "former" clients those for whom the Victims Program has made some payments, but has made no awards for several years. However, those cases are not formally closed because awards on these claims have not reached the statutory maximum. In other words, since I have not "closed" the file, nor advised the client that my representation had ended, a client may contact me in the future about requesting additional awards. In these cases--and there is a very large number of them--it is my fear that the Bar would consider me to still be the representative (even though Mr. Towery suggested that "old" cases which have not had any work for a year or more, may not be considered "current clients"). Trying to figure out the clients' current addresses would be a monumental and expensive task--my clients by and large are low income and frequently move without letting me know the new addresses--not to mention the cost of preparing and mailing notices to them all.

Even excluding "old" files, I file between 50 and 100 new claims each month, and a case can take several years to reach resolution, so there are several thousand clients whose cases are clearly active and "current". Again, the expense of notifying them all would be prohibitive.

I am hopeful that the Bar would exclude from this proposal practices such as mine, in which the fees received per case or client are relatively small, or perhaps attorneys whose income is less than, say, $150,000 gross per year.

Alternatively, I propose that notice of non-coverage of malpractice insurance be required only for new clients retained after the implementation date. (It would not be as onerous for me to include a notice in my initial correspondence to new clients.)

I would be happy to talk with you about my particular practice and concerns. Please share this letter with appropriate members of the task force and/or Board of Governors.

Thank you for your consideration of my plight.

Sincerely,

MICHAEL J. SIEGEL

MJS/id

Bercovitch, Saul

From: Towery, James E. [JET@hogefenton.com]
Sent: Wednesday, April 12, 2006 5:18 PM
To: 'David Justin Lynch'
Cc: Bercovitch, Saul
Subject: RE:[rrc] Disclosure of insurance coverage

Mr. Lynch:

Thank you for your comments. As you may know, the proposal from the Insurance Disclosure Task Force has not yet gone out for public comment, although our hope is that the Board of Governors committee will authorize that in June. I will forward your email to the Task Force for consideration when the Task Force meets to consider other public comments. This is a complex issue, and we appreciate the input both of lawyers and of the public.

Thank you again for taking the time to send me your suggestions.

Jim Towery

-----Original Message-----
From: David Justin Lynch [mailto:djl@attorneylynch.com]
Sent: Wednesday, April 12, 2006 10:55 AM
To: Towery, James E.
Subject: RE: RE:[rrc] Disclosure of insurance coverage

I pay through the nose and out my ass for LPL. Yet there are lawyers who practice without it who in my opinion are gaining an unfair advantage. My suggestion is that LPL be mandatory for all lawyers with certain minimum limits and something like an assigned-risk plan for lawyers who cannot otherwise obtain insurance on the open market. Deductibles should not exceed $2500 per lawyer and wasting limits policies should be illegal. Concurrently, there should be more stringent limits on suits against lawyers--how about a certificate of merit requirement like the medical profession has, how about an absolute statute of limitations of three years which starts to run from the day the relationship ends (instead of tolling while the client sustains no damages), prohibiting cross-complaints in response to suits for fees, abolishing by statute any and all duties allegedly owed to non-clients, etc.

DAVID JUSTIN LYNCH, Esquire

Bercovitch, Saul

From: Difuntorum, Randall
Sent: Wednesday, May 03, 2006 6:01 PM
To: Bercovitch, Saul
Cc: McCurdy, Lauren
Subject: Rules Revision Commission - Informal Drafting Suggestions on Proposed New Rule 3-410

Hi Saul:

Attached please find the Rules Revision Commission's suggested modifications to the Insurance Disclosure Task Force's draft of proposed new rule 3-410. As we discussed earlier today, the Commission has developed recommended revisions that are intended to address drafting issues only (i.e., structure, style, format, or 'word-smithing' changes) With great deference to the Board's decision to create a special task force to address the substantive policy issues, the Commission did not debate the merits of the policy represented by the proposed new rule and the Commission's redraft is not intended to be any comment on the substantive policy issues.

The attached clean and comparison draft shows the changes that are recommended and specific explanations are set forth in the footnotes. The Commission points out that there are two changes that could be regarded as possible substantive changes. The first is found in para. (A). In para. (A), the Commission added language that clarifies/expands the time frame in which a lawyer may obtain a signed and dated client notice. Refer to footnote no. 9 for further explanation. The second possible substantive change is found in para. (A), para. (D), and disc. para. [7]. The subcommittee has added language that may be viewed as modifying the Task Force's method for including an exemption for government and in-house lawyers. Refer to footnote no. 5 and footnote no. 11.

Thanks for affording the Commission this opportunity to offer early informal input on the good work of the Task Force. The Commission remains available to provide any further assistance that the Task Force may desire.

Please feel free to call me if you have any questions. -Randy D.

****

Randall Difuntorum
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State Bar of California
180 Howard Street
San Francisco, CA 94105
(415) 538-2161
Randall.Difuntorum@calbar.ca.gov


RRC_Ins_Disclosure_Subcommitte...


RRC_Ins_Disclosure_Rule_3-410_...

Rule 3-410. ~~Insurance~~ Disclosure of Professional Liability Insurance

(A) ~~A member who is not covered by~~ A member in private practice shall not accept a representation, if the member does not then have, professional liability insurance ~~shall inform a client at the time of the client's engagement of the member that the member is not covered by professional liability insurance. The~~ unless the member first informs the client in writing of that fact. The written notice required by this paragraph shall be ~~provided to the client in writing, and the member shall obtain from the client a~~ signed and dated ~~acknowledgment of receipt of that notice.~~ by the client prior to or at the time the member accepts the representation, or as soon thereafter as reasonably practicable.

(B) ~~If a member is covered by~~ A member who has professional liability insurance ~~at the time of a client's engagement of the member, and the member subsequently ceases to be covered by professional liability insurance during the~~when the member accepts representation of ~~the~~a client, ~~the member~~ shall inform the client in writing within thirty days ~~of~~after the date ~~that the member ceases to be covered by~~any such professional liability insurance ~~is~~ is terminated during the representation.

(C) ~~Within thirty days of [insert effective date of this rule], a member shall inform in writing all existing clients for whom the member is currently rendering continuing legal services if the member is not covered by~~ A member who does not have professional liability insurance ~~shall~~ shall comply with paragraph (A) with respect to the member's current clients within thirty days after the effective date of this rule.

(D) ~~Paragraphs (A), (B) and (C) do~~ This rule does not apply to a member who is employed as a government lawyer and who does not engage in the practice of

law in any other capacity. This rule also does not apply to a member who is a corporate or in-house counsel who does not engage in the practice of law in any other capacity and who does not represent a clients ~~outside that capacity.~~ other than the member's employer.

Discussion

[1] ~~Under Paragraph (A) of this rule, a member~~ Paragraph (A) requires a member engaged in private practice and who is not covered by professional liability insurance ~~is required~~ to disclose that fact directly to a ~~client at the time of the engagement. This requirement applies with respect to new clients and returning clients who engage~~new client and to a current or former client who engages the member for a new matter at the time the member accepts the representation.

[2] For purposes of this rule, professional liability insurance means insurance that provides the member coverage for the member's acts or omissions as a lawyer in the provision of legal services.

[3] Paragraph (B) requires a member to provide ~~additional legal services.~~ written notice to the member's current clients if during the representation the member's professional liability insurance is terminated or otherwise ceases to exist.

~~[2] A member may use the~~[4] The following language ~~in making the disclosure required by Rule 3-410(A) or Rule 3-410(C), and may include that language in a written fee agreement with the client or in a separate writing:~~ is one way a member may satisfy the requirements of paragraphs (A) and (C):

"Pursuant to California Rule of Professional Conduct 3-410, I am informing you in writing that I ~~am~~do not ~~covered by professional liability insurance.~~"

have legal malpractice insurance that covers the legal services that are being provided to you in this matter."

~~[3] A member may use the~~ [5] The following language ~~in making~~is one way a member may satisfy the ~~disclosure required by Rule 3-410~~requirements of paragraph (B):

> "Pursuant to California Rule of Professional Conduct 3-410, I am informing you in writing that I ~~am~~ no longer ~~covered by professional liability insurance.~~"have legal malpractice insurance that covers the legal services I am providing to you in this matter."

[6] ~~Paragraph (C) of this rule is transitional, and requires notice to existing clients for whom a member is currently rendering continuing legal services on the effective date of this rule. Notice is not required pursuant to Paragraph (C) if, for example, before the effective date of this rule, a member has completed the preparation of a will for a client or completed legal services relating to the incorporation of a client's business, if no continuing legal services are being provided for the client on the effective date of this rule. If, however, the same client returns for additional legal services after the effective date of this rule, notice would be required pursuant to Paragraph (A).~~ Paragraph (C) is intended to require written notice to the member's current clients for whom the member is rendering legal services as of the effective date of this rule. Notice is not required under paragraph (C) if the member has completed the legal services the member was retained to perform; for example, the completion of the preparation of a will or the incorporation of a client's business. However, the member must comply with paragraph (A) if the member renders additional services in the completed matter after the effective date of this rule or the same client retains the member in another matter.

[7] ~~[4] Rule 3-410(D) provides an exemption for a "government lawyer" or "in-house counsel" provided the member does not "represent clients outside that capacity." The basis of both exemptions is essentially the same. The purpose of this rule is to provide information directly to a client if a member is not covered by professional liability insurance. If a member is employed directly by and provides legal services directly for a private entity or a federal, state or local governmental entity, that entity presumably knows whether the member is or is not covered by professional liability insurance. The exemptions under this rule are limited to situations involving direct employment and representation, and do not, for example,~~ Paragraph (D) exempts from this rule certain members who are not engaged in private practice. Paragraph (D), however, is not intended to exempt ~~apply to~~ outside counsel for a private, public, or ~~governmental entity, or~~government organization or to counsel retained by an insurer to represent ~~an~~the insured.

Proposed Rule 3-410

Insurance Disclosure

RRC Draft No. 1.2 (4/26/06)

Rule 3-410.[1] Disclosure of Professional Liability Insurance[2]

(A)[3] A member[4] in private practice[5] shall not accept a representation,[6] if the member does not then have[7] professional liability insurance[8] unless the member first informs the client in

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[1] The Commission has discussed the numbering system and format currently used by the rules and has tentatively decided to recommend that the Board adopt the ABA Model Rule numbering system, style and format. If proposed new rule 3-410 is adopted by the Board and approved by the Supreme Court, the Commission would include it in the Commission's recommendation for appropriate changes to conform to the Model Rules numbering system, style and format, as that would make rule 3-410 consistent with the Commission's anticipated recommendation for all of the rules.

[2] A more complete description of the subject matter covered by the proposed rule is recommended to afford lawyers who may not be familiar with the rules of professional conduct to identify and comply with the requirements of the proposed rule.

[3] Under the ABA Model Rule format, the paragraphs would be designated in lower case, e.g., (a), etc.

[4] The Commission's current drafts of proposed revisions to the California Rules of Professional Conduct refer to "lawyer" rather than "member" to be consistent with the Model Rule format and the scope of the rules in California.

[5] It is preferable to identify the class of lawyers intended to be covered by the proposed rule up front rather than in the final paragraph of the proposed rule. The wording is the same as Pennsylvania's new Insurance Disclosure Rule 1.4(c), adopted last December and which takes effect July 1, 2006.

[6] The phrase "accept a representation" tracks current Rule 3-310(C)(1) and is more precise than "at the time of the client's engagement of the member."

[7] The phrase "does not then have" is recommended in place of "who is not covered by," since the latter phrase raises possible legal coverage issues and is less clear.

[8] Paragraph (C) relates the requirement to have professional liability insurance to the provision of "legal services" while paragraphs (A) and (B) do not limit the requirement for insurance to instances when the lawyer is providing legal services. Therefore, to the extent that the rule and the comments do not relate professional liability insurance to the practice of law, lawyers engaged in a dual profession or ancillary business practice could arguably satisfy the rule by having professional liability insurance that covers the lawyer's non-legal services without affording coverage for legal services. This issue is addressed in comment [2] below.

writing of that fact. The written notice required by this paragraph shall be signed and dated by the client prior to or at the time the member accepts the representation, or as soon thereafter as reasonably practicable.[9] [10]

(B) A member who has professional liability insurance when the member accepts representation of a client shall inform the client in writing within thirty days after the date any such professional liability insurance is terminated during the representation.

(C) A member who does not have professional liability insurance shall comply with paragraph (A) with respect to the member's current clients within thirty days after the effective date of this rule.

(D) This rule does not apply to a member who is employed as a government lawyer and who does not engage in the practice of law in any other capacity. This rule also does not apply to a member who is a corporate or in-house counsel who does not engage in the

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[9] If acknowledgement of the notice by the client is to be included in the proposed rule, the Commission recommends that the rule be specific on when the client's signature must be obtained. There has been litigation under Rule 2-200 on the timing issue, which can be avoided easily by specifying the time in the rule. The suggested language tracks the language the Commission has proposed for Rule 2-200.

[10] The following is offered as an additional provision following the second sentence in paragraph (A) and which is consistent with current Rule 1-311 on the obligation to serve a written notice on clients on whose matters disbarred, suspended, resigned, or involuntarily inactive members work:

> "The member shall obtain proof of service of the member's written notice to the client and shall retain such proof and a true and correct copy of the client's written acknowledgement for two years following termination of the member's employment with the client."

practice of law in any other capacity and who does not represent a client other than the member's employer.[11]

Discussion[12]

[1] Paragraph (A) requires a member engaged in private practice and who is not covered by professional liability insurance to disclose that fact directly to a new client and to a current or former client who engages the member for a new matter at the time the member accepts the representation.

[2] For purposes of this rule, professional liability insurance means insurance that provides the member coverage for the member's acts or omissions as a lawyer in the provision of legal services.

[3] Paragraph (B) requires a member to provide written notice to the member's current clients if during the representation the member's professional liability insurance is terminated or otherwise ceases to exist.

[4] The following language is one way a member may satisfy the requirements of paragraphs (A) and (C):

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[11] As a result of the proposed suggested revisions to paragraph (A), the Commission recommends that current proposed paragraph (D) be modified and clarified with a proposed new discussion paragraph [7].

[12] Under the Model Rules format, adopted by the Commission, the term "Discussion would be changed to Comment."

"Pursuant to California Rule of Professional Conduct 3-410, I am informing you in writing that I do not have legal malpractice insurance that covers the legal services that are being provided to you in this matter."

[5] The following language is one way a member may satisfy the requirements of paragraph (B):

"Pursuant to California Rule of Professional Conduct 3-410, I am informing you in writing that I no longer have legal malpractice insurance that covers the legal services I am providing to you in this matter."

[6] Paragraph (C) is intended to require written notice to the member's current clients for whom the member is rendering legal services as of the effective date of this rule. Notice is not required under paragraph (C) if the member has completed the legal services the member was retained to perform; for example, the completion of the preparation of a will or the incorporation of a client's business. However, the member must comply with paragraph (A) if the member renders additional services in the completed matter after the effective date of this rule or the same client retains the member in another matter.

[7] Paragraph (D) exempts from this rule certain members who are not engaged in private practice. Paragraph (D), however, is not intended to exempt outside counsel for a private,

public, or government organization or counsel retained by an insurer to represent the insured.[13]

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[13] The term "entity" should be changed to "organization" to conform to the current California Rules of Professional Conduct . See Rules 1-600 and 3-600.

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June 21, 2006

James Towery, Esq.
Hoge Fenton Jones & Appel
60 S. Market Street
San Jose, CA 95113-2393

James Towery, Esq.
State Bar of California
180 Howard Street
San Francisco, CA 94105

Re: Mandatory Legal Malpractice Insurance

Dear Jim:

I have been reading the articles about mandatory legal malpractice insurance. I believe in the late '70s I was appointed by the Governor (Deukmejian) to be chairman of a task force to study this issue. We studied it and recommended that legal malpractice coverage be mandatory for all attorneys in California. The same protests were made then as now.

One would think that 30 years later, we would not be revisiting this issue (I guess the statute that resulted from our study must have had a sunset provision in it). One would think that as far as ethics standards go, we would get better, and this issue would no longer be controversial and would have been mandatory for a long time.

When weighing claims of "poverty" by lawyers who say they cannot afford the insurance premiums, we must remember that the Bar's primary duty is to the consumer of legal service, not to the lawyers. This is a type of issue that could cause us to be more heavily regulated by the Legislature if we don't do what is right. The doctors have already lost the battle; we don't want to go down that road.

Accordingly, as a past chairman of the task force on mandatory legal malpractice, I strongly recommend that the Bar require this and that it be enacted into a statute with no sunset provision.

Thank you.

Sincerely,

Michael J. Brady

Michael J. Brady

MJB/dm

RC1/406370.1/DM1

Bercovitch, Saul

From: Ojaivalleylaw@aol.com
Sent: Thursday, June 22, 2006 10:11 PM
To: Bercovitch, Saul
Subject: Insurance disclosure

I see nothing wrong with the requirement for disclosure. I have the information in my contract and it is presented to all clients. I would not object to disclosing in the same manner in my profile ... I do not see requiring a method which would create expense and excess paper work.

Eileen Walker
146711

Bercovitch, Saul

From: Maister, Marc [MMaister@irell.com]
Sent: Monday, June 26, 2006 11:50 AM
To: Bercovitch, Saul
Cc: Bark, Brian; Maister, Marc
Subject: Insurance disclosure rule

A couple of suggestions/questions:

1. How does this written disclosure rule apply to an in-house attorney or an attorney that does not have liability insurance with respect to casual encounters for free legal advice (the advice given at a party etc). Although the legal advice is free and the attorney client privilege may attach, is it realistic to require a written disclosure for free advice? Are you essentially forcing every in-house counsel to get a policy for miscellaneous advice they may give outside of their role as in-house counsel? Should there be an exception for free legal advice? What about pro-bono work? Often government and in-house lawyers do this work, and may be covered by the pro-bono agency's insurance. Would the attorney have to fill out a form every time he/she takes on a pro-bono matter?

2. As you may know, professional liability insurance is issued on a claims made basis. Accordingly, an attorney may be covered now but it may be more important that they have coverage in the future. For example, an estate attorney drafts a will and makes a mistake. Twenty years later when the person dies the mistake is discovered. If the attorney does not have coverage at that future time the fact that they had coverage at the time of the mistake will not help the client's estate. Accordingly, the rule may create a somewhat false sense of security.

3. Not all malpractice insurance is the same. An attorney could buy $100,000 of coverage including defense costs, and then take on a $1 million representation. The disclosure or lack thereof therefore becomes meaningless.

4. How does the rule apply to self insured retentions? Large firms may have to pay out millions of dollars before insurance is even triggered? Surely the rule would not require such firms to send a disclosure saying they are not covered by insurance? When in fact they may have programs that cover them for hundreds of millions. I think this issue should be made clear.

5. What about the innocent attorney that does not place the coverage for their firm and does not know that the coverage has lapsed. What if they are told they are covered and they are not? Perhaps through the payment of a claim. Is innocent failure to disclose an exception. Insurance is a confusing topic and I will tell you that people generally do not understand what insurance they have and how it works.

6. What about the attorney who has sporadic coverage? Will the website show the periods they had coverage and when they did not have coverage? What happens if they purchase coverage that goes back in time (prior acts coverage).

7. What if someone simply cannot get coverage at a reasonable price? Can they post a bond or some other type of protection for the client? What if you had coverage and it is exhausted? What about a fronting policy?

In short, while the rule is well intentioned it may have many practical issues that prevent its usefulness. It is one thing to check a box in a bar renewal and another to have a substantial disclosure obligation that could lead to discipline. If the committee stands by its belief that there should be a disclosure if an attorney does not have malpractice insurance, I suggest broadening 3-410 to require disclosure only if the attorney is not covered under any professional liability insurance whatsoever (i.e., add the word "any" in front of professional liability insurance). Also, there should be an incentive for folks to get insurance -- so they are removed off of the current list immediately if they get the coverage.

Just some thoughts.

Marc Maister
Irell & Manella LLP
840 Newport Center Drive
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CA 92660
Phone: 949 760-5283
Fax: 949 760-5200

ccmailg.irell.com made the following annotations

STEPHEN B. BEDRICK
ATTORNEY AT LAW
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OAKLAND, CALIFORNIA 94612

TELEPHONE: (510) 452-1900
FAX: (510) 452-1980
June 27, 2006

Saul Bercovitch, Staff Attorney
State Bar of California
180 Howard Street
San Francisco, CA 94105

Re: State Bar proposal to require attorneys to disclose lack of malpractice insurance

Dear Mr. Bercovitch:

I strongly oppose the State Bar's proposal to require attorneys who do not carry malpractice insurance to disclose that to privately retained clients. It would constitute a major financial burden and penalty on many of us who practice law in a non-corporate context.

Much of my law practice constitutes court-appointed appellate work in both state and federal courts. Any possible malpractice (and there has been none in my 33 years of practice) would be covered through the appointing entities. It would be unfair and constitute a hardship to force me either to pay the full cost of insurance to cover a small part of my practice, or to make such a disclosure in those situations where the occasional private client seeks to retain me.

There are thousands of attorneys in similar circumstances. Please do not penalize us.

Very truly yours,

STEPHEN B. BEDRICK

SBB:ls

Letters to the Editor

The Recorder
June 30, 2006

LAWYERS NEED TO DISCLOSE THEIR INSURANCE COVERAGE

I am a San Francisco attorney and since 1987 my practice has consisted almost exclusively of suing attorneys for malpractice. I read your article in the June 21 Recorder - "Bar Mulls Requisite Insurance Disclosure" - with great interest, since one of the biggest problems in suing attorneys is the lack of insurance.

I understand it can be difficult for solo attorneys or small firms to afford insurance, but I have no sympathy for the argument that they should not have to disclose their lack of insurance coverage. Between the attorney who does not make a lot of money and the unsuspecting client who may be left without a remedy if his lawyer commits malpractice, there is no question that the client's interest should come first.

The proposal is only for attorneys to disclose their insurance coverage; they will not be forced to purchase insurance. Thus, the proposal does not have a direct economic effect on uninsured attorneys. If a client chooses not to hire an attorney because he or she does not have insurance, that only means the client is making a better informed choice. I really do not see how our profession can argue against allowing our clients making better choices.

Mandatory and affordable insurance would be the best solution. I have seen too many cases where clients were left with nothing because their errant attorneys lacked insurance. [James] Towery's proposal to at least disclose to the client the lack of insurance is a good first step.

Paul A. Frassetto
San Francisco

JULIE SULLWOLD HERNANDEZ
Attorney at Law

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June 30, 2006

Saul Bercovitch, Staff Attorney
The State Bar of California
180 Howard Street
San Francisco, CA 94105

Via Fax: (415) 538-2515

RE: State Bar's Proposal to Require Attorneys Without Malpractice Insurance to Disclose That Fact to New, Privately Retained Clients

Dear Mr. Bercovitch:

I am writing to note my displeasure at the Bar's use of our dues to further burden sole practitioners in California.

It is currently estimated that 31,000 of the state's 153,000 active attorneys do not carry malpractice insurance. One of the State Bar's recent surveys showed that 25% of California's lawyers earn less than $50,000 a year and 49% earn less than $100,000. Sole practitioners amount to 40% of California's lawyers. Obviously, not all lawyers are in a position to shell out the minimum $4,000 to $7,000 per year cost of malpractice insurance to avoid the harsh impact such a rule cause to uncovered attorneys.

I am fortunate in that I can afford malpractice insurance and, being a homeowner, I am exceedingly grateful for that. However, not all of us sole practitioners are so fortunate and the cost of the premiums create an often insurmountable bar to obtaining insurance for many.

I understand that part of the Bar's function is to protect the public from unscrupulous lawyers. However, the Bar does very little, in my view, to help the sole practitioner ... the lawyer that comprises a whopping 40% of the lawyer population in this state. Rather, it consistently supports measures which punish the attorney with the smaller practice while not addressing the underlying problems they face in making ends meet. What about coming up with a means of affordable malpractice insurance for sole practitioners?

Your very truly,

JULIE SULLWOLD HERNANDEZ

Bercovitch, Saul

From: john lenderman [johnlenderman@sbcglobal.net]
Sent: Monday, July 03, 2006 3:38 AM
To: Bercovitch, Saul
Subject: Insurance disclosures

I already disclose the fact that I do not carry mal insurance in my retainer agreement. I have done this for years without any complaints by the clients.

The cost of insurance is excessive and leads to higher fees that are ultimately charged to the clients. Further, examine the policies available - it is not really insurance with the high deductables.

My gripe is that if my name or account appears on some data base OR on member information with public access I will get solicitations for insurance.

Government attorneys are exempt and this is just another feel good measure. In the long term the public will pay more and frankly my clients have trouble paying my fees as they are.

I don't even bid on agency contracts that request insurance. They pay $75 an hour, require insurance and my overhead is more than that.

Any report should examine who is pushing the issue politically and I would speculate it is the insurance industry or attorneys who sue other attorneys.

The persons with the problem are not going to have insurance, those attorneys take large cash retainers and run off with the money and do nothing. Let the bar take their license and do not pass additonal costs to us.

Law Offices of
SCHNECK & SCHNECK

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Patents and Trademarks

July 6, 2006

Board of Governors
State Bar of California
Attn: Mr. Saul Bercovitch
180 Howard Street
San Francisco, California 94105

Re: Comment on Proposed Amendment
to Rule 950.5 and 950.6 of Rules of Court
and Rule 3-410 of California Rules of
Professional Conduct

Dear Members of the Board:

The above-identified proposals exhibit a misapprehension that California consumers would benefit from disclosure of lack of malpractice insurance by uninsured California attorneys. It seems to us that California consumers would receive a much greater benefit by knowing which attorneys are being sued for malpractice and the disposition of malpractice cases. In instances where a claim is made and a settlement was reached, the claim and the amount of the settlement should be disclosed. In the case of a court action, the name of the court and file number, as well as the disposition of the case should be disclosed. A State Bar web page could handle all of this information based upon certifications by State Bar members. Since insurance companies demand disclosures of claims history as a measure of risk analysis, why shouldn't the public have the same risk information to make its own analysis? Consumer information is more valuable than insurance.

Ploys to encourage mandatory malpractice insurance have long been favored by large firms in order to distribute their high overhead to other members of the Bar who do not have such

overhead but compete with them. Malpractice insurance increases the overhead of an attorney from $5,000 to $20,000 per year for coverage that has deductibles on the low end of coverage and a cap at the high end. The public benefit is questionable in view of the costs. This overhead raises the cost of legal services to consumers served by small firms and solo practitioners. Enforcing compliance with insurance disclosure rules will divert the State Bar's efforts to discipline a willful misconduct, already stretched thin.

We are in favor of protecting California citizens from members of the legal profession who engage in malpractice. However, focus should be put on ethics and independence of law firms, as well as publication of past histories of claims, not disclosure of non-meaningful information. For example, it is most likely that the California lawyers that advised California corporations that crafted and/or failed to review back-dated stock option plans of California corporations, now the subject of SEC investigation, were large firm lawyers. Why should small firms and solo practitioners be obligated to disclose lack of insurance coverage unless all firms and attorneys disclose their malpractice claims? A complete information picture is the best resource for protecting California consumers.

Very truly yours,

Thomas Schneck

TS:mpg

cc: Jim Towery, Esq.

Bercovitch, Saul

From: McCarthy, Nancy
Sent: Monday, July 17, 2006 9:44 AM
To: Bercovitch, Saul
Subject: FW: MALPRACTICE INSURANCE DISCLOSURE

fyi

-----Original Message-----
From: CBJ
Sent: Tuesday, July 11, 2006 11:48 AM
To: McCarthy, Nancy
Subject: FW: MALPRACTICE INSURANCE DISCLOSURE

-----Original Message-----
From: Abdulaziz, Grossbart & Rudman [mailto:info@agrlaw.net]
Sent: Friday, July 07, 2006 12:27 PM
To: CBJ
Subject: MALPRACTICE INSURANCE DISCLOSURE

July 7, 2006
SENT VIA EMAIL

cbj@calbar.ca.gov

State Bar of California
1149 South Hill Street
Los Angeles, CA 90015

RE: MALPRACTICE INSURANCE DISCLOSURE

Gentlepersons:

I am an attorney in Los Angeles and have practiced law for more than thirty years in the Los Angeles area. I note in your most recent California Bar Journal that recommendations proposed by a Task Force were sent out for public comment last month. Somehow, I was not aware of those recommendations and the solicitation of comments. I am now providing comments and hope that you will send it to the appropriate group.

I oppose the proposals. We are a small law firm of four attorneys. We carry malpractice insurance. Our position is now, and was a few years ago when this matter reared its ugly head, to oppose this idea in that it would invite more lawsuits than appropriate. Many attorneys will not file suit against another attorney who has no malpractice insurance feeling that it would not be profitable. The uninsured attorney would not be a good target for litigation. I believe that this would stir up more litigation and not benefit anyone.

Respectfully submitted,
ABDULAZIZ, GROSSBART & RUDMAN

SAM K. ABDULAZIZ
SKA:ccq

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Emphasizing Construction Law

Page & Page
Attorneys at Law
Edgar Eugene Page, Esq. 231147 Kathleen C. Page, Esq. 233040

July 8, 2006

Saul Bercovitch, Staff Attorney
The State Bar of California
180 Howard Street
San Francisco, California 94105

Re: Proposed New Insurance Disclosure Rules

Dear Mr. Bercovitch:

I am in favor of the proposed new insurance disclosure rules. As a small firm (only two attorneys) practitioner, I have carried malpractice insurance since I became an attorney.

Many uninsured attorneys claim that it is too costly to carry insurance. However, the more attorneys there are in the system the more attorneys there are to spread the costs among.

Moreover, I believe that every client should be informed that the attorney has no malpractice coverage.

Therefore, I believe that the proposed new insurance disclosure rules should be enacted.

Yours truly,

Kathleen C. Page

Kathleen C. Page
State Bar No. 233040

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Public Protection Project (3P)
PO Box 1780 N. Highlands, CA 95660

Embedded in the rule of law are rouge

July 10, 2006

Saul Bercovitch, Staff Attorney
The State Bar of California
180 Howard St.
San Francisco, CA 94105-1639

Subject: Proposed New Insurance Disclosure Rules

Dear State Bar Board of Governors:

Thank you for the opportunity to be heard and your time to read this comment.

Giving the public constructive notice via Internet and actual notice via letter from attorney to client is caveat emptor, reinforcement, and long overdue. Retaining counsel is a risk, sometimes a high risk. Without initial and continual disclosure, risk can't be measured or managed.

The public is at risk or has a grave disadvantage in the attorney-client relationship. For example, criminal defendants who are dissatisfied with his or her attorney's legal services have to prove factual innocence in case of a dismissal or "not guilty" verdict, or obtain post-conviction relief to have a claim. They can only file a claim for unethical or fraudulent billing practices without actual innocence. *Bird, Marella, Boxer, & Wolpert v Superior Court* (2003) 106 Cal.App.4th 419, 427. In civil matters, dissatisfied clients (including criminal defendants who met the innocent requirement) have to prove a case within a case and find a competent attorney who is willing to take the case. The tragedy is overcoming those obstacles and barriers only to learn that the attorney who harmed them has no malpractice insurance or assets.

Is there a minimum amount of insurance that will be required? Once the disclosure requirement is in effect, an uninsured market is segmented. An insurance company or a scam artist can target the market with policies with limits of $5,000 or $10,000. Such a policy may allow attorneys to say that they have coverage when in fact they don't.

Disclosure is a deterrent to unprofessional conduct and a commitment to public protection.

Sincerely,

Fred Gipson

Fred Gipson

Bercovitch, Saul

From: Jonathan Stein [jonathan@jonathangstein.com]
Sent: Monday, July 10, 2006 8:00 AM
To: Bercovitch, Saul
Subject: State Bar Proposal Re: Disclosure of Malpractice Insurance

Dear Mr. Bercovitch:

I believe that the proposal to require disclosure of the insurance status of attorneys is a good proposal that should be fully supported by our members.

The State Bar's proposal should be welcomed by our membership as a public protection issue. Clients have a right, and a need, to know about their attorney's malpractice insurance status. By making this information available, the client has better information to make an informed decision in choosing an attorney. While a client still may not be fully protected, at least the client will know if the attorney has taken reasonable steps to provide some level of protection for the client's benefit. By providing this information, a client has the ability to make a more informed decision. While it may not be a perfect decision, at the least, it provides the client with one more piece of information that can help the client. Clients may make decisions based on this information and this proposal allows clients to obtain more information to make decisions at almost no cost.

I know there is a concern about the availability and cost of insurance for sole practitioners. However, that concern is unfounded. Currently, affordable malpractice insurance for solos is available through several insurance companies, including Lawyers Mutual. Further, if solos are concerned about the cost of insurance, there are a variety of options available including insurance pools, buying groups and other risk management techniques. Finally, there is nothing in the bill that requires insurance be purchased. There is no increased cost to an attorney who does not want to purchase malpractice insurance.

I understand that some people are also concerned about giving clients a false sense of security since some attorneys may be underinsured. While underinsurance is an issue, it is also an issue with driving. Some estimate that 50% of all California drivers are uninsured, and of those with insurance, an alarmingly high percentage have minimum limits policies that do not adequately protect people who may be injured. However, most of us still drive, even though we know there are people out there who are underinsured. Clients would probably be happier to be able to recover something, instead of nothing.

I think this is a measure that is overdue. Clients are entitled to know the malpractice insurance status of their attorney, or potential attorney. This information, provided free to the client, just allows the client to make a more fully informed decision and that is something that we should all encourage.

Sincerely,

Jonathan G Stein

Jonathan Stein
Law Offices of Jonathan G Stein
5050 Laguna Blvd, Suite 112-325
Elk Grove, CA 95758
916 247 6868
mailto:jonathan@jonathangstein.com
www.jonathangstein.com
Read "The Practice", at:
www.thepracticeblog.com

Bercovitch, Saul

From: Anju Multani [multanilaw@yahoo.com]
Sent: Monday, July 10, 2006 11:43 AM
To: Bercovitch, Saul
Subject: Comment on malprac ins

I would like to have my vote against mandatory disclosure re malprac insurance registered.
Anju Multani

Anju Multani
Law Offices of Anju Multani
8333 Iowa Street, Suite 201
Downey, California 90241
Telephone: (562) 923-0777; Facsimile: (562) 923-3151
Email: Multanilaw@yahoo.com

Bercovitch, Saul

From: chriscallahan [chriscallahan@astound.net]
Sent: Monday, July 10, 2006 5:44 PM
To: Bercovitch, Saul
Subject: mandatory malpractice insurance

I am opposed to mandatory malpractice insurance unless the State Bar offers a low cost and affordable premium as a benefit to its members. Low cost would mean no more than 60% of the market rate.

Christine Calla

Bercovitch, Saul

From: Feedback
Sent: Tuesday, July 11, 2006 3:42 PM
To: Bercovitch, Saul
Subject: FW: malpractice insurance

-----Original Message-----
From: Frank Hoffman [mailto:f.hoffman.esquire@gmail.com]
Sent: Tuesday, July 11, 2006 1:57 PM
To: Feedback
Subject: malpractice insurance

The bar's apparent opinion is that having such insurance is an inherent good. It therefore intends to, entirely at the expense of members, encourage the profits of these private corporations. In my view, this analysis is one-sided and incomplete.

Does the bar give any thought to the amount of insurance fraud committed by insurers?
So much of the conversation about fraud involves claimant fraud, and hardly any involves insurer fraud. As someone who has practiced law for more than two decades, I state bluntly that insurer fraud DWARFS claimant fraud.

Has the bar ever considered whether or not organized crime has infiltrated the insurance industry? Why not?
It seems to me that adopting an official position in favor of insurer profits, and subsidizing such with members' funds, requires the bar to investigate these insurers. Taking the position that insurers are inherently responsible is contrary to the evidence. While I realize that many in state bar employment see insurance as a career path, it would be immoral to allow this to influence this decision.

It does society no good to strongarm members, with their own money, to contribute to entities they profoundly disagree with. The insurance industry today is analogous to the trusts under Teddy Roosevelt. They cause far more social harm than good. They are in need of dedicated action by visionary leaders. America, California and our citizens do not benefit by further subsidies of these systemically flawed industries.

Bercovitch, Saul

From: A. Grant Macomber [macnmac@inreach.com]
Sent: Wednesday, July 12, 2006 6:26 AM
To: Bercovitch, Saul
Subject: Insurance disclosure

I presently disclose to new clients, in writing, the fact that I do not have E&O insurance. To make an issue of it might make clients uncomfortable with me, and I do not like the idea.
I gross between $15,000 and $16,000 a year, practicing law as much as my physical ability permits. Insurance would take away half my gross. Social Security, my practice, and my wife's $10,000 a year all all we have to live on.
The lawyer in the local legal aid office told me that 75% of the lawyers in our area do not have insurance. Stigmatizing them would be most unkind.
A. Grant Macomber
P. O. Box 248
Applegate, CA 95703
530-878-1733
SB#37202

Bercovitch, Saul

From: Samuel M. Huestis [email@huestislaw.com]
Sent: Wednesday, July 12, 2006 7:17 PM
To: Bercovitch, Saul
Subject: Comment on Proposed New Insurance Disclosure Rules

Saul Bercovitch, Esq.
Staff Attorney
The State Bar of California
180 Howard Street
San Francisco, CA 94105
415-538-2306
415-538-2515 Fax

Mr. Bercovitch:

Although the maintenance of professional liability insurance is commendable, professionally responsible, and in the best interest of the public, and although I maintain such insurance myself, I STRONGLY OPPOSE the proposed insurance disclosure rules due to the nature of claims-made insurance policies and the high likelihood of misleading the general public by the proposed disclosures.

The bar knows that the existence of coverage on the date of a disclosure does not assure the existence of coverage when a client makes a claim. Acts or omissions of lawyers are covered under claims-made policies, which are the only type available to most lawyers, only if (1) they are included in the definition of covered matters (for example, fraud and other intentional acts are not covered), (2) the acts or omissions occur during a specified time, which may not and usually does not correspond with the policy period, (3) a claim is made by the client during the policy period, and (4) the claim is reported by the lawyer during the policy period or an extended reporting period. The general public does not know or understand that. Most members of the general public can be expected to liken professional liability coverage to auto coverage in which an accident is covered if it happens during the policy period. Thus, most members of the general public can be expected to misinterpret and be misled by insurance disclosures. Some may actually be harmed by reliance on such disclosures.

Including within the disclosures a description of how claims-made coverage operates may mitigate misinterpretation of insurance disclosures and resulting harm, but claims-made coverage is so complex that I doubt it can be explained adequately in any disclosure that will be readily understood by the general public.

Therefore, although the goal of insurance disclosure rules is laudable, more harm than good may be done by the rules.

I urge the bar not to adopt the proposed rules but, instead, to use its resources to weed out lawyers and others, including so-called independent paralegal services, document services, and trust mills, that consistently practice below the standard.

Repectfully,

Samuel M. Huestis
LAW OFFICES OF SAMUEL M. HUESTIS

5500 Telegraph Road, Suite 261
Ventura, California 93003
(805) 642-3559
(805) 642-3529 Fax
email@huestislaw.com

Bercovitch, Saul

From: Donald Graham [dgraham@1stcounsel.com]
Sent: Thursday, July 13, 2006 12:29 PM
To: Bercovitch, Saul
Subject: Insurance Disclosure

Mr. Bercovitch,

Your name was listed in the California Bar Journal as a contact for the proposed new rule regarding insurance disclosure. I am submitting the following comments for consideration. First a complaint, then a suggestion.

I am a corporate counsel with a part-time private practice for which I have malpractice insurance so I am not particularly concerned personally about the disclosure rule. However, as a member of the profession I cannot see the benefit of this rule. Most states and most professions do not have anything like the insurance disclosure rule. Doctors, accountants, dentists, and even veterinarians are not required to make such disclosures. Generally, in personal injury litigation the existence of a defendants insurance is an important consideration in whether to sue and in subsequent litigation tactics. Is this rule supposed to provide free discovery for potential litigants? Is it backed by the insurance industry and plaintiff attorneys? Are we considering this only because a few other states have implemented something like it? Poor uninformed clients will not access the Internet to research their attorney's status and current community custom in dealing with any professional does not lead many clients to inquire about insurance, regardless of the profession, prior to obtaining services. In addition, isn't the next logical step in this approach to client protection a requirement to explain how much insurance there is and on what basis should it be considered adequate? Do we need to develop "informed consent" forms to confirm that clients have knowingly assumed the risk of engaging services with California attorneys? Where will disclosure and discussion end? So what are we doing here? Is malpractice so prevalent that it is likely that any attorney service should come with a warning label similar to those on cigarettes?

Do we really have a problem with our efforts to protect clients? California lawyers already must pass one of the most difficult bar exams in the country, adhere to a code of conduct, take continuing education classes, pay dues that support attorney discipline and, in part, fund a client/victim reimbursement program. If the true reason for this rule is to improve awareness and protection of clients (which I doubt), then here are a few of ideas that you might consider as an alternative:

1. Conduct a public awareness program that helps clients select attorneys and suggests that insurance might be one of the questions to be asked of potential counsel.

2.. Publish an annual report that specifically describes the aggregate amount of money that lawyers pay out of pocket for client protection including attorney discipline, CLE, client protection fund, and if the insurance rule passes, include the full cost of malpractice insurance imposed on all lawyers in California. It might be too much to include the billable hours and dollars lost attending CLE, but that would be informative also.

3. Publish an annual report on how many clients have been "hurt" by lack of insurance. (Does anyone know?)

4. If the insurance rule is approved, list on the Bar's site the average cost of insurance for the typical lawyer, or perhaps list the average cost by type of practice, so that clients can appreciate what lawyers are in fact doing to protect the public.

I find it a shame that we have reached a stage where our association has so little confidence in its members that it demands that we "insure or warn". Does this help the profession look competent and reliable?

Thanks for your time.

Cordially,

Donald H. Graham
SBN 131906

Bercovitch, Saul

From: M. Brent Pickelsimer, Esq. [brent@pickelsimer.com]
Sent: Thursday, July 13, 2006 1:44 PM
To: Bercovitch, Saul
Subject: Comment re Insurance Disclosure

Dear Mr. Bercovitch,
With the vast areas of practice that members engage in, the rule regarding direct disclosure of non-insurance in writing in all written retainer agreements for matters in which the fee is over $1,000.00 is a good one. It was well thought out and should NOT be changed. For members who offer low-cost legal services it is important that they are able to keep overhead down as they compete with the ever-growing un-licensed, unregulated, non-attorney "document preparation" services. These type of services are not among those that generate malpractice claims and the public is better served by a licensed attorney providing these services than a non-attorney. This would unfairly stigmatize the "little guy" practitioners who do not spend the money on the insurance and pass the savings on to the clients. The idea of the State Bar publishing a list of uninsured attorneys sounds like an idea that was generated by the insurance industry. This type of "black list" would essential force all attorneys to obtain malpractice insurance, even those who practice in areas with low risks of claims. As it is now, members can evaluate the cost of the premiums vs. the value of the coverage and if the insurance industry is gouging them they can elect to self insure. If those that are self-insured are "black-listed" the insurance industry can gouge away! It would also create a whole new flood of un-wanted junk mail from the insurance industry.
If there was a real need for a change, which I do not believe that there is, ONLY those members who have a record of discipline should be subject to stricter no-insurance disclosure rules because they have demonstrated a propensity for erring.
Thanks for listening,
M. Brent Pickelsimer, Esq.
PICKELSIMER LAW OFFICES
Telephone & Fax (213) 401-1100

Bercovitch, Saul

From: Frank Maul [FrankM@smbblaw.com]
Sent: Thursday, July 13, 2006 3:02 PM
To: Bercovitch, Saul
Cc: phokokian@co.fresno.ca.us
Subject: Comment on Proposed Insurance Disclosure Rule

Dear Mr. Bercovitch,

Assuming that an email is a sufficient "written comment" on the proposed E & O insurance disclosure rule, please accept the following:

I oppose the proposal. I am unaware of any other profession which obligates its members to publicly disclose that they do or do not carry E & O coverage. While I am fortunate enough to belong to a successful firm which can afford E & O coverage, I recognize the burden that the purchase of such coverage can place on many of the attorneys in my community. My firm is what would typically be called an "insurance defense firm" and we regularly come into contact with sole practitioners who typically do a fine job on the cases we handle with them but who, in some instances I know of, can not afford to purchase increasingly-expensive E & O coverage. Having a rule that requires that they disclose that fact to their prospective clients and have a signature on a document confirming the disclosure would be highly embarrassing. Having their names listed on an Internet web site for one and all to peruse would further embarrass Bar members. Even the Puritans only required that the Scarlet Letter to be worn, not publicly posted in the Town Square.

The proposal also provides little protection to the public for smaller claims (below the amount of the high deductibles that attorneys are frequently getting to lower their premiums) or for bigger claims exceeding the smaller coverage limits that attorneys would get to keep premiums down.

I am currently reading an excellent book about Abraham Lincoln called *Team of Rivals*. (Which I commend to you.) The author notes that when Honest Abe moved to a city to practice law he had so little money that he went to a hardware store owner to ask how much it would cost him to buy the materials to make a bed to sleep in out-of-doors. When told the amount, he did not even have the money for that and asked for credit. (The owner, impressed by Abe, actually let him sleep in his home for several years.) I suspect that he would not have had the money to buy E & O coverage were it then available and I hear he nonetheless did pretty well for himself.

Thank you.

Frank David Maul (SBN: 66737)
STAMMER, McKNIGHT, BARNUM & BAILEY
2540 W. Shaw Lane, Suite 110
Fresno, CA 93711

Bercovitch, Saul

From: Paul Miller [paulmilleresq@yahoo.com]
Sent: Monday, July 17, 2006 11:34 AM
To: Bercovitch, Saul
Subject: Proposed New Insurance Disclosure Rules

Dear Mr. Bercovitch:

I am troubled by the new proposal regarding the disclosure of a lack of insurance by attorneys. I believe no public policy interest is served by disclosing that an attorney is not insured. In fact, I believe if this proposal is adopted, uninsured attorneys will be more likely to be targeted by unscrupulous clients who raise flimsy claims of malpractice just for the purpose of forcing an uninsured attorney (who may not be at fault) to settle.

Additionally, I believe this proposal unfairly targets new attorneys who are solo practitioners with a small client base, part time attorneys, and attorneys who practice in fields unrelated to law but enjoy the distinction of being a lawyer, as they are the ones most likely to be uninsured because their client base may be inadequate for them to afford malpractice insurance.

Finally, this proposal has the trademarks of legislation that appears to have been authored by the insurance industry alone, and the State Bar is blindly accepting it, regardless of whether it is for the good of its members or not.

Therefore, in conclusion, I would encourage the State Bar to not adopt this proposal. Thank you for your time. Finally, I do not wish to have my comments published in the California Bar Journal.

Paul Miller, Esq.

TO: Saul Bercovitch
Re: comment concerning proposed insurance disclosure rules
Date: 7-20-06
by fax to (415) 538-2515

Dear Mr. Bercovitch:

I am expressing disapproval of and dissent with the two proposed insurance disclosure rules. This perennial issue has a well funded and ever ready support which has always made me believe the issue is kept alive by the insurance industry. Who else stands to benefit financially?

Like many sole practitioners in similar circumstances, I do inform my clients that I do not carry malpractice insurance. If I need a written agreement with a client, the disclosure is also in the writing. I tell them straight out that I keep my fees very low because I do not have to pay for malpractice insurance. I've never had a client leave because I didn't have malpractice/ professional liability insurance. I don't mind telling prospective clients in advance of any work, but I don't feel it should be compelled. I have never been sued by or even threatened to be sued by a client in all of my years of practice. Don't punish me for the wrongs of a few attorneys.

These two proposed rules are very troubling, especially the second. I'm tired of justice only for the rich. Do you have any idea how expensive justice is? Now, the rich are trying to squeeze even harder. There's really no excuse for trying to publicly embarrass or condemn licensed attorneys in good standing for simply refusing to have malpractice insurance coverage. What next, a yellow star on our left shoulders? Are those of us willing to represent the poor, not comfortably working for corporations, law schools, government agencies, law firms, etc., supposed to be singled out in this despicable manner? Please, say "No" to these insurance-directed proposals.

Thank you,

Susanlea

Susan Lea (Bar #83605)
P.O. Box 4995, Buena Vista, Co 81211

Bercovitch, Saul

From: Bunniess@aol.com
Sent: Saturday, July 22, 2006 8:24 PM
To: Bercovitch, Saul
Subject: Ins Disclosure

I don't mind having to tell clients if I don't carry ins but to have you put it on the internet is beyond acceptable.

Until this year I did not have it due to cost but I always told my clients. I never worried as I work closely with my clients.

I only obtained it due to the change in the bankruptcy laws and felt I could make a mistake, and as I do social securiuty disability cases, to be on the two main organizations' web pages, one must have it.

But I am not sure if it is worth the cost even now.

So to say you are going to publish my name on the web is very upsetting. If you spent your time and resources getting the cost down and weeding out the bad attorneys it would be time and money better spent1

Patricia Johnson
122570

Bercovitch, Saul

From: McCarthy, Nancy
Sent: Monday, July 24, 2006 9:39 AM
To: Bercovitch, Saul
Subject: FW: Proposed Malpractice Insurance Rule

FYI

-----Original Message-----
From: CBJ
Sent: Monday, July 24, 2006 8:55 AM
To: McCarthy, Nancy
Subject: FW: Proposed Malpractice Insurance Rule

-----Original Message-----
From: Philip Tutt [mailto:tutt.roberts@sbcglobal.net]
Sent: Sunday, July 23, 2006 4:01 PM
To: CBJ
Subject: Proposed Malpractice Insurance Rule

The proposed requirement that attorneys who do not carry malpractice insurance must notify their clients of the same (as if this would, somehow, advance public protection) is both patently unfair to small practitioners, and absurd. In addition to calling to mind the old law that a leper sound a bell and shout "unclean", the would-be rule is nothing less than an open invitation to a dissatisfied client to cut losses by suing the non-insured attorney in the hope of a quick cash settlement. The only people who stand to benefit from this rule are insurance underwriters.

Like most attorneys, I read the Bar Journal discipline section regularly. It is hard to believe how tolerant our overpriced displine system is. If the state bar was really interested in protecting consumers, it would push for rule changes making disbarment both permanent and frequent.

Philip Tutt
San Francisco

Janet L. Dobrovolny
Attorney-at-Law

2000 Powell Street, Suite 1605
Emeryville, California 94608
Telephone 510-653-3878
Fax 510-654-9851

July 31, 2006

Saul Bercovitch
VIA FACSIMILE

Comments regarding proposed rule regarding malpractice insurance

I would request the addition of a self-insurance option. With medical and auto, when a state requires insurance, there are self insurance arrangements that qualify under the law.

The insurance industry is hardly the best protector of the consumer. The practice of insurance defense firms stripping policies until few funds are left to pay the damaged party is common. The insurance company chooses the attorney to represent me and I am sure it won't be the person I would choose to represent me. The company settles to mitigate costs even if they aren't sure who is right or even if they know you are right but it would cost them too much to prove it. The list goes on.

The strategy of the proposed rule gives a huge boon to the insurance industry and punishes those who have had no claims.

By keeping the money I would have spent on premiums over the years in a protected account, I'm able to have the flexibility to defend as I wish and still have money to pay out if someone has been damaged by my negligence. If I never damage anyone, which has been my good fortune for over 28 years, then I still have the money instead of the insurance company having my money to cover their risks. This is greater motivation to continue to provide the best service than thinking a company will pay if I make a mistake.

The proposed rule is little more than a give away to the powerful insurance interests unless an alternative way to comply is provided.

Thank you,

Janet L. Dobrovolny

JANET L. DOBROVOLNY

August 2006

California Bar Journal

Disclosing malpractice coverage

Heavy burden on lawyers that will restrict court access

By Kenneth G. Petrulis

While in principle it sounds good to say that consumers should be informed as to their attorneys' malpractice insurance coverage, in practice the result of the proposed rules will be consumer misinformation, a disproportionate burden on the attorneys who need our help the most and restriction of consumer access to the court system. The proposed disclosure rules assume that malpractice insurance is something you have or you don't. This is often not the case. The rules will put a disproportionate, perhaps impossible, burden on new and part-time attorneys. As a result, the provision of legal services to the poor and near poor in our state who are already severely under-serviced will be further inhibited.

Malpractice insurance is not like other types of insurance. Stating you have insurance or not is often not a yes or no answer. Typical malpractice insurance is a claims-made form of coverage, subject to many vagaries as to the existence and adequacy of coverage.

The proposed rule requires the member to inform all existing clients on the date of effectiveness of the rule if the member is not covered by professional liability insurance. Because the proposed rule is self-reported and not verified, it encourages noncompliance. If no notice is given, the consumer will feel protected even if the consumer's attorney does not have adequate coverage. There is no procedure to confirm coverage, the lack thereof or its inadequacy or lapse. Inadequate insurance and lapse of coverage can occur inadvertently; for example, when changing carriers.

In addition, if the member subsequently ceases to be covered, the member must inform each client in writing within 30 days that the member is no longer covered.

The mechanics of the proposed rule will be a severe shock to lawyers who are currently without coverage. There will be not only the time and cost in notifying clients, but also the backlash when clients, receiving a notification that their attorney is not covered by insurance, decide to seek new counsel. The process becomes more onerous when malpractice is difficult to obtain or is accidentally dropped and additional notices need to go out to the client.

The member must also be concerned about the possibility of a gap in coverage when switching carriers. The failure to notify clients of such a gap, which may not be clear to the practitioner at the time it occurs, may subject the member to suspension, as called for by the rule. It may also give the malpractice plaintiff an unexpected bonus when suing.

We already know that most of the public cannot afford legal services. For this reason they turn to unlicensed legal practitioners. The proposed rule will make it more difficult for solo practitioners to start and maintain their businesses. While it is fine in principle to say that everyone should have an attorney who is covered by malpractice insurance, we need to recognize that this form of disclosure requirement is going to decrease the supply of available practitioners and the affordability of legal services.

The State Bar is currently launching its Pipeline to Diversity program to encourage diverse young people to enter the field of law. The added burden of the proposed disclosure rules on the already difficult road to a successful practice runs counter to the program's inclusionary spirit.

By turning a blind eye to the needs of the poor and middle class poor, by focusing only on the theoretical benefit to be gained by forcing disclosure upon the public and their attorneys, we are ignoring the real problem. California should not implement a malpractice insurance disclosure law unless it is ready to ensure access to affordable insurance to every attorney so that everyone's access to the justice system is protected.

One state, Oregon, has solved the insurance problem by requiring mandatory insurance and then providing affordable insurance for even the small practitioner. The importance

of existing affordable insurance cannot be overemphasized. We have been through too many malpractice crises in this state to know that there will be occasions when not all competent, qualified practitioners will be continuously covered, even if they want to be.

The proposed disclosure rules are targeted at the economically disadvantaged and the attorneys who serve them. In contrast, firms, which typically service the more affluent and almost inevitably have insurance, will not have to state so. The proposed rules also exempt government lawyers, in-house counsel and counsel retained by an insurer to represent an insured. We already have a growing problem in providing affordable legal services to the entire population. Government is already denying access by restricting contingent fee agreements and taxing the attorneys' fees portion of many contingent fee recoveries.

The current disclosure rules would make it difficult or impossible for attorneys without malpractice insurance to continue to practice and still observe the rules. We should instead be fostering the financial viability of new attorneys, especially the solo and diverse practitioners who are most likely to serve the most underserved part of our population.

• *Kenneth G. Petrulis is a principal with Goodson Wachtel and Petrulis, a tax and estate planning law firm in Los Angeles. He is a past president of the Beverly Hills Bar Association and a member of the board of directors of the Conference of Delegates of California Bar Associations.*

Bercovitch, Saul

From: Shiva S. Delrahim [sdelrahim@pwkllp.com]
Sent: Tuesday, August 01, 2006 2:22 PM
To: Bercovitch, Saul
Subject: RE: FW: malpractice insurance disclosure

Thank you so much for contacting me regarding this issue. Below, you will find my comment that may be disclosed.

In 2005, I approached the State Bar of California to express my concern that attorneys in California were not required to dislcose to their clients the fact that they did not carry liability insurance. As professionals who must uphold the highest of fiduciary duties to our clients, we should be required to make these pertinent disclosures to clients who look to us for honesty and integrity in dealing with their matters personally. It is imperative that clients be made aware of an attorney's lack of liability insurance--whether the client wishes to continue to be represented by the attorney is then the client's choice. As the state with the largest number of attorneys, we should have been at the forefront of this issue, but we will be following the lead of numerous states that have already insituted this initiative. To reduce costs associated with this, the information can be an additional item to be dealt with in the annual bar fees statement. Penalties associated with lack of disclosure should be similar to that of commingling funds as the integrity of the profession is compromised at the client's expense. Whether an active attorney has liabilty insurance should be disclosed on the attorney search feature to avoid those frivolous litigators who may be out to look for attorneys with insurance for the sole purpose of suing them.

If you have any further questions, please do not hesitate to contact me. Thanks again for this opportunity.

----- Original Message -----
From: "Bercovitch, Saul"
To:
Sent: 8/01/2006 2:04PM
Subject: FW: malpractice insurance disclosure

Ms. Delrahim -

As discussed, I am forwarding your e-mail from 2005 relating to insurance disclosure.

The proposed new insurance disclosure rules are now on the State Bar's public comment page at http://calbar.ca.gov/state/calbar/calbar_generic.jsp?cid=10145&n=79567

The page has instructions for submitting comments, and includes links to the *Insurance Disclosure Task Force - Report and Recommendations* and the proposed new rules. The comment deadline is September 15, 2006.

Saul Bercovitch

Saul Bercovitch
Staff Attorney
The State Bar of California
180 Howard Street
San Francisco, CA 94105-1639
Telephone: (415) 538-2306
Fax: (415) 538-2515
E-mail: saul.bercovitch@calbar.ca.gov

-----Original Message-----
From: Shiva Delrahim [mailto:delrahim2003@lawnet.ucla.edu]
Sent: Friday, June 24, 2005 2:08 PM
To: Curtis, Diane
Subject: malpractice insurance disclosure

I think that it is essential that California join ranks with other states that require disclosure to their clients. Having become a member of the Bar only two years ago, I was appalled to find out that CA has no such requirement and the only people at risk are the clients. It may be a good idea not to require insurance, but disclosure ought to be a requirement.

Sincerely,

Shiva Delrahim (SBN # 228841)

Law Offices of Frank Hoffman & Associates
2225 West Commonwealth Avenue Suite# 111
Alhambra, California 91803
Tel: (626) 282-3330 Fax: (626) 282-1927

August 3, 2006

Saul Bercovitch, Staff Attorney
The State Bar of California
180 Howard Street

By facsimile: 415-538-2515

RE: Insurance Disclosure

Mr. Bercovitch:

I protest any entanglement with the insurance industry.

This industry has far too many subsidies and preferences under law. That the organization I pay dues to would add to those preferences is, in my view, indicative of systemic issues within the bar.

I looked at the Report. There was insufficient discussion of insurer fraud against claimants. With the study commission being made up mostly of representatives of large firms, this is perhaps no surprise. How many of these members do insurance defense work?

How long must claimants of every category be accused of insurance fraud merely for making a claim? How long will insurers get away with paying pennies on the dollar for claims? How many family homes destroyed by fire or natural disaster not be built because insurance companies don't want to pay? How many people will suffer in fear and pain because their HMO or health insurer denies them established medical treatments? I am absolutely fed up with this notion that insurance companies are inherently virtuous. They are not.

After 23 years in this practice, I state bluntly that insurer fraud against claimants dwarfs any claimed fraud against insurers. It is only because of the entanglement of said industry with law enforcement and with other agencies is this crime not pursued. One specific area of outrageous entanglement is the notorious "revolving door" employment situation as between agencies and insurers. I am deeply concerned that the bar is following this example. How many former bar employees now work for the insurance industry? I am sure the answer to that question would be revealing.

The insurance industry has grown fat on preferences and subsidies. In this county, I find no record at all of the Los Angeles District Attorney (it has a police department within it) having ever even investigated an instance of insur*er* fraud. Now, a police officer pulls over a motorist and checks his auto insurance card. This is entirely at taxpayer expense. If a citation issues, the court clerks, bailiffs and judges are provided entirely at taxpayer expense. Insurers are not asked to pay for these outrageously expensive subsidies. In essence, we are using the state's police power to promote the profits of private businesses. No other industry receives this level of subsidy. The subsidies/entanglements proposed by the bar are more of the same.

Question; Will the bar investigate and rate the business integrity of the E & O carriers? Of course not. Their inherent virtue is assumed. In the same breath, the members not carrying this suspect coverage will be branded as somehow inept or unprepared.

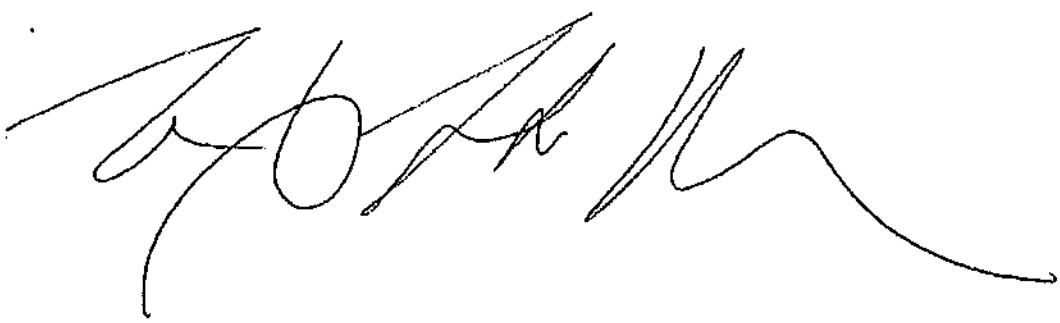
I have had a very few instances of possible liability in my 23 years of practice. In two instances I paid them myself. The massive amounts now demanded by E & O carriers means that I saved a fortune doing business this way.

Mr. Bercovitch, new rules should not be promulgated because they sound good. Nor should they be proposed because you wrongly believe insurance is an inherent good. Likewise, they should not be promulgated because the agency wants to create more work for itself. Further there should be a real problem that cannot be dealt with a better way.

The membership should vote on this. Had I not stumbled across this, I would never even have known that a committee of unknowns was appointed and was making recommendations about this.

I cannot state it more bluntly - **No entanglements and no insurance subsidies. I question every single part of the process that gave birth to this. Using my fees to promote insurer profits violates my First Amendment rights. I say "NO" and state that, if the membership were to be informed of the issues, they would repudiate this proposal soundly.**

FRANCIS X "FRANK" HOFFMAN



Bercovitch, Saul

From: Matthew C. Mickelson [mattmickelson@bizla.rr.com]
Sent: Thursday, August 03, 2006 1:27 PM
To: Bercovitch, Saul
Subject: Comment on Proposed Insurance Disclosure Rules

Saul Bercovitch
California State Bar
180 Howard Street
San Francisco, CA 95105-1639

August 3, 2006

Re: Proposed Insurance Disclosure Rules

Dear Mr. Bercovitch:

I am writing in opposition to the proposed rule requiring disclosure of an attorney's lack of insurance to the Bar and to clients.

The proposal is simply unfair to smaller practitioners who do not have the means to afford malpractice insurance. A forced reporting requirements would act like a "mark of cain" to current and prospective clients, making it appear to clients that a lack of malpractice insurance in some way diminishes a lawyer's professional worth. The fact is that it is not morally or professionally wrong to simply decide not to pay for such insurance. This is especially so where a lawyer is practicing in a field where malpractice claims are unlikely or, even if filed, will lead to small damages.

Of course, for many small practitioners, malpractice insurance is not really an option. The costs of such insurance eat into revenues so greatly that marginal profits, already small, often disappear. This proposal will lead many smaller lawyers to drop out of the profession; good news for those firms at the top, I suppose, but bad for regular people who cannot afford the outrageous fees charged by the larger firms.

The proposal would make California an outlier among the states, given that only 17 states have such disclosure requirements, and none of them have such an all-encompassing rule. The trend is against such requirements, especially in this state, which abolished any reporting in 1999. Since that date there has been no indication that clients are clamoring for such information, and if they do, they need merely ask their attorney the question.

The proposal is bad policy and is based on faulty assumptions. It will increase costs for smaller clients -- who this proposal is supposedly designed for -- and will put many small firms and solos out of business. It is not needed or wanted by the profession at large or by the public. I strongly urge that the proposal be rejected.

Sincerely,

Matthew C. Mickelson
Law Offices of Matthew C. Mickelson
16055 Ventura Boulvard, Ste. 1230
Encino, CA 91436
mattmickelson@bizla.rr.com
818-382-3360

Bercovitch, Saul

From: Charles Festo [Charles_Festo@wesandsons.com]
Sent: Friday, August 04, 2006 12:13 PM
To: Bercovitch, Saul
Subject: RE: Proposals re insurance disclosure

Mr. Bercovitch:

Thanks very much for your quick reply and the helpful information. Yes, I'd like you to view my e-mail communications as a "public comment" and, having been in private practice many years ago, would like to voice my personal opposition to the proposal in general. I'm not convinced either requirement would accomplish much other than to create the need for additional bureaucracy to administer the papers.

Thank you,

Charles F. Festo

"Bercovitch, Saul" <Saul.Bercovitch@calbar.ca.gov>

08/04/2006 03:16 PM

To "Charles Festo" <Charles_Festo@wesandsons.com>
cc
Subject RE: Proposals re insurance disclosure

Mr. Festo -

Details on the proposal are available on the State Bar website, at http://calbar.ca.gov/state/calbar/calbar_generic.jsp?cid=10145&n=79567

The page has instructions for submitting comments, and includes links to the Insurance Disclosure Task Force - Report and Recommendationsand the proposed new rules.

The proposed Rule of Court provides, in part: "Each activemember who is employed as a government lawyer or in-house counsel and does not represent clients outside that capacity mustcertify those facts to the State Bar in the manner that the State Bar prescribes. Members who provide this certification are exempt from providing information under subdivision (a)."

The proposed Rule of Professional Conduct provides, in part: "Paragraphs (A), (B) and (C) do not apply to a member who is employed as a government lawyer or in-house counsel and does not represent clients outside that capacity."

I will assume, for now, that your e-mail below is a request for additional information, and not a public

comment on the proposal. If you would like us to consider that e-mail as a public comment on the proposal, or if you would like to submit a separate public comment, please let me know.

Thank you.

Saul Bercovitch
-----Original Message-----
From: Charles Festo [mailto:Charles_Festo@wesandsons.com]
Sent: Friday, August 04, 2006 11:41 AM
To: Bercovitch, Saul
Subject: Proposals re insurance disclosure

Dear Mr. Bercovitch:

The July California Bar Journal which I just received indicates that consideration is under way to require disclosures to clients and the Bar Association about professional liability coverage for attorneys and also lists you as the contact for comments. I've been admitted in CA since 1990 but practice only as in-house counsel (currently in NJ but w/offices in CA) so I hope there is some type of carve out which would not apply these proposals to persons in my situation. I've worked as inside counsel since 1981 and, except for recently, professional liability coverage was not even available for most of that time.

I would oppose any application of these proposals to in-house counsel, assuming they move forward, and would appreciate your passing on any relevant information if possible. Thanks for your attention to this matter.

Very truly yours,

Charles F. Festo
General Counsel
William E. Simon & Sons, LLC
310 South Street, PO Box 1913
Morristown, NJ 07962-1913

Bercovitch, Saul

From: BNewmanLaw@aol.com
Sent: Saturday, August 05, 2006 11:33 AM
To: Bercovitch, Saul
Subject: Insurance Disclosure Draft

I am strongly opposed to these disclosure recommendations because the range of insurance "protection" is so dramatically broad (differing between specific policies and insurers in dollar and subject coverage; in period applicability; in claim procedures; and in a multitude of other provisions and conditions) that the "public" (that constituency which I believe we are trying to protect by these proposals) can, and most probably will, be confused and misled by a process which allows them to perceive that any lawyer not proclaiming his/her ***lack*** of malpractice coverage, is "completely" and "appropriately" covered and therefor so is the client..

I believe that the only acceptable way to craft appropriate protection for all clients is either a) require ***all*** lawyers to carry and maintain a minimum level of approved coverage; and/or b) require that an approved format report of the actual coverage (or lack thereof) be communicated by ***all*** lawyers to ***all*** existing and potential clients.

I truly believe the proposed changes, as currently crafted, will create substantially more harm than the evil they are intended to address.

Barry I. Newman
Attorney at Law
3308 Avenida Sierra
Escondido, CA 92029-7937
(760) 743 - 5005
FAX: (760) 743 - 8224

Bercovitch, Saul

From: Jonas M. Grant, Esq. [jonas@incorporatecalifornia.com]
Sent: Saturday, August 05, 2006 6:58 PM
To: Bercovitch, Saul
Subject: Comment on Proposed New Insurance Disclosure Rules

My comment on the Proposed New Insurance Disclosure Rules is as follows:

Overall, I am against it, as I find it is something clients are NOT interested in - never been asked about it once - but if the new disclosure requirement must go forward, I would suggest that it be modified so that law corporations that maintain security for claims in accordance with the State Bar's rules in this regard be allowed to represent that they are in effect 'covered' or 'self-insured', which is, in my opinion, wholly accurate.

Thank you for your consideration. Best regards,

Jonas M. Grant, Attorney at Law - 190120
Law Office of Jonas M. Grant, P.C.
11738 Moorpark St., Suite J
Studio City, CA 91604-5505
By Appointment Only
818/786-4876 ofc
818/755-0077 fax
jonas@incorporatecalifornia.com

Bercovitch, Saul

From: ddern@dixlaw.com
Sent: Saturday, August 05, 2006 7:27 PM
To: Bercovitch, Saul
Subject: Insurance Disclosure

As a former member of the Board, I would like to add my objection to the proposed insurance disclosure rule. In addition to Ken Petrulis' thoughtful objections on behalf of consumers, I would oppose giving the insurance carriers any leeway at all; as you know the rates in California are high and not entirely rational, and I cannot recall that any study has been done in years as to the ratio of premiums collected to claims paid. I find the carriers arrogant and unyielding it their attempt to charge the most they can. For example although I have had only one claim against me (that never made it past the pleadings) in over 50 years of practice, I am still charged a very high rate because my clients (none of whom are living celebrities) are in "entertainment," When I objected to this type of "red-lining" I was told that "you can go bare--we don't care..." The implication of the disclosure is that if you don't have insurance you are a risk to your clients, and that is an unfair burden to place on attorneys. Additionally, this will be another step to bring failures to give the notice into the discipline system--a big waste of time and money. Dixon Q. Dern

DIXON Q. DERN, P.C.
Office Address:
1801 Avenue of the Stars, Suite 701
Los Angeles, CA 90067
Telephone 310-557-2244
Facsimile 310-275-7655
Mailing Address:
1262 Devon Ave.
Los Angeles CA 90024
ddern@dixlaw.com

Bercovitch, Saul

From: Stuart J. Schwartz [stuart77@charter.net]
Sent: Saturday, August 05, 2006 9:40 PM
To: Bercovitch, Saul
Subject: Insurance Disclosure

Mr. Bercovitch,

I am a sole practitioner of over 25 years membership in the State Bar. While I have managed to maintain professional liability insurance for that entire period, it has not always been easy due to cost and frequently arbitrary and undisclosed underwriting standards. I also know many outstanding sole practitioners who are unable to afford reasonable professional liability insurance whose practices would be adversely affected by the proposed new disclosure rules. Forcing uninsured attorneys to disclose such to their existing and new clients will essentially stigmatize such attorneys as second tier attorneys causing severe financial hardship and perhaps forcing them to accept more risky engagements and clients. Frankly, this proposed rule seems to be another example of the State Bar's perceived favoritism towards the large law firms, plus I just don't see that much benefit to clients having such information isolated from other information indicating the overall quality of the involved attorney. Requiring insurance disclosure without providing the means for all attorneys to be assured of being able to obtain reasonably priced and comprehensive professional liability insurance is unfair and a grave injustice to many highly qualified sole and part time practitioners.

Bottom line is that I am opposed to the insurance disclosure provisions approved by the Board Committee on Regulation, Admissions and Discipline.

By the way, to indicate my dismay over these proposals, I note this is the first time that I have ever provided my views to the State Bar.

Stuart J. Schwartz
(909) 944-1449
(909) 944-8609(fax)
stuart77@charter.net

Bercovitch, Saul

From: DCronin170@aol.com
Sent: Monday, August 07, 2006 5:13 PM
To: Bercovitch, Saul
Cc: jocronin@cts.com
Subject: insurance disclosure

Dear Mr. Bercovitch:

Please add my name to the members of the State Bar who oppose the proposed insurance disclosure rule.

I do not see where the proposed rule is of any benefit to practicing attorneys. The consumer already has considerable benefits available in the form of the security fund, etc.

The State Bar should start acting like a trade organization which represents its members instead of just the opposite.

Thanks.

Dan Cronin 56811

Macomber & Macomber

Please send mail to
P. O. Box 248
Applegate, CA 95703

macnmac@inreach.com

Law Offices
Telephone (530) 823-5038

890 Grass Valley Highway
in the Executive Offices of
Chevreaux Concrete, Inc.
Auburn, California

Forrest E. Macomber
1903-1976
In memoriam

A. Grant Macomber
SB# 37202
Admitted to practice in the
U.S. SUPREME COURT

August 8, 2006

Saul Bercovitch, Staff Attorney
The State Bar of California
180 Howard Street
San Francisco, CA 94105

Re: California Rules of Court, proposed rule 340.6 and
Califonia Rules of Professional Conduct, proposed rule 3-410.

Comments:

The Dogmatic Approach.

The Report and Recommendations of the Insurance Disclosure Task Force shows a committee that rushed to adopt an insurance disclosure requirement. That decision was made at its first meeting (p. 8 of the Report) although the Task Force did not identify any problem. A second meeting was scheduled to review assorted facts and to recommend proposed rules.

At the second meeting three months later, the Task Force had limited information, including data that lawyers in the larger firms in Illinois almost always had insurance, only 7 out of 1,000 of the lawyers in firms of 11 to 25 lawyers not having insurance, while 400 out of 1,000 solo practitioners did not (p. 8 of the Report). However, a reliable source tells me that there is no attorney referral service in my area (Auburn, Placer County) because 70% of the lawyers out of potentially 98 polled in the two-county area did not have malpractice insurance.

The Task Force recommends that the State Bar develop educational material, in consultation with members of the Task Force, "to compliment the proposed insurance disclosure requirements (pp. 4 and 15 of the Report). Apparently a majority of the Task Force is determined to send the message that uninsured lawyers are not competent; the insurance carriers won't touch them; the client will be poorly served by uninsured lawyers and will have no redress.

The Task Force did not consider any data on whether a problem existed.

At this same, second meeting, the proposed rules were adopted as the recommendation of the Task Force. "Ultimately [in this single meeting] the view disfavoring any insurance disclosure requirement did not prevail" (p. 9 of the Report). The Report refers to action by "consensus" rather

than by disclosing votes. "Consensus" suggests solidarity, unanimity, but the text of the Report suggests that dissent was stifled.

The Rational Approach.

The rational approach would have been first to determine if there were a problem. The Task Force never considered this.

The State Bar could require members to disclose law school grades, hearing loss, and vision impairment. This information would be more relevant to selecting a lawyer. On the other hand, making an issue of lack of E&O coverage would suggest that there are serious problems concerning uninsured lawyers, especially when the Task Force gets done with its public education.

Poorly Drafted Rules.

Proposed rule 950.6, subdivision (a), paragraph (2) requires the member attorney to certify "whether the member represents clients." Is this a red herring? I understand it to mean that the member must certify whether he or she represents clients in litigation or administrative proceedings. But what is the purpose? Neither the Report nor the proposed rule tells us what the phrase means or the significance of the phrase. Will the member's answer be posted on the State Bar Web site? That is not disclosed in the Report or in the proposed rules.

Proposed rule 3-410 requires the member attorney to obtain the client's signed and dated acknowledgment of receipt of notice of non-coverage. This would make lack of coverage an issue with the client. Why is it deemed so important to make an issue of lack of coverage? Neither the proposed rules nor the Report tell us.

However, the client's signed and dated acknowledgment would be on par with Rule 3-300, regarding disclosure and documentation of potentially conflicting interests. This would suggest that lack of insurance is as serious a matter. No other rule receives so much emphasis.

The proposed rules, requiring the member attorney to make an issue of lack of coverage, also suggest that the attorney guarantees the desired outcome, that the client will probably be dissatisfied with the outcome, and that the client will wish to sue.

The Sell.

In the *California Bar Journal* for August 2006, Mr. Towery's article in support of the proposed rule (he chaired the Task Force) concludes, "If you were the client, would you want to know if your lawyer were uninsured? Of course you would." We should ask Mr. Towery if he has asked all his health care providers if they have E&O coverage – and his clergy man or woman, investment adviser or investment consultant, insurance broker, and real estate broker. If not, maybe their coverage or lack of it is not that important to him.

Mr. Towery has a conflict of interest. He is paid by the insurance carriers. He should not have been on the Task Force.

The Task Force did sloppy work. It reached a conclusion without identifying a problem, and it proposed rules that look like a rough draft on the back of an envelope. I would fire an associate who did such sloppy work. Wouldn't you?

Sincerely yours,

A. Grant Macomber

Bercovitch, Saul

From: John Cronin [jocronin@cts.com]
Sent: Tuesday, August 08, 2006 10:20 AM
To: Bercovitch, Saul
Subject: insurance disclosure

Dear Mr. Bercovitch:

Please also add my name to the members of the State Bar who oppose the proposed insurance disclosure rule. Such a requirement would only make it more difficult for the sole practitioner to compete with the larger firms.

Thanks.

John Cronin 134903

Bercovitch, Saul

From: McCarthy, Nancy
Sent: Wednesday, August 09, 2006 12:36 PM
To: Bercovitch, Saul
Subject: FW: "Disclosing Malpractice Insurance"

-----Original Message-----
From: CBJ
Sent: Wednesday, August 09, 2006 10:22 AM
To: McCarthy, Nancy
Subject: FW: "Disclosing Malpractice Insurance"

-----Original Message-----
From: Barger, Richards D. [mailto:rbarger@barwol.com]
Sent: Tuesday, August 08, 2006 5:43 PM
To: CBJ
Subject: "Disclosing Malpractice Insurance"

Letters to the Editor
State Bar Journal

I read with interest the *Opinion* column in the August 2006 issue of *The State Bar Journal* entitled "Disclosing Malpractice Insurance" with pros and cons by Messrs. Towery and Petrulis. What's the ruckus all about? All that is required is the add a new Subsection (C) to Rule 3-400 of the *Rules of* Professional *Conduct* to provide that if any lawyer cannot satisfy a final judgement against that lawyer arising from liability for professional negligence, his or her license to practice will be suspended until that judgement is satisfied. That allows any lawyer to make an informed decision as to whether or not to purchase professional liability insurance. It's simple!

Richards D. Barger
Los Angeles

Bercovitch, Saul

From: louis@wuiplaw.com
Sent: Tuesday, August 08, 2006 7:24 PM
To: Bercovitch, Saul
Subject: Opposition to Proposed New Insurance Disclosure Rules

To Whom It May Concern:

I am writing in opposition to the Proposed New Insurance Disclosure Rules (the "Proposal") because the Proposal effectively calls for deception and systemic bias on the part of the Bar. The Proposal is contrary to the stated purpose of the California Bar, "to protect the public, the courts, and the profession."

As I understand it, the Proposal requires only attorneys who do not have malpractice insurance to disclose their lack of malpractice insurance to actual and potential clients. However, the Proposal does not require attorneys who have malpractice insurance to disclose that they are covered by malpractice insurance. This is harmful to the consumer because partial disclosure is often more deceptive in nature than either full disclosure or no disclosure.

As an analogy, I submit that malpractice insurance serves as a "pot of gold" to compensate a client for losses incurred due to attorney malpractice. Not all pots contain the same amount of gold, and gold can be located in containers other than pots, e.g., sacks, chests, etc. In essence, the Proposal requires those without a pot to disclose that fact they do not have a pot, while allowing those with a pot of gold to make no disclosure at all. My guess is that most consumers are more interested in whether there is enough gold to compensate for their losses rather than whether there is a pot.

Accordingly, if the Bar were truly interested in consumer protection through full disclosure instead of pitting members with a pot against those without a pot, the Proposal should require all attorneys disclose to their actual and potential clients how much gold they have instead of whether they have a pot.

Respectfully submitted,

Louis L. Wu
California Bar No. 202,949

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P.O. Box 10074
Oakland, CA 94610

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PETER M. APPLETON
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TELEPHONE (503) 585-0105
FACSIMILE (503) 370-6245

August 9, 2006

Editor
California Bar Journal
180 Howard Street
San Francisco, CA 94105-1639

Dear Editor:

I write in response to "Disclosing Malpractice Coverage." (August, 2006).

Mr. Petrulis refers to Oregon's "affordable mandatory malpractice insurance."

Although this statement is probably just a quibble, the system here is not really insurance. It is a Professional Liability Fund to which all Oregon bar members must contribute as is a condition to practicing law. It provides modest levels of compensation for the victims of professional malpractice and because it is mandatory, everyone knows that coverage is always available. Consideration of the Oregon system as a solution to the California legal malpractice problem should be considered, although such a system might be much more difficult to administer in a state with 150,000 active lawyers than in a state with 12,000 lawyers.

Very truly yours,

Peter M. Appleton

RICHARD S. LESLIE
ATTORNEY AT LAW
P.O. BOX 90400
SAN DIEGO, CALIFORNIA 92169-2400
TELEPHONE (858) 456-0695
FAX (858) 456-0639

August 9, 2006

State Bar of California
180 Howard Street
San Francisco, California 94105-1639
Attn: Saul Bercovitch

Re: Proposed Insurance Disclosure Rules

Dear Friends:

These comments are in opposition to the proposals requiring mandatory disclosure of the fact that an attorney does not have malpractice insurance. I suspect that much work and thought has gone into the development of this proposal and my comments are not intended to denigrate those efforts. My comments are influenced by over twenty-five years of experience and involvement with health care licensees and the public policy considerations related to consumer protection and required disclosures.

In essence, these proposals are unfair, unwise, unwarranted, too broad, and are not likely to protect the consumer in any meaningful way. Too little attention is paid to the fact that this rule will require an attorney, at the outset of or during the attorney-client relationship, to raise the topic of malpractice. I have been licensed in California for approximately thirty- three years. No judgments have been entered or settlements made on my behalf for any alleged malpractice or negligence. In fact, no claims have ever been made against me. No complaints have ever been filed against me (to the best of my knowledge) with the State Bar. Yet, I would be required to raise the topics of malpractice and malpractice insurance with a prospective or existing client!

Clients may feel as though they have been informed of the lack of malpractice insurance because the attorney may have committed an act of malpractice and is now letting the client know of this information so as to "suggest" that the client should be reluctant to pursue a claim. The negative intrusiveness of this disclosure requirement into an already existing relationship is apparent. What would prevent a client from being angry with the attorney (or suspicious) for not revealing this information sooner – and only revealing it when required to do so by the Bar? This sets the attorney up for possible problems. This dynamic should be avoided - and it can be avoided by making the proposal prospective rather than retrospective.

No provision is made nor is any exception established for attorneys who have practiced, for example, for ten (or twenty) or more years without incident (e.g., no claim made for alleged malpractice). The careful and prudent attorney would still have to disclose the fact of having no malpractice insurance – perhaps putting an idea into the head of a client

that would otherwise not arise. Since it is a mandatory disclosure, the prospective client might think that there is something wrong with the attorney's practice. The disclosure comes across as a negative, even though it has nothing to do with how skillful and careful the attorney may be.

Why not instead require attorneys to disclose to prospective clients past malpractice claims, settlements, or judgments? Why not require attorneys to disclose to prospective clients past complaints made to the State Bar about their behavior? Why not make attorneys disclose to prospective clients past criminal convictions? Why not make attorneys disclose to prospective clients past or current drug and alcohol problems? These kinds of disclosures would be more relevant to the issue of consumer protection, yet they are not proposed. Would not these disclosures result in more relevant information for the consumer?

Another problem that I have with the proposal is that it exempts "in-house counsel." I consult with two entities and provide services that include writing articles, writing proposed legislation, and presenting workshops. In fact, *I do no litigation of any kind and I do not represent individuals in legal matters.* I primarily consult with the Executive Director of a statewide professional association on legal and legislative issues affecting that profession. I have performed services for this organization for twenty years (1977 through 1999) and again from July 2005 to the present. I am similar to "in-house counsel," except that I am not a W-2 employee. There should be an exemption for this type of practice.

This proposal will have the effect of punishing those who have in good faith made a business and professional decision not to insure by requiring a disclosure that is unrelated to the quality of services to be performed and in no way informs the client of past negligent or inappropriate behavior. It requires, at the outset of and during the lawyer-client relationship, a discussion about possible malpractice (e.g., "I need to let you know that I have no malpractice insurance. Therefore, you may want to go to a lawyer or law firm that has insurance – so you can be sure to recover damages if they are ultimately awarded!).

Please reject this proposal. For the reasons stated above, it is unreasonably and unnecessarily punitive. There are better and more effective ways to protect the consumer. Thank you for your thoughtful consideration.

Sincerely,

Richard S. Leslie

Richard S. Leslie

Lynne I. Urman
Attorney at Law
P.O. Box 17454
San Diego, CA 92177-7454

August 10, 2006

Saul Bercovitch
180 Howard Street
San Francisco, CA 94105-1639

Re: Proposed Insurance Disclosure Rules

Dear Mr. Bercovitch:

I have several concerns regarding the professional liability insurance disclosure rules proposed by the Board Committee on Regulation, Admissions and Discipline.

The first rule would require direct disclosure to the client if an attorney is not covered by such insurance. There are exemptions for government and in-house counsel. What about contract attorneys who are hired by other attorneys to assist on cases? Would the "other attorney" be considered a "client" under this rule? Would either attorney have any obligation to disclose to the actual client the contracting attorney's insurance status? It is not uncommon for the actual client to be unaware of a contracting attorney's assistance and/or the contracting attorney to be uninformed as to the identity of the actual client.

The second rule would require disclosure to the State Bar if an attorney is not covered and this information would be made publicly available (e.g., via the Bar's Web site). I see no need for this rule, particularly if the first rule is enacted. What concern is it of the general public's if an attorney is or is not insured? If a member of the public seeks to hire a particular attorney, the first rule would require this information be disclosed. Rather than serving any justifiable purpose, this rule may stigmatize attorneys who are not insured. The lack of insurance may convey negative impressions, particularly among members of the public who are unaware of the high cost of malpractice insurance (e.g., it may suggest that the attorney is uninsurable). At least with the first rule, attorneys have the opportunity to discuss the lack of insurance with potential clients. Such input is nonexistent under the second rule.

Both rules presumably are intended to protect the public. Yet, their adoption may be counterproductive. It is already difficult for the public to find attorneys who will take small cases. I would venture to guess that some of the attorneys who currently handle such cases are

uninsured, based on financial considerations. Given the potential stigma attached to the lack of insurance, these attorneys may choose to join larger firms that ordinarily do not handle small cases. Or, they may feel "forced" to purchase insurance and reject smaller cases in favor of those with the financial potential to offset the cost of insurance. Which is more beneficial to the public: representation by competent, but uninsured attorneys or self-representation (or worse, representation by unlicensed and unqualified individuals who may step in to fell the gap)?

Thank you for your time and consideration.

Sincerely,

Lynne Urman

Lynne I. Urman

Bercovitch, Saul

From: Eva Levine [ellevine@sbcglobal.net]
Sent: Thursday, August 10, 2006 4:36 PM
To: Bercovitch, Saul
Subject: Proposed Insurance Disclosure Rules

I wish to register my opposition to the proposed insurance disclosure rules for the following reasons:

1. I agree with the arguments against the proposed rules by Kenneth G. Petrulis in the August Bar Journal.
2. Additionally, I believe that having malpractice insurance does not necessarily protect the consumers of legal services. There is no evidence that attorneys with insurance are better than those that do not have insurance.
3. The proposed rule would seriously and negatively impact small firms and solo practitioners in favor of large firms, as the small firms will pay disproportionately more of their income on insurance, while large firms may benefit from having their premiums reduced due to higher participation rate from attorneys. Just like many doctors who have quit because of high malpractice insurance premiums, many attorneys will have no economic incentive to stay in practice.
4. If insurance costs drive attorneys away from continuing their practice, there will be fewer attorneys who are able and willing to serve the disadvantaged population, as Petrulis argues.
5. Mr. Towery's argument that clients expect attorneys to carry malpractice insurance is presumptuous. His clients may have that expectation, if they are paying $400 or more per hour. There is no evidence that other clients have similar expectations. High-fee attorneys can pass on their costs to their clients, while other clients cannot afford to absorb the costs.
6. I find that the proposed public disclosure of attorneys that carry no insurance particularly insidious. Does the State Bar intend to create two classes of attorneys? If insurance disclosure is intended to offer clients a way to evaluate attorneys, the better way would be to have an effective complaint and disciplinary program that the public trust and understand. Having insurance may actually be a way for bad lawyers to mask their incompetence.
7. If the State Bar really feels that insurance is good for the clients, follow the Oregon example, as Petrulis suggests.
8. I have an insurance broker's license, and am aware of the benefits of insurance. However, I am highly skeptical of the benefits of malpractice insurance currently available from commercial companies. I ask that the State Bar think through the issues before adopting the proposed rules.

Eva Liang Levine

Bercovitch, Saul

From: McCarthy, Nancy
Sent: Tuesday, August 15, 2006 9:27 AM
To: Bercovitch, Saul
Subject: FW: Insurance disclosure rule

-----Original Message-----
From: CBJ
Sent: Tuesday, August 15, 2006 9:02 AM
To: McCarthy, Nancy
Subject: FW: Insurance disclosure rule

-----Original Message-----
From: Michael Mahoney [mailto:mmahoney@ispwest.com]
Sent: Friday, August 11, 2006 4:49 PM
To: CBJ
Subject: Insurance disclosure rule

The Editor, California Bar Journal

Sir:

The main points about the Bar's proposal for mandatory disclosure of insurance coverage are these:

(1) The members of the task force proposing this rule are all insured, so far as I know. They are therefore proposing a rule that they themselves will never need to obey. The task force considered requiring all attorneys, insured or not, to disclose the amount of their malpractice coverage, but this proposal was rejected as "too complicated."

(2) The Bar sometimes, through its certification programs, allows attorneys to advertise that they are better than other attorneys. This is the first time that attorneys would be required to advertise that they are, somehow, worse than other attorneys. Rule 955 requires disclosure to clients by attorneys who have been suspended; the proposed rule would require attorneys with no disciplinary record at all to wear the scarlet letter.

(3) Perhaps the most odious requirement is a provision in the proposed rule that the uninsured attorney must notify the client, in writing, of the lack of coverage, and that the client must sign and return the notice to the attorney. Anyone who has tried to get a client to sign and return a simple document knows how difficult this is. Until that document is returned, the attorney can do nothing, can not pick up a telephone, can not pick up a pencil, even if the client's vital interests are at risk, without violating the Code of Professional Responsibility. I can't think of a better recipe for mischief.

The public comment period on this rule is open until September 15, and comments should be sent to the State Bar of California, 180 Howard Street, San Francisco 94105, to the attention of Saul Bercovitch, staff attorney; or by e-mail to saul.bercovitch@calbar.ca.gov.

Michael Mahoney

San Francisco

(415) 693-9361

Bercovitch, Saul

From: DKorrey@aol.com
Sent: Monday, August 14, 2006 10:49 AM
To: Bercovitch, Saul
Subject: Comment on Disclosure of E&O Insurance or lack thereof

This proposal is only workable if the bar elects to get in the insurance program by guaranteeing that affordable basic insurance is made universally available to the bar members. /s/David M. Korrey

Bercovitch, Saul

From: McCarthy, Nancy
Sent: Wednesday, August 16, 2006 9:33 AM
To: Bercovitch, Saul
Subject: FW: Letters to Editor - Disclosing malpractice coverage.

-----Original Message-----
From: CBJ
Sent: Wednesday, August 16, 2006 9:07 AM
To: McCarthy, Nancy
Subject: FW: Letters to Editor - Disclosing malpractice coverage.

-----Original Message-----
From: M. Hollie Rutkowski [mailto:Hollie@TCLC.org]
Sent: Tuesday, August 15, 2006 5:48 PM
To: CBJ
Subject: Letters to Editor - Disclosing malpractice coverage.

I practice workers' compensation law where case value is relatively small, and getting ever so much smaller all the time, now that temporary disability benefits are capped at two years, permanent disability benefits have decreased by 50-75%, medical treatment has slowed to a trickle, and new boutique industries such as Utilization Reviewers and MPN managers soak up administrative costs so that claims examiners can pay parasites instead of people.

Case value is relatively static in workers' comp. The AMA Guides and the new Permanent Disability Rating Schedule see to that. We applicant's attorneys can improve our clients' outcomes in general, but it is an order of magnitude less than what was possible before the reforms.

Finally, insurance companies can pretty much deny claims, deny treatment, and deny benefits with impunity so long as an auditor does not catch them at it. The constant is workers' comp is that every injured worker is desperate for money and has limited ability to get more.

As a matter of economic survival, many law offices choose malpractice coverage with a high deductible. If I read the opinion of James Towery correctly, lawyers in private practice will have information on their insurance made available to the public. I wonder if the State Bar has considered the law of unintended consequences. What if desperate people find that they can threaten their attorneys with malpractice and suggest that $5000 would make the pain go away? It would take exactly one such occurrence for me to decide that representing desperate people is too dangerous, and I'll bet that there are others out there who are silently nodding their heads and contemplating exit strategies.

"We already know that most of the public cannot afford legal services .. The proposed disclosure rules are targeted at the economically disadvantaged and the attorneys who serve them." Ain't it the truth.

M. Hollie Rutkowski, Esq.
The Compensation Law Center
P.O. Box 13370
Sacramento, CA 95813
T:916.974.0424
F:916.974.0428

Bercovitch, Saul

From: Ndaesq@aol.com
Sent: Tuesday, August 15, 2006 10:48 PM
To: Bercovitch, Saul
Subject: Comments re: Proposed New Insurance Disclosure Rules

Mr. Bercovitch--I was contacted by Carmen Ramirez and ask to send you my thoughts on the proposal. So, here are my thoughts:
First, the cost of insurance can be exorbitant for solo practitioners. (I am a government sub-contractor with no benefits) Second, most insurance is almost completely useless. If you are sued you aren't covered if you have changed insurance companies. Basically, the only time you are covered is if you keep the same insurance for your entire career. The problem with that, is the insurance companies know this fact and significantly increase your rates every year. Then the amount is so high--that you have to change companies because you can't afford it any longer. So, if there are any claims against when you had the previous insurance, the current insurance doesn't cover you AND the previous insurance doesn't cover you. You play this game--should I just hope I don't get sued--should I hope my friends will defend me--should I hope that if I get sued it is in that window when I had X insurance and still have X insurance--or do I leap from policy to policy knowing that I am not really covered and waste money. Until they reform insurance to assure that coverage means coverage--it is a complete waste of money.
Please vote against this--
Thank you.
Nancy Aronson

Law Office of Coleen P. Gillespie

716 North Ventura Road, #313
Oxnard, CA 93030-4405
Phone: (805) 988-9817
Facsimile: (805) 988-8926

August 16, 2006

Saul Bercovitch, Staff Attorney
The State Bar of California
180 Howard Street
San Francisco, CA 94105

Re: Proposed New Liability Insurance Disclosure Rules

Dear Mr. Bercovitch,

I strongly oppose the proposed new rules requiring attorneys to disclose whether they maintain professional liability insurance. These new proposed rules will discriminate against small offices and solo practitioners. Such disclosures will steer potential clients to large, wealthy firms for which high premiums are no problem. Conversely, the new rules may also make it difficult for clients with small claims to find an attorney at all. I have personally been told by attorneys at firms which generate millions of dollars per year in revenue that they will not even consider a case which is worth less than $300,000. Many cases and disputes involve less than that sum; but small and solo offices may not be able to take those cases due to the increased costs involved in running their offices (if these rules are passed). Further, these new disclosure rules discriminate against attorneys (as opposed to other professions). I have never been informed by any doctors whether or not they carry professional liability insurance, and do not know of any similar type of rules for other professions.

As an attorney with over twenty years' experience, and never having had a claim, I believe it is fundamentally unfair to force such disclosure rules, the burden for which will fall heavily on the small and solo practitioner.

Very truly yours,

Coleen P. Gillespie

Coleen P. Gillespie

Law Office of Amy L. Kreutner
P.O. Box 3573
Costa Mesa, CA 92628
(714) 520-1468

August 16, 2006

Editor, California Bar Journal
180 Howard Street
San Francisco, CA 94105-1639

Re: Mandatory Malpractice Insurance Proposals

To Whom It May Concern:

The following is my letter to the editor concerning the mandatory malpractice insurance proposals. Thank you for your consideration.

A burden on the poor

The mandatory malpractice insurance proposals pose a concrete threat to my ability to provide free assistance to the poor. Mr. Petrulis' article (August 2006) does not present a mere hypothetical in arguing that the rules would harm the economically disadvantaged.

In October 2005, I started an estate planning practice as a solo practitioner. Needless to say, I have been saddled with many expenses, especially state bar dues, section dues, local bar association dues, countless CLE seminars, section meetings, a decent printer, accountant fees, taxes and approximately $2,200 for the necessary licensed computer software. I would very much like to have malpractice insurance, but when I looked into the matter, I could not afford it. My practice will break even for the first time in September 2006.

Under the proposed rules, if I opt to not carry the insurance, a blemish will be placed on my record, discouraging paying clients from choosing me for legal services. Because that would harm my business, I would consider carrying the insurance, which would force me to reduce or eliminate the time I spend helping needy seniors for free. For example, I spent most of last week helping a homeless 69 year old woman, who has been living out of her car. Likewise, I would have to cut back on educating seniors (e.g., warning them about senior scams, where con artists try to take advantage of seniors financially) for free.

There are many seniors living on fixed incomes who cannot afford to pay for an attorney's time. As evidence of this, due to reduced government funding, at least one local food bank has been forced to reduce the number of seniors to whom it provides food. This is part of a larger trend in the state, meaning that more and more poor seniors are in need of assistance with basic necessities, such as food. Regarding services from attorneys, these seniors need help, and this help needs to be given for free.

As for the opposing argument that clients have a right to know whether or not their lawyer carries the insurance, they still have that right, whether or not these burdensome rules are approved. To discover whether the lawyer has such insurance, all they have to do is ask. Lawyers have an ethical duty to give an honest answer.

As an alternative, California should consider providing affordable malpractice insurance for all attorneys. If funds are limited, the insurance might be provided on a sliding scale basis, meaning the less an attorney makes, the more affordable the insurance would be. This would give solo practitioners, who make time to serve the poor, a realistic opportunity to be covered by the insurance, without the administrative burdens that would result from the current proposals.

Amy L. Kreutner
Costa Mesa

ALK

Bercovitch, Saul

From: Morrispartyof4@aol.com
Sent: Wednesday, August 16, 2006 11:32 AM
To: Bercovitch, Saul
Subject: Malpractice Insurance Disclosure

Dear State Bar Board of Governors:

I am writing to state my position against the proposed malpractice disclosure requirement.

I am currently self-employed, and have been so for 7/14 years I've been licensed to practice law in the State of California. Because I work out of my house, I am able to offer my services at a lower rate than others affiliated with large firms. As a result, people that could not afford the expense of an attorney at a firm can afford legal services-- primarily the working class. Further, during my 14 years in practice I have never had a malpractice claim filed against me nor any complaints filed with the State Bar.

I think there is a misperception that solo or part-time attorneys are somehow inadequate or inferior that those affiliated with firms. However, as I have learned over the last 7 years many of us solo or part-time lawyers choose this type of practice due to family or other commitments. In my case, because I am able to work part-time I am able to juggle the needs of my special needs daughter as well my practice needs.

Therefore, I urge you not to adopt the proposed disclosure rules, because they present a minefield for us solo and part-time attorneys as well as to others in our practice who unwittingly experience a coverage gap. This disclosure requirements will also limit the access of the middle and lower classes to legal services, which few can afford as it is.

Sincerely,
Deborah Meyer-Morris
SBN:158876
cell 805-443-2557

Bercovitch, Saul

From: Davidjmurraylaw@aol.com
Sent: Wednesday, August 16, 2006 2:57 PM
To: Bercovitch, Saul
Subject: Proposed Insurance Disclosure Rules

LAW OFFICES OF DAVID J. MURRAY
DAVID J. MURRAY, ESQ.
341 BROADWAY, SUITE 407
CHICO, CA 95928
Phone (530) 896-1144
Fax (530) 896-1146

VIA E-MAIL ONLY
Saul.bercovitch@calbar.ca.gov

August 16, 2006

Saul Bercovitch, Esq.
180 Howard Street
San Francisco, CA 94105-1639

Re: Proposed Insurance Disclosure Rules

Dear Mr. Bercovitch:

I oppose both of the proposed insurance disclosure rules. I am a solo practitioner. I have been practicing since 1992. This rule is disparate and will only affect those who practice as solos or part time.

I do not need another reporting requirement from the bar or having to worry about violating some obscure bar rule regarding gap or tail coverage.

Sincerely,

LAW OFFICES OF DAVID J. MURRAY

David J. Murray

Bercovitch, Saul

From: McCarthy, Nancy
Sent: Monday, September 11, 2006 9:24 AM
To: Bercovitch, Saul
Subject: FW: LETTERS: Disclosure of Malpractice Insurance.

-----Original Message-----
From: CBJ
Sent: Friday, August 18, 2006 10:56 AM
To: McCarthy, Nancy
Subject: FW: LETTERS: Disclosure of Malpractice Insurance.

-----Original Message-----
From: ATTORNEYandCPA@aol.com [mailto:ATTORNEYandCPA@aol.com]
Sent: Friday, August 18, 2006 2:32 AM
To: CBJ
Cc: ATTORNEYandCPA@aol.com
Subject: LETTERS: Disclosure of Malpractice Insurance.

Dear CBJ:

It seems to me that any client interested in knowing what the direct or indirect limits of his or her attorney's malpractice coverage may be, would also be rightfully interested in: **(1)** that attorney's personal ability to pay any judgment that exceeded their malpractice insurance limit; and **(2)** any limitations on the liability of that attorney's firm or other partners due to its selected form of organization (i.e. true partnership versus LLP). This would be especially true in cases that involved the potential for a multimillion dollar judgment.

This would imply that all attorneys should really be required to: **(1)** disclose their personal net worth and future earning capacity (along with the proposed disclosure of malpractice insurance coverage); and **(2)** to disclose the exact liability of their firm and other partners for amounts not covered by the offending attorney's malpractice insurance, personal net worth, and future earnings. In this regard, I doubt that the partners of most law firms would want to disclose their personal net worth and/or future earning capacity to their potential clients ... even though these disclosures would clearly be relevant to the satisfaction of malpractice judgments in excess of their malpractice insurance limits.

Personally, I think this whole malpractice insurance disclosure issue boils down to the "haves" trying to stick it to the "have nots" (i.e. those that already "have" company paid malpractice insurance to protect the personal assets of their attorneys ... not their client's judgments ... are perfectly willing to enact a rule requiring those who do not have malpractice insurance to have to say so).

Very truly yours,

/s/

Michael W. Szkaradek (State Bar #150530)
ATTORNEYandCPA@aol.com
714-730-5880 / 714-544-1526

Post Office Box 28688
Santa Ana, California 92799-8688

Harley A. Merritt

Attorney at Law
1280 E. 9th St., Suite A
Chico, California 95928

Telephone: (530) 894-3694 Fax: (530) 894-3912

August 21, 2006

Editor
CALIFORNIA BAR JOURNAL
180 Howard Street
San Francisco, California 94105-1639

Re: **Disclosing Malpractice Coverage**

Dear Editor:

I have just finished reading the article, "Disclosing Malpractice Coverage" in your August 2006 issue.

I believe that Mr. Petrulis makes a significant and important point, when he implies that California seems more than willing to indirectly compel attorneys to purchase malpractice insurance, by forcing disclosure to clients if they don't, but hasn't done anything to see such insurance is affordable.

I carry malpractice insurance. However, as virtually all solo practitioners will tell you, it is a burdensome expense. Every year I have to decide if my bank account will allow me to pay the premium in full, or whether I need to make monthly payments (which always includes a monthly "service" fee in addition to the premium). I am not at all surprised that many attorneys do not have malpractice coverage. They simply cannot afford it.

I still recall the last malpractice insurance crisis, when it was nearly impossible to obtain malpractice insurance as all the insurers were busy fleeing California. Even today, with many insurance companies issuing malpractice coverage, it is extremely difficult for the "new" lawyer to obtain such insurance, and they pay a hefty price for coverage - if they can afford it and can find any.

The real problem, which neither the Bar or the legislature has addressed, is finding a way to provide coverage for the public's protection, while making that coverage affordable. As Mr. Petrulis noted, Oregon has found the solution. Why hasn't California looked north and studied adopting a similar program as exists in Oregon?

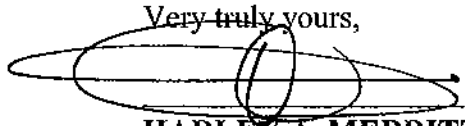
Compelling attorneys, or any profession or group, to carry insurance is a windfall to the

insurance companies. To me anyway, they seem to be wealthy enough, what with mandatory auto insurance and Workers' Compensation insurance, without more "state mandated" welfare contributions to them from attorneys or any other group.

On balance, I don't think it is appropriate for the state to in effect compel attorneys to carry malpractice coverage unless, at the same time, the state has in place a program making access to such coverage affordable to attorneys.

Further, the current proposal is fatally flawed. Without some mechanism to determine whether attorneys carry malpractice coverage and if they don't, they disclose that to their clients, with this proposed legislation there will probably be a lot of attorneys who either don't carry it or don't disclose it or both - as a matter of perceived economic necessity on their part. On the other hand, if there was a program available that provided reasonable rates to attorneys for coverage, the number of attorneys without coverage would, I think, dramatically drop even absent legislation to require disclosure. Isn't the purpose of mandating malpractice coverage (even if it is an indirect "mandate" through requiring disclosure when there is no coverage) - encouraging attorneys to carry malpractice coverage to protect the public?

Very truly yours,



HARLEY A. MERRITT

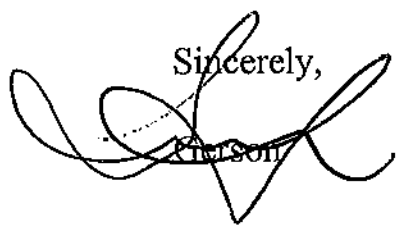
GERSON SIMON
Attorney at Law
P.O. Box 71424
Los Angeles, CA 90071-0424
(213) 687-3442

August 21, 2006

Saul Bercovitch, Staff Attorney
The State Bar of California
180 Howard Street
San Francisco, CA 94105

Dear Mr. Bercovitch:

I do not believe that the California State Bar should be using state bar dues to lobby the California State Legislature to require attorneys who do not have malpractice insurance to disclose this fact to new, privately retained clients. Its absurd for the Legislature to enact such a requirement. The next thing you will be doing is to require attorneys to disclose to one and all new clients, whether they have health, burglary, flood, or any other kind of insurance, ad infinitum.



JAMES F. JOHNSON
Attorney at Law
2269 Chestnut Street, No. 384
San Francisco, CA 94123
Tel: (415) 455-8251

August 22, 2006

Mr. Saul Bercovitch
Staff Attorney
The State Bar of California
180 Howard Street
San Francisco, CA 94105

Re: State Bar Alert: Malpractice Insurance Disclosure Proposal.

Dear Mr. Bercovitch:

I am a licensed member of the State Bar of California, bar number 055772, and I am writing to you about the proposed changes in error and omissions (E & O) insurance coverage.

While I can appreciate the problems caused by uninsured lawyers, I also see many problems associated with mandating coverage. I do not have the time to provide an extensive outline of such problems, so I will simplify my comments by restricting myself to my own circumstances.

100% of my work is for court appointed appellate criminal cases. For any work related to criminal appellate cases to which I am appointed on direct appeal to the California Court of Appeal or the California Supreme Court, I am provided with malpractice insurance coverage by a quasi-state agency.

It is a common occurrence that in the criminal appeals to which I am appointed for the indigent, and incarcerated, defendants to request my assistance or counsel in matters concerning federal habeas corpus petitions related to the direct appeal. Much of the time I am, for many reasons, not able to provide such assistance. However, the malpractice insurance coverage I am provided with by the state agency as noted above ***does not*** apply to such federal habeas corpus matters. There are many, many lawyers in California who are providing assistance and counsel on federal habeas petitions on a ***pro bono*** basis who are in the same situation I am in with respect to E & O coverage, and I expect that they, as well as I, will cease all such pro bono assistance and/or counsel if E & O coverage becomes mandatory.

I estimate that if the billable time for all of the pro bono assistance I have provided to indigent criminal defendants over the last 30 years – all of which pro bono work *was not* covered by the state E & O coverage as noted

above – was added up, it would easily amount to over $250,000.00. ***This pro bono work would never have been performed if E & O coverage was mandatory.***

I am sure I could expand on the above comments to point out numerous practice areas in which pro bono work is provided that will not be provided if E & O coverage becomes mandatory.

In conclusion, while I understand the problems that can be created by lawyers practicing without E & O coverage, I think a mandatory coverage statute would create as many, if not more, problems than it would solve.

Sincerely,

JAMES F. JOHNSON

Bercovitch, Saul

From: RyanEsq1@aol.com
Sent: Wednesday, August 23, 2006 1:19 AM
To: Bercovitch, Saul
Subject: Insurance Disclosure

Dear Mr. Bercovitch,

I would like to offer my view on the proposed insurance disclosure rules.

I was admitted to the bar in 1988. I was a member of a small firm in San Francisco when I suffered a stroke in 1993. It took me 2 years to recover and since then I have practiced law out of my home. I offer people in my community low cost legal services. Until the change in the law last year, I was paying scaled bar dues because my income from legal services, since 1995, has never been more than $18,965. How can I possibly afford to pay for insurance? I think that if the bar requires me to have insurance, I will have to close my practice. I don't think this is fair. Some accommodation should be made for attorneys who offer low cost, many times no cost, legal services to their community. Please feel free to contact me if you would like further comment.

Sincerely,

James T. Ryan
State Bar #135791
Tel: 415-898-5855

Bercovitch, Saul

From: McCarthy, Nancy
Sent: Wednesday, October 04, 2006 4:13 PM
To: Bercovitch, Saul
Subject: FW: Letter to Editor

-----Original Message-----
From: CBJ
Sent: Thursday, August 24, 2006 10:13 AM
To: McCarthy, Nancy
Subject: FW: Letter to Editor

-----Original Message-----
From: Howard Freedland [mailto:Howard.Freedland@open-silicon.com]
Sent: Wednesday, August 23, 2006 11:27 AM
To: CBJ
Subject: Letter to Editor

Editor,

James Towery's argument in favor of insurance status focuses on what a client would want to know: the "Golden Rule", as he calls it. As in-house counsel, I find myself often in the role of client when choosing outside lawyers to provide services. Following Towery's argument, if people hired lawyers to cater to the off-chance that they would have to make a claim, what would clients want to know? Clients would want to know what the likelihood of having to make a claim would be: have any of the firm's lawyers been sued for malpractice or disciplined? do any have substance abuse problems, marital problems, financial problems, or any of the other excuses that fill the discipline reports? Next, clients would want to know the extent to which a firm could satisfy a claim: insurance is but one (misleading) component, what is the firm's financial position, how much assets are left at the firm level and how much are distributed out of a creditor's reach? Mere disclosure that the lawyer has insurance is misleading: what's the limit? does it waste with costs of defense? what's the retention (deductible)? what's excluded? If the task force felt that disclosure of insurance was important to clients, why stop there? Shouldn't the client know if his or her lawyer is on drugs, having marital difficulties, or is well-off enough to satisfy a malpractice judgment even absent insurance?

If I were hiring lawyers solely with worries about satisfying a hypothetical malpractice claim, I would prefer to have Bill Gates as my lawyer than any lawyer with insurance.

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August 29, 2006

Saul Bercovitch, Esq., Staff Attorney
The State Bar of California
180 Howard Street
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By e-mail and U.S. Mail

Re: Comments to Proposed New Insurance Disclosure Rules

Dear Mr. Bercovitch:

My comments to the proposed insurance disclosure rules follow.

1. Insurance is obtained for the benefit of the insured.

The proposed rules ignore the basic reason why one obtains insurance, i.e. to protect *oneself*, not some third party. Whether one has liability insurance is a personal and business choice for the lawyer. What other professional is required to inform clients if he or she doesn't have liability insurance? Does your doctor tell you? Your architect? Your dentist? Your real estate broker? Your CPA? Why impose this duty on lawyers alone?

The Insurance Disclosure Task Force raised the points that clients may have "an expectation" that lawyers are insured, that insurance disclosure is a matter of "consumer protection" and the presence or absence of insurance is a "material fact" that clients should know. Task Force Report of June 2, 2006, p. 9. The Task Force also felt that clients have a "right" to know about insurance coverage. This "right" is nowhere to be found in the law and is totally unsupported by any case or statutory citation.

A client who thinks that errors and omissions insurance is "material" can ask about it at the time of engagement. It is entirely speculative to think that clients "have an expectation" that lawyers are insured. If this is a "consumer protection" issue, then the Legislature should deal with it by making all professionals and indeed all businesspeople disclose whether they have insurance. In fact, the Legislature has carefully considered the issue of legal malpractice insurance disclosure, enacted two different laws, and let the second law sunset. Quite frankly, the Legislature is more representative of the public than the Task Force and its view should be respected.

2. Any insurance disclosure should apply to all lawyers.

What is really interesting in the proposal is that there is no disclosure requirement for a lawyer who *does* have insurance, for the stated reason that the disclosure might be "misleading." Indeed, due to claims-made requirements and other policy limitations such as "wasting," a client who thinks that he or she has any meaningful protection, particularly for a case with big damages, may be sadly mistaken.

If insurance really is "material" to the client and if clients have a "right" to disclosure of insurance coverage, as the Task Force urges, then all lawyers should make a full disclosure so that clients can be fully informed. The problem is, of course, that a lawyer would have to give the client a copy of the policy to make any meaningful disclosure. And good luck to the client when trying to decipher the policy. Plus the policy would have to be redistributed if it was amended or the lawyer got a new insurance company.

The proposed cure is to have the State Bar develop legal malpractice insurance educational materials for the public. This approach is totally inadequate. As the Task Force report acknowledges, disclosure of coverage insurance to the State Bar is "inadequate" and "this model is less likely to result in the information getting to the clients." Report, p. 9. Following the same logic, prospective clients are not likely to consult the State Bar about legal malpractice insurance and to obtain copies of any State Bar educational material. Further, any State Bar materials would necessarily be general in nature and would not disclose any information about the insurance policy of the lawyer being considered by the client.

A serious difficulty will arise when a lawyer discloses that he or she does not have insurance and the client then seeks other counsel. The client, having rejected the first lawyer because of the lack of insurance, will surely ask about the insurance status of new counsel. What will new counsel say? He or she will be put in the position of saying "yes, I have insurance" but would then be ethically obliged to go into detail to inform the client about the extent and limitations of the insurance as applicable to the client's case, particularly since the client has a "right" to such "material" knowledge. As acknowledged by the Task Force, any such disclosure is fraught with peril. The result could be even more legal malpractice lawsuits for failure to adequately disclose the insurance's extent and limitations on the theory that any disclosure must be a full and complete disclosure or it is misleading.

3. The proposed Rule of Professional Conduct improperly elevates insurance disclosure to a disciplinary matter.

The Legislature tried full disclosure (i.e., disclose *whether or not* a lawyer has insurance) and then tried disclosure of no insurance. After seeing how each of these disclosure requirements worked in practice, the Legislature did away with them. The proposed Rule of Professional Conduct 3-410 is an end run around the Legislature. Under the proposed rule, it would be an *ethical* and *disciplinary* violation to not disclose the lack of insurance. This puts insurance disclosure in the same category as stealing from clients, representing conflicting interests and suppressing evidence. This obviously doesn't make sense.

4. The proposed Rule of Court is improper.

An insurance disclosure requirement has no place as a Rule of Court. Rules of Court are "adopted by the Judicial Council under its constitutional authority to 'adopt rules for court administration, practice and procedure not inconsistent with statute' or under express authority granted by the Legislature." *California Rules of Court* : Introductory Statement. Insurance disclosure has nothing to do with the "administration, practice and procedure" of the courts. In fact, given the legislative history regarding legal malpractice insurance disclosure, the proposed Rule is particularly inappropriate as directly contrary to the will of the Legislature.

The proposed rule was formulated by the ABA. California doesn't follow the ABA rules of professional conduct. That should apply here as well.

The proposed rules will increase legal malpractice suits.

One of the essential requirements for a successful legal malpractice lawsuit is the ability to collect a judgment from the errant lawyer. When the Legislature imposed insurance disclosure requirements, it became easy to identify which lawyers had insurance and which didn't, facilitating and encouraging legal malpractice lawsuits. The proposed no-insurance disclosure requirement is like painting a big red "X" on the backs of attorneys whose engagement letters are silent on the subject of insurance. Any legal malpractice plaintiff's lawyer would know that such attorneys have insurance, i.e., are worth suing.

The proposal doesn't solve the real problem, affordable insurance.

The real problem here is the lack of affordable insurance. The State Bar has done absolutely nothing to create a program of mandatory basic insurance that all lawyers can afford. Solve that problem and disclosure becomes a non-issue.

The State Bar, with over 150,000 active members, is in a unique position to bargain for and obtain affordable malpractice insurance for its members. Given the State Bar's economic clout (as opposed to, say, sole practitioners), insurance companies would certainly vigorously compete for the right to provide this coverage. Consider the competition for Official Reporter which Lexis won over West and the lower cost and increased benefits from Lexis. The same would apply to a battle among insurance carriers to supply mandatory malpractice insurance.

The Task Force decided to take "no specific action" on affordable mandatory insurance, "leaving those issues open for the moment." I respectfully urge the Task Force and its illustrious membership to reopen this topic as a priority item.

Very truly yours,

LAW OFFICE OF JOHN G. APPEL, JR.

John G. Appel, Jr.

JGA:scb

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September 1, 2006

California State Bar
180 Howard Street
San Francisco, Calif. 94105-1639

Attn: Saul Bercovitch

Re: Proposed insurance disclosure rules

Dear Mr. Bercovitch:

I include in this letter my comments on these proposed rules and ask you to bring them to the attention of the Board of Governors.

1. My situation.

I am a sole practitioner specializing in the field of commercial collections. I work alone without clerical staff. My clients, most of whom I meet through the intermediary of a collection agency or another law firm, have bad debt that they wish me to collect. This form of practice needs to be pursued on a volume basis. I have at present 210 open files. The number of separate clients is slightly less, because a few clients have more than one matter pending with me.

I have had malpractice insurance in the past. I found that it was difficult to procure, because insurance companies do not like to cover sole practitioners who have no clerical staff. The premiums I have been quoted are around $3,000.00 for a coverage limit of $500,000.00. In my situation, this is a substantial sum.

Looking at it from the point of view of my and my clients' exposure, and assuming that in five years of practice I committed one act of malpractice, I would have had to pay $15,000.00 in premiums to be covered. Furthermore, the insurance carries a $5,000.00 deductible, so at the point of that hypothetical act of malpractice I would have to pay out of pocket $20,000.00 before I got any benefit from the insurance. The median claim my clients are asking me to collect is $6,900.00. It thus seems clear to me that I and my clients are better off if, in the event of a meritorious claim, I simply pay them out of my own pocket.

I do not take any affirmative steps to advise my clients that I have no coverage. Certainly, if any client asks about coverage I give a truthful answer, and if that client chooses not to engage me that is his right and his choice.

I would suspect that the other attorneys who do not have coverage have similar stories. Some have low income and cannot afford the premium, nor do they wish to charge their clients higher fees to cover it. Others, like me, are in niches where they calculate their exposure to be less than the cost of the insurance.

2. Proposed 3-410 of the Rules of Professional Conduct

An attorney who is asked by a client whether the attorney has malpractice coverage is bound to give a truthful, nonevasive answer. That is already the rule. An attorney who misleads a client by suggesting that there is malpractice coverage, when there is not, commits a violation of the code. The proposed rule, however, goes further. It requires the uninsured attorney to make an affirmative disclosure that there is no insurance.

(a) The Bar allows certain practitioners upon having qualified to present themselves as certified specialists, that is, better in the particular specialty than other lawyers. This rule would mark the first time that attorneys are required to divulge that they are, essentially, worse than other attorneys. There is, of course, Rule 955, which requires suspended members to notify their clients of the suspension, but those attorneys are ineligible to practice law at all. Under the proposed rule, an uninsured attorney who has passed the bar examination, has paid the annual dues, and has a clear disciplinary record must make this disclosure to the client; another attorney in the same position, who has coverage, need not. I doubt that it is in the long-term interest of the Bar for certain attorneys to carry a label of inferiority, especially if occasioned largely by their low income.

(b) I venture to guess that no member of the Task Force is without malpractice insurance. The group that is not affected by this proposal is therefore legislating for the group that is. There would be a way around this: If the proposal were changed to require every attorney, insured or not, to disclose the limits of any malpractice coverage.

The case for this amendment is simple. The limit of the basic coverage is usually $500,000.00. A client who has a case of that value, and places it with an uninsured attorney, puts that amount of capital at risk. But a client who has $1 million at risk, and places his case with an attorney whose insurance has a $500,000.00 limit, is putting exactly the same amount of capital at risk. If the Task Force is interested in greater public

information so that clients may protect their capital, there should be no objection to this.

When a proposal is made that would personally affect the members of the Task Force, however, they object. The Task Force says that the disclosure would be too confusing, because of the nature of a claims-made policy, the size of the deductible, and the question of whether the policy was a wasting policy or not. But these objections prove too much. If it is important to require uninsured attorneys to make this disclosure, it must be because insured attorneys are better than uninsured attorneys. That, at least, is how the lay public will view it. If clients turn away from uninsured attorneys to insured attorneys, as I expect will happen to some extent, they will not know what they are getting, as the insured attorneys will not be required to divulge any details of their insurance policies.

(c) By far the most pernicious part of this rule, however, comes in the proposed manner of its enforcement. I cannot believe the Task Force thought very long about this. The proposal is that the disclosure of non-insurance must be made to the client in writing, and the client must sign the document and return it to the attorney. Any attorney who has tried to get a client to sign a document and send it back can see what a barrier this is.

Until the attorney receives back the signed acknowledgment from the client, he can do nothing for the client. He cannot pick up a pencil, he cannot pick up a telephone, without violating the Bar disciplinary rule. If the client is in jail, the attorney cannot seek to arrange his bail. If the client's home is about to be foreclosed upon, the attorney cannot take steps to delay the foreclosure.

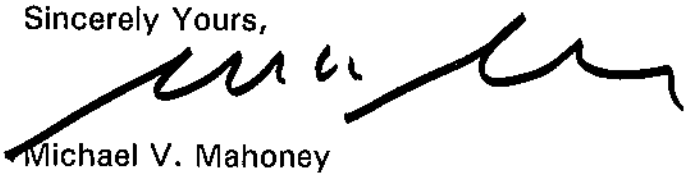
I question the legality of a rule that prevents a licensed attorney from practicing law. The unintended consequence of this will be more, not less, malpractice, as attorneys are forced to sit on their hands waiting to get the documents back from their clients. But this should perhaps be called *force majeure,* as the attorney would be required to refrain from action by a rule of the State Bar.

3. Proposed Court Rule 950.6

This rule raises no difficulties that I can see. A two-line form could be added to the annual dues statement asking the attorney to state whether there is malpractice coverage. The information once collected could be put on the Bar's web site. The rule would seem to have minimal impact on practitioners.

The Task Force discusses in some detail the costs to the Bar of administering the system. This attention contrasts with the blithe disregard that the Task Force displays toward the havoc it proposes to work on the finances and practices of the uninsured attorneys.

Sincerely Yours,



Michael V. Mahoney

-----Original Message-----
From: Steve Haley [mailto:shaley@groomandcave.com]
Sent: Thursday, September 07, 2006 3:27 PM
To: Towery, James E.
Subject: State Bar E&O Disclosure Proposal

Jim:

I circulated the E&O Disclosure Proposal to the membership of the West Valley Bar Association on August 4. I've delayed sending you this email until after the Labor Day Weekend, in order to provide the membership time to respond after returning from vacations, etc.

I have received three written responses, and 2-3 comments in the course of telephone conversations. I suspect that most of the membership was aware of the issue in light of the articles in the Bar Journal.

All but one of the responses were positive. One respondent requested a limitation on paperwork for insured attorneys, expressing a preference that there be no paperwork for an insured attorney.

The one respondent who was not in favor of the proposal was concerned about a number of issues:

1. Lack of empirical proof that 'consumers assume that lawyers carry malpractice insurance.'

2. The notice requirement would create confusion for clients who receive notice in the middle of litigation that their attorney lacks E&O insurance.

3. The rule impacts unfairly on new or younger attorneys.

4. The fact that a client is required to sign an acknowledgement of notice at the outset of representation would tend to create an unwarranted suspicion of doubt about the competency of the attorney, i.e., whether an attorney can afford coverage or chooses to forego coverage is unrelated to his/her competency.

Speaking for myself, I am in favor of the proposal, as compared to the other options that the Task Force had considered.

I do have a concern, however, that an emphasis on the existence or lack of E&O coverage may have the unintended consequence of fostering an expectation on the part of some clients that an attorney is in essence a guarantor of his/her services, i.e., an expectation that, despite the lack of a desired result in their case, the client may still be 'made whole' through a claim against the attorney's E&O coverage.

Above all else, I think that the time and effort that the Task Force has devoted to this issue is of great benefit to the Bar, and I appreciate it.

Regards,
Steve

--
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Bercovitch, Saul

From: Steve Lewis [slewis@lewisandbacon.com]
Sent: Thursday, September 07, 2006 6:19 PM
To: Bercovitch, Saul
Cc: 'Towery, James E.'
Subject: Comments re Insurance Disclosure Task Force

Dear Mr. Bercovitch:

I believe the failure to disclose the absence of malpractice insurance is a material omission and therefore a matter properly covered by the Rules of Professional Conduct as well as the Rules of Court. One argument against the proposed rules is that disclosure would work as a disadvantage for uninsured solo and small firm lawyers. Very simply, the disclosure requirements would only have an adverse impact on uninsured lawyers if one assumes many clients armed with the information would not hire uninsured lawyers, thereby making the case that the failure to disclose is a material omission. In addition, the belated discovery by a client of the absence of insurance adversely affects the public, and I believe that is a more important consideration than the adverse impact the disclosure rule would have on uninsured lawyers.

Some suggest that the better approach is mandatory insurance for all California lawyers; others claim that mandatory insurance is not feasible in California. In my opinion, a mandatory insurance program would benefit the public and the profession and is therefore a matter worthy of serious study. However, mandatory insurance is a much more difficult and certainly less practical objective to achieve. Moreover, history tells us that without a disclosure requirement the political and market forces needed to spur the study and possible adoption of a mandatory insurance program are unlikely to develop. In any event, some action needs to be taken now, as reflected by the story in the next paragraph.

I am currently representing a client whose lawyer was handling very large transactions and litigation for her. My client has paid this lawyer hundreds of thousands of dollars in legal fees, and he is demanding more. From my analysis, this lawyer made mistakes that have had a significant adverse financial impact on my client, and we have only recently learned (to our mutual surprise) that (a) he does not carry malpractice insurance, and (b) he seems to have very little in reachable assets. There is nothing the State Bar can do to make my client whole. The key point is that my client never would have used this lawyer if she'd known he had no insurance. Unfortunately, like many clients, she did not think to ask.

From my perspective and my client's perspective, the failure to disclose the absence of insurance is without question an omission of a material fact by a fiduciary. I therefore fully support the task force's proposal.

Thank you for your attention.

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COPLI MEMORANDUM

To: Saul Bercovitch, Staff Attorney

From: Carol Kuluva and Carey Barney, Co-Chairs, Committee On Professional Liability Insurance

Date: September 8, 2006

Re: Insurance Disclosure Public Comment - Proposed Amendment to Rule 950.5 and Proposed New Rule 950.6 of the California Rules of Court, and Proposed New 3-410 of the Rules of Professional Conduct.

On August 28, 2006 the Committee On Professional Liability Insurance ("the Committee") met at the State Bar Offices in San Francisco. On the agenda were the proposed new insurance disclosure rules, Proposed Amendment to Rule 950.5 and Proposed New Rule 950.6 of the California Rules of Court, and Proposed New Rule 3-410 of the Rules of Professional Conduct.

A lengthy discussion was held and it was generally noted that the Committee would optimally prefer additional time to further evaluate the proposed rules. It was discussed that the Committee has particular expertise in the area and should the Rules be adopted, in whatever ultimate form, the Committee should be utilized as a resource for purposes of developing public educational material concerning professional liability insurance as contemplated in the proposal to maintain the Insurance Disclosure Task Force.

While the general concept of a disclosure of the lack of insurance was generally agreed to as appropriate as a matter of public protection, concerns were raised as to the form of the disclosure, and in that connection considerable reservations were expressed by Committee members as to the present wording of the proposed Rules. The Committee would request that it be provided additional time to evaluate and provide further comment.

However, given the time restraints, the following comments were raised by members of the Committee.

1. Impact as a Rule of Professional Conduct – Use in Civil Litigation. –It was discussed that consideration should be given to taking the proposed Rule 3-410 out of the Rules of Professional Conduct and placing it in the context of the Business and Professions Code along the lines it previously existed, albeit in a different form. There was discussion within the Committee of the impact of the Rules of Professional Conduct upon a lawyer being sued for professional liability. Historically the Rules were intended to be disciplinary and did not provide an independent basis for a

cause of action. Case law and now the Rule Revision Commission are re-visiting this issue. Concern was raised that under certain circumstances the uncertainty of this Rule could be used to the detriment of the lawyer during the defense of the alleged professional liability claim. The potential exists that it would be alleged that ambiguity in the disclosures mandated could result in claims of breach of fiduciary duty or negligence per se. Although there may be no basis for discipline under the circumstances, the lawyer could find him or herself confronting expert testimony concerning the Rules as "evidence" of wrongdoing and broadening exposure.

2. State Bar Exposure to Liability. It is one thing to have the members make the representation that they have no professional liability insurance. It is another thing for the State Bar to be representing that members have insurance, thereby potentially exposing the State Bar to liability where there is no "coverage" in the circumstances of a particular claim. See discussion below regarding problematic language and use of term "covered."

3. Consistency with Proposed Revisions to Rules of Professional Conduct. The proposed Rule of Professional Conduct does not track the revisions that are taking place in the recently circulated proposed revisions to the Rules of Professional Conduct promulgated by the Rules Revision Commission.

4. Ambiguities Inherent in Representations of "Coverage". The use of the term "covered" in the Rules is fraught with peril for a number of reasons. "Coverage" is an insurance term of art and the existence of "coverage" is generally determined by an insurance company and not the member. The determination is based upon a multitude of circumstances such as the nature of the claim, the context of the facts, the timing of the claim, policy language, including policy limits, deductibles, terms and exclusions, among other things. Without reference to deductibles and/or self-insured retentions, the representation is uncertain at best. Thus, the Rules as drafted potentially expose the lawyer as well as the State Bar to claims of misrepresentation. A good example is the "claims made" professional policy that is almost universally in place in today's market. A representation that the member is currently covered by a policy of professional liability insurance does not necessarily provide the client "security." Often claims are made long after the then "current policy" has terminated. Unless provision is made into the future, the member may lack insurance when a past client who is no longer subject to notification under the Rules files a claim after the insurance policy has terminated. The foregoing examples demonstrate also the importance of the educational component.

The Committee strongly believes that alternative language to the term "covered" should be utilized. For example, the Rules could utilize terminology such as "A member who does not have professional liability insurance..." or similar language that would not be subject to a misrepresentation claim in the event that a claim is made that the insurer determines to be not covered under its policy as issued.

5. Alternatives to Traditional Insurance. The issue was also raised that some lawyers may elect to be protected by a bond and the Rules should allow this alternative to professional liability insurance to protect these lawyers from being stigmatized.

6. Unlicensed Carriers. The Committee also expressed concern that offshore or other unlicensed insurers may offer extremely low limits of insurance or otherwise lack sufficient financial wherewithal, thus making the insurance coverage illusory to the client under many scenarios.

This position is only that of the State Bar of California's Committee on Professional Liability Insurance. This position has not been adopted by the State Bar's Board of Governors or overall membership, and is not to be construed as representing the position of the State Bar of California.

Cc: Starr Babcock, Sr. Executive, Member Services

SHAWN J. CURTIN
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Telephone 415/492-2280 Facsimile 415/492-2295

September 8, 2006

Saul Bercovitch
State Bar of California
180 Howard Street
San Francisco, California 94105

Re: Mandatory disclosure of insurance status

Dear Mr. Bercovitch:

I have been a sole practitioner in San Rafael for 26 years. Although I know some solo and small firm attorneys who have carried errors and omissions insurance at some time during their careers, many have found that the income from a small law practice does not justify the outrageous premiums charged. Some limit their practices to small scale, low risk projects. Most have never had any serious complaints about their service, and many of their clients have been with them for decades. Why should they help pay for the negligent, incompetent, illegal, and unethical behavior of others by contributing a substantial portion of their income to the insurance pool through high premiums?

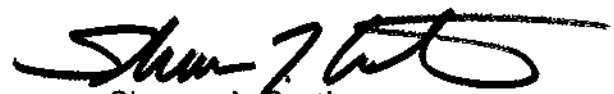
I strongly oppose mandatory disclosure of insurance, or the lack thereof, to all clients in all cases. Such a disclosure to long time clients would be a very awkward and uncomfortable process, causing undo concern. Clients will ask, "Why are you telling me this after 20 years?".

Further, many clients are "telephone clients" who are referred to, but never meet, their attorneys. Perhaps they call every year or two with a quick question or need a half-hour consultation. Does the attorney abruptly begin the call with the insurance disclosure? This would be a rude and unnecessary distraction.

Despite Jim Towery's pathetic party line drivel, I doubt there is any public protection motive behind this proposal, because that could be substantially achieved by reinstating the insurance disclosure requirement for written fee agreements from a few years ago. No, this is yet another assault on the small, underpaid, solo practitioner who

delivers honest legal services to a variety of clients at low cost without the bureaucratic entanglements of a big firm. Apparently, the greedy, big firm bastards still aren't making enough money, so they are going to try to steal more clients from solos, or drive some more of them out of the practice to thin out the competition. Once again, the Bar is not looking out for its solo and small firm members, but rather stabbing them in the back.

Very truly yours,



Shawn J. Curtin

/fb

Bercovitch, Saul

From: GADLAW1@aol.com
Sent: Friday, September 08, 2006 12:54 PM
To: Bercovitch, Saul
Subject: Insurance Disclosure

Mr. Bercovitch: I have an unblemished record of practicing law as a sole practitioner for over 30 years. I no longer carry mp insurance. I know it is not prudent but I am gradually retiring and just don't want to pay for it. My practice is limited to maybe 10 cases so I have a good handle on what I do and don't feel at risk. But, I do not want to be forced to disclose this fact to my clients simply because it would be embarrassing. If they ask, I would tell them. I would ask that you read the two letters in the current State Bar Journal titled "Sticking It To The Have-Nots" and "Recipe for Mischief". They make very valid points and express my view and that of a large percentage of California lawyers, in my humble opinion. Thank you. Glenn Dorfman, Santa Barbara. #068838

Bercovitch, Saul

From: rsnoke@pacbell.net
Sent: Friday, September 08, 2006 2:26 PM
To: Bercovitch, Saul
Subject: Against Insurance disclosure

Dear Saul Bercovitch:

I am opposed to insurance disclosure of any kind, and I'm opposed to mandatory insurance, and I'm opposed to written notification to the client of if you have insurance or if you do not have insurance.

The end result of forcing public disclosure of having or not having insurance, will be that the big firms and their corporate clients will have an advantage, and the citizen attorney and his individual clients will be at a disadvantage.

As an article stated in the California Bar journal, the attempt to cram down a insurance disclosure on the citizen attorney is just another case of the Haves sticking it to the Have nots, I fully agree with that statement.

The State Bar has a well deserved reputation of being an agency that represents itself, and its own pecuniary insterest and the big firm's interest and their corporate clients and not the interest of the citizen attorneys who represent the individuals.

Why else would the State Bar at the expense of its members have its main office in its fancy office building in high rent downtown San Francisco. If the State Bar really represented the Attorney's it would have its main office in low rent Bakersfield, with small rental space in San Jose, L.A., San Diego, and San Francisco.

Why not indeed. ???

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Maurice Rozner
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September 9, 2006

Saul Bercovitch
180 Howard Street
San Francisco, CA 94105-1639

Re: Proposed State Bar Insurance Disclosure

Dear Mr. Bercovitch:

The proposed rule re insurance disclosure will put me out of business.

I am US Air Force retired and a practicing attorney in California for over thirty years. I am a sole practitioner. I'm partially handicapped as a result of military duties. I pay full bar dues. I mainly do living trusts and only earn about forty thousand a year, except in exceptional years, from the law practice.

I've been sued once for malpractice and won on the third demurrer with the court dismissing the action against me. Regardless, my first rate insurance company tripled my rates even though I argued I had won because the plaintiff had no probable cause against me and I won on demurrers. Thus, I was forced to drop my coverage.

I now can't afford the cost of insurance since I do not work full time but I do pay full bar fees. As anyone in the profession knows there are many items contributing to overheard. IF I AM FORCED TO DISCLOSE THAT I AM SELF-INSURED, I WILL NOT GET ANY CLIENTS FROM MY SINGLE LOS ANGELES TIMES SUNDAY AD. Effectively the new rule will put me out of business.

Sincerely,

Maurice Rozner

Mary Cavanagh
Attorney at Law
155 North Balboa Street, D-1
San Marcos, California 92069-1346
(760) 591-4243 telephone
(760) 891-0164 facsimile

September 11, 2006

Editor, California Bar Journal
180 Howard Street
San Francisco, CA 94105-1639
Via Facsimile Number: (415) 538-2247

Re: Proposed Rule Requiring Mandatory Disclosure of Lack of a Malpractice Policy

Dear Editor:

We should all be ashamed of the proposed rule requiring disclosure of the lack of malpractice policy, which does nothing to protect the public and unfairly labels those who lack malpractice insurance, as lesser attorneys. We have over 100,000,00 members. We are the malpractice insurance market in California. Why don't we use our bargaining power to help all members and protect the public? Every Oregon attorney is required to carry malpractice insurance, through an insurance trust, the Professional Liability Fund (PLF), which costs far less than the malpractice policies available here in California. The PLF and the Oregon State Bar also actively teach new attorneys how to manage their practices and avoid malpractice claims. Oregon has universal, affordable, malpractice insurance, because the Oregon State Bar and the PLF made it happen. The California State Bar should follow Oregon's example.

Sincerely,

Mary Cavanagh

Mary Cavanagh

STEPHEN GREENBERG
ATTORNEY AT LAW
P.O. Box 754
Nevada City, CA 95959
California State Bar No. 88495
(530) 470-8896
sgberg1@mac.com

September 11, 2006

Saul Bercovitch, Staff Attorney
The State Bar of California
180 Howard Street
San Francisco, CA 94105
Fax: (415) 538-2515

Dear Mr. Bercovitch:

I'm a sole practitioner in a home office, doing exclusively postconviction criminal defense. I strongly oppose the Bar's proposal for mandatory disclosure of malpractice insurance non-coverage. Well over 90% of my practice consists of court-appointed appellate work, with malpractice insurance covered by the appellate project system. I have never purchased my own policy, because it would cost many dollars, for little sense: (1) I've probably averaged one new private client every two years or so. (2) The likelihood of a malpractice suit is less than remote, given the law's requirement of complete exoneration as a prerequisite to malpractice relief. (*Coscia v. McKenna & Cuneo* (2001) 25 Cal.4th 1194, 1197-1201; *Redante v. Yockelson* (2003) 112 Cal.App.4th 1351, 1357-1358.)

In this context, I believe the disclosure proposal would impose an unfair burden on me and on similarly situated attorneys. I would be forced to disclose a fact that in the context of the work I do is virtually meaningless, but one that may scare away my very few private clients. And my loss would hardly guarantee those clients' gains. As an experienced Level V appellate attorney, I'm confident that I provide a very high quality of representation to my clients. By contrast, in a recent murder appeal where I was initially appointed by the court, the client's family suddenly decided to hire a private attorney in a firm with a boastful Internet presence (and, no doubt, malpractice coverage). I read the attorney's opening brief and was shocked: From ignorance of court rules to weak presentation and meaningless argument, it was terrible. This is only one story, of course, but I am honestly concerned that in the postconviction arena the proposed disclosure rule would effectively hurt both clients and responsible counsel.

Sincerely,

Stephen Greenberg

Law Offices of Michael J Siegel

♦♦♦

Practice Limited to Crime Victim Advocacy ♦ P.O. Box 150 ♦ Loomis, Ca. 95650
Phone (916) 652-4400 ♦ Fax (916) 652-7873

September 11, 2006

Saul Bercovitch, Esq.
California State Bar
180 Howard St
San Francisco, CA 94105

FAX: 415-538-2515

Re: Proposals regarding insurance disclosure

Dear Mr. Bercovitch:

First, please be aware that I had prepared a Public Comment for you several weeks ago, and attempted to e-mail it to you. That effort failed, and, because I had not saved the document, it was lost. It has taken me until now to overcome my frustration.

Summary of my position: As you know from my earlier correspondence, I opposed the original proposal (currently contained in Proposed Rule 3-410), and still do so for the reasons listed below. However, I do not oppose the proposed new insurance disclosure rule in Rules of Court 950.5 and 950.6 if adopted without Rule 3-410.

Brief summary of my background: I am a solo practitioner, focusing almost entirely on representing crime victims and their families who apply for assistance from the California Victim Compensation and Government Claims Board. Gov. Code Sec. 13950 *et seq.* I have been in this administrative law practice for 25 years, and believe I am the only attorney in California whose practice is solely on crime victim advocacy. The Victim Compensation Board pays my legal fees and my clients receive zealous legal representation at no cost to them. [Gov. Code Sec. 13957.7(g) and Sec. 13952(d)(3)]. Attorney fees are capped by statute at $500, but I rarely receive more than $200 on a case, and usually not even that much. I used to have professional liability insurance, but several years ago it became apparent that the modest amount I receive on a case, and the relatively limited exposure (most claimants are not eligible for more than $3,000 in mental health benefits), did not justify the expenditure on malpractice insurance.

I do, however, have quite a caseload of "ongoing" clients, and the cost of contacting each of them to notify them that I do not have insurance would be a major undertaking, in terms both financial and time expenditure. Most of my clients are low-income, and move quite a bit; some are domestic violence victims who choose not to leave a forwarding address (to avoid being located by the perpetrators). I predict that a large percentage of such mailings would be returned "addressee unknown".

Concerns over the concept:

I have historically been an ardent advocate for consumer protection. However, this proposal appears to be a case of a solution in search of a problem. Although the Task Force has estimated

the number or percentage of attorneys without professional liability insurance, I did not see in the materials any confirmation of the number, if any, of consumers who have been harmed by an attorney's failure to maintain such insurance. What is the number of malpractice suits which involve attorneys without insurance? How many of those resulted in the consumer's not receiving appropriate compensation? (And, since the Task Force has opined that it does not want to exempt pro-bono clients, it would be useful to know the number of those clients/consumers who have been harmed by the absence of malpractice insurance.) It is this population which arguably needs protection, but no data was obtained--or, at least, provided--to show that there is any need for a change in current practice or that the proposed rules are the answer.

Concerns over Rule 3-410:

1. The cost is prohibitive, as described above. You had indicated in our telephone conversation that my problem with distinguishing between current clients and former clients was addressed in the "Discussion" section of the proposed rule, but I do not agree. It is not clear whether I would be providing "additional legal services" to a "returning client" if such client contacts me for further victim assistance of a type previously provided (*e.g.*, advocating for reimbursement for mental health counseling after a lapse in time). To be on the safe side, I would have to send out thousands of letters to clients whose cases had not reached their statutory or regulatory limits for victim assistance, but whose files had been "archived" due to non-activity. (Even without having to contact clients whose claims are "inactive", I still would have a Herculean notification task, since I take on about 100 new clients each month.)

It appears to me that the proposed rule pre-supposes certain things which are not applicable in my case. For example, it is obviously presumed that a client returning "for additional legal services" would be paying the attorney for that additional work. In my practice, however, my clients never pay me. It is presumed that most agreements for legal representation are reached face to face. However, virtually all of my contact with clients and potential clients is by letter, fax or telephone. It may not be difficult in the "typical" case for the attorney to have the client read and sign the acknowledgement letter during their meeting, but I do not meet my clients--at least, not face to face. Finally, unlike other practitioners, I cannot pass on the cost of insurance or of notification to my clients though an increase in hourly rate, since my fees are paid based on a statutory formula--similar to a contingency fee--and I do not have the option to charge "costs".

2. The proposed rule requires that all clients sign and date a letter acknowledging receipt of notice of non-coverage of insurance. As pointed out above, many clients will never receive my letter, and many that do receive it will probably not respond. I would then be in violation through no fault of my own. How does the Task Force propose to address this?

3. Please note that there is little business advantage for me to have insurance. Since I represent approximately 70% or more of all victim compensation claims represented by attorneys--though only about 8% of all claims filed in this state--my "competition" for clientele is not other attorneys, but, rather, the Victim Witness Assistance centers located in almost all the counties in California. And those offices are either under county agency jurisdiction (primarily district attorneys' or probation offices) or non-profit agencies run by non-attorneys. In neither case do the advocates have professional liability insurance. (Indeed, county agencies have significant protection under the Government Torts Claim Act from claims or suits by their clients.) Thus, neither requiring me to carry insurance nor forcing me to notify my clients that I do not have such insurance is likely to affect the client's decision about my representation.

4. The proposed rule contains some limited exceptions to this one-size-fits-all notice requirement. Only government attorneys and in-house counsel are exempted, on the unsupported assumption that the employer "presumably" knows about the attorney's insurance coverage. (More likely, the employer does not care if the attorney has insurance.) Although the Task Force reportedly considered and rejected exempting pro bono cases, I would like to make another pitch for such an exemption. Small practices such as mine, and public interest law firms which do pro bono work, will have to consider closing their doors if the cost of insurance or the expense of notification is sufficiently onerous. In such case, a valuable legal resource to the community would be lost and many consumers may not have any access to justice. The "cure" would be worse than the "disease".

I am sure other attorneys--especially solo practitioners, small firms or newly licensed attorneys--also object to this rule for reasons similar (or perhaps not) to mine. I appreciate that the Task Force believes it is trying to help consumers by requiring malpractice insurance or giving notice of non-coverage. However, the proposed approach would create an untenable burden on practitioners like me, and force us either to incur an unjustified cost or to consider retirement.

For all these reasons I respectfully oppose the adoption of Rule 3-410.

Support for Rule 950.6.

I do not have a problem with Rule of Court Rule 950.6. If a current or potential client wants to check on my insurance coverage (or lack thereof), s/he is welcome to contact the Bar. However, I do not agree with the Task Force's implication that Rule 3-410 is also necessary because "less sophisticated" Californians do not have access to a computer to check information on-line. Computers have become ubiquitous. Even if a person does not have one, his neighbor/friend does. Or, he can use the computer at the local public library. In any event, a client can call the Bar to check on insurance status. (I assume the Task Force agrees that telephones are readily

available to everyone?) So, if a consumer is sufficiently concerned whether an attorney is insured, s/he can find out. (For instance I presume that people know to contact the Contractors State Licensing Board before hiring a contractor, or check with the Medical Board to find out if their doctor has a record of complaints. Better Business Bureau? Chamber of Commerce?) An attorney's record of disciplinary action is currently available from the Bar. I submit that <u>that</u> record is or should be of more interest to a potential client that insurance coverage. But any way, the insurance coverage information could and should be equally available to the public, and any member of the public who wants to know, should easily find that information.

A "less sophisticated" client may not know what s/he does not know, and may not care, especially if the legal advice or representation is free to them. I submit that their acknowledgment of notice of their attorney's non-insurance--especially if that notice is buried in a lengthy fee or service contract--does not necessary show that they are aware of the risks involved in retaining such counsel.

I know you will pass on my concerns and comments to the Task Force. Thank you for taking the time to wade through all this.

Sincerely,

MICHAEL J SIEGEL

MJS/id

Bercovitch, Saul

From: John D. Harwell [jdh@harwellapc.com]
Sent: Monday, September 11, 2006 8:53 AM
To: Bercovitch, Saul
Subject: Insurance disclosure

I am a sole practitioner who chooses to maintain malpractice insurance. It is a very significant cost of my practice. I cannot imagine practicing law without insurance.

I have a client who was badly served by a lawyer holding him/herself out as an ethics advisor to the bar. When sued for malpractice he/she, self-representing, announced almost gleefully, that he/she had no insurance and no assets in his/her name. The case, worth about 1/2 million in damages, went away as no contingency based lawyer would continue representation because of the difficulty of collecting on any judgment.

No client ought to be put into that position without advance notice. My client was a physician, someone relatively sophisticated and never imagined a lawyer, especially one of somewhat high profile, would ever practice without insurance. He imagined lawyers protected themselves and their clients as do physicians.

At a minimum, all lawyers practicing without malpractice insurance should be required to disclose to their prospective clients the lack of coverage. At the very minimum, clients should be given the information necessary to make an informed choice.

I believe all lawyers should be required to carry malpractice insurance, but I am often thought to be unreasonable. Did you know that all physicians who practice in any hospital in California are required to carry malpractice insurance at a minimum 1 million/3 million level? Idea is to protect patients. Apparently, idea to protect clients hasn't gone that far in our profession.

John D. Harwell
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contained in this message. If you have received this message in error, please advise the sender by reply e-mail and delete the message.
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Bercovitch, Saul

From: Frank Mangan [Frank_Mangan@fd.org]
Sent: Monday, September 11, 2006 12:04 PM
To: Bercovitch, Saul
Subject: Insurance disclosure.

I am strongly opposed to forcing all lawyers to disclose that they have no malpractice insurance. This is going too far with regulations. I have malpractice insurance now through my employer, but have gone without in the past and may do so in the future when I go back into private practice. I do only criminal defense work and believe malpractice insurance is not necessary for me. Also, this is yet another burden on sole practicioners that will not affect large firms. I would not mind disclosure to the Bar.

Frank M. Mangan
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Bercovitch, Saul

From: Sgclaw@aol.com
Sent: Monday, September 11, 2006 1:51 PM
To: Bercovitch, Saul
Subject: Vote against mandating malpractice disclosure in contracts

I am a general practicing attorney and I serve a wide range of people and companies that larger law firms do not, will not or cannot serve. Over the years, the GP's income has hardly kept pace with the "specialists" so that I'm not aware of any new GPs in my town since I started practising in 1984. This gap is being filled by people who have no license and no training to practice law. For GPs, keeping high priced malpractice insurance is too expensive and we've already cut our overhead to the bone to stay in business. Putting such an unnecessary disclosure in my contract only hurts my business and does nothing for the people injured by the unauthorized practice of law. If you hired a contractor to work on your house, would it be more important to you if he was insured with Allstate or whether he has a disciplinary record with the contractor's board? Most of the new policies for us GPs that I've seen exclude just about everything we can get sued for anyway so what's the point? I notice under the proposal that the contracts don't have to provide if someone has insurance and I can tell that is done for the benefit of rich lawyers in big firms who are already insured. I think the issue here is who do we work for. Do we work for big insurance companies or do we work for our clients? Requiring insurance through a back door disclosure policy is akin to increasing our taxes.

By artifically creating a demand, insurance premiums will rise and then be passed on to the consumer except for us "little" people whose clients can not afford the high legal rates already charged by the "big" lawyers. Thank you for listening to me and thank you for keeping the middle classes' access to legal services alive in California. vty Steve Chandler State Bar Number 114699

Bercovitch, Saul

From: Robert Beauchamp [rrb@beauchampfirm.com]
Sent: Monday, September 11, 2006 2:24 PM
To: Bercovitch, Saul
Subject: Comments on Proposed Insurance Rules

Do I need to submit comments by regular mail or can you consider this email. If the former, please reply and I will forward by mail. If the latter, please consider the following:

I am essentially an in-house lawyer for a real estate developer but I still do some minimal part-time representation, primarily but not exclusively pro bono. Malpractice insurance is prohibitively expensive in light of my minimal practice. The new rules would force me to abandon my limited practice rather obtain insurance and I would not choose to have the State Bar post on its website the scarlet letter that I do not carry insurance with the negative connotation that such statement carries.

I also have the following general statement. That State Bar is becoming more and more a tool of large firm lawyers imposing greater and greater restrictions and expenses on solo and small firm lawyers. I know, because I began my career at Gibson, Dunn & Crutcher. At that time I had the luxury of having a firm pay my premiums and State Bar related expenses. As insurance becomes more and more expensive, those who practice low margin and pro bono law will be less and less likely to do so. Similarly, there would be a preference for employment with firms who cover their attorneys increasing the cost of legal services to those formerly served by solos and small firms. The unintended consequences of these proposed rules on real people, both lawyers and clients, are further reaching than the big firm and State Bar lawyers who sit in ivory towers could possibly imagine.

Thank you for considering these comments.

Robert R. Beauchamp
3151 Airway Avenue
Suite U-2
Costa Mesa, California 92626
Telephone: (714) 918-0707 (extension 3)
Facsimile: (714) 918-0706
Robert Beauchamp Mobile Phone: (949) 370.8000

Bercovitch, Saul

From: Higginbothamlaw@aol.com
Sent: Monday, September 11, 2006 9:37 PM
To: Bercovitch, Saul
Subject: Comments regarding the 2 proposed insurance disclosure rules

My name is Keith Higginbotham. My bar number is 152036. I have been practicing law since 1992. I am mostly an appearance attorney practicing exclusively Federal Bankruptcy law. I average 5-8 hearings a day for 4 days a week. My clients consist mostly of other law firms -- big and small, where I make their court appearances at mostly law and motion matters.

I have never carried malpractice insurance and have been blessed with never having been sued by one of my clients.

I am opposed to both proposed rules -- but especially the one requiring direct disclosure. This has never been an issue with any of my clients. Having to affirmatively make this disclosure could have a significant chilling affect on my specialized practice.

Of the two proposals, I find the disclosure to the Bar to be slightly less distasteful.

Thank-you for allowing for our input.

Keith Higginbotham

JACK COHEN
Attorney at Law
Post Office Box 6273
Beverly Hills, California 90212

September 12, 2006

Mr. Saul Bercovitch, Staff Attorney
The State Bar of California
180 Howard Street
San Francisco, CA 94105

Re: **Proposed New Insurance Disclosure Rules**

Dear Mr. Bercovitch:

The following comments are provided in regard to the proposed new insurance disclosure rules for attorneys. Two separate insurance disclosure rules have been proposed. One rule would require direct disclosure to the client (proposed Rule 3-410) while the other rule would require certification of insurance status to the State Bar and public disclosure of those attorneys who are not insured (proposed Rule 950.6). In providing the comments, references are made to the June 2, 2006 Agenda Report (hereafter "Agenda Report") prepared for the members of the Regulation, Admissions, and Discipline Oversight Committee.

Requiring direct client disclosure and disclosure to the State Bar is overkill and unnecessary. There should be a single disclosure requirement made directly to the client (proposed Rule 3-410). This is the approach that the Legislature took with respect to previous insurance disclosure requirements for attorneys. (Agenda Report at pp. 5-6.) Requiring direct disclosure to the client (or potential client) would enable the client to personally question the attorney regarding the circumstances surrounding any absence of insurance. This will enable the client to make a more informed consumer decision whether the absence of insurance is or is not a barrier to engagement.

Under the guise of "maximizing consumer protection," a dual disclosure requirement was recommended. (Agenda Report at p. 10.) It was acknowledged that such a dual requirement was "unique" in that none of the other sixteen (16) states that have adopted an insurance disclosure requirement for attorneys utilize dual disclosure. (Agenda Report at pp. 7, 10.) The fact that none of the sixteen states that have adopted an insurance

disclosure requirement opted for dual disclosure seriously calls into question the merits of this option. If dual disclosure were truly such a meritorious option that "maximizes consumer protection and a client's right to know," it would be reasonable to expect that at least several of the sixteen states that have previously considered the matter would have opted for dual disclosure. Instead, none have.

It was noted in the Agenda Report that by making insurance information available to the public such as on the State Bar website, "potential clients would be able to ascertain whether an attorney is uninsured before deciding whether to contact the attorney about a potential engagement." (Agenda Report at p. 10.) However, this approach does not enable any potential client to personally question the attorney regarding the facts and circumstances surrounding any absence of insurance. This will result in many consumers making potential engagement decisions based solely on public disclosure information (e.g., State Bar website) without being fully informed of the facts and circumstances surrounding any absence of insurance which might otherwise impact the decision of a consumer to engage a particular attorney.

For the reasons set forth herein, dual disclosure should be rejected in favor of a single insurance disclosure requirement made directly to the client as contained in proposed Rule 3-410. Thank you for your consideration of my comments.

Very truly yours,

Jack Cohen
Attorney at Law

Statement of Opposition to Proposed Rules of Non-Insurance Disclosure
by
Edward Poll

The State Bar of California has sent for public comment a proposed Rule of Professional Conduct and Rule of Court that would require all attorneys to make disclosure to their clients when they do not have professional liability (malpractice) insurance.

Support for the rule is based on the supposition that the public will be better protected. Based on the rationale enumerated below, I strongly oppose the proposed rules and urge the Committee to modify its position.

Background

- More than 70% of the lawyers in California are sole and small firm practitioners.
- 25% of California's lawyers earn less than $50,000 per year; 49% earn less than $99,999 per year.
- Professional liability insurance, on average, cost between $4,000 and $7,000; the cost is substantially higher in certain practice areas.
- The cost of most available insurance would approximate 10% of the affected lawyers gross earnings.
- A California Bar Journal survey of 2001 found that 18%, or approximately 30,000, of private practitioners go "bare" or do not have professional liability (malpractice) insurance.
- Illinois found that 40% of its sole practitioners do not have such insurance.
- There is no "affordable" malpractice insurance available in California for experienced attorneys.
- The State Bar of California endorses a private insurance carrier's offering of malpractice insurance and receives a substantial stipend from every policy written under this program. If this is not a conflict of interest, it is an apparent conflict.
- Oregon has had mandatory malpractice insurance since 1978 and offers an affordable insurance program for its members.
- Government and in-house counsel would be exempt. Most, if not all, larger law firms have insurance coverage, thus limiting the application of these proposed rules to sole and small firm practitioners.
- Comment deadline: September 15,2006. Written comments are to be directed to Saul Bercovitch, Staff Attorney, The State Bar of California, 180 Howard Street, San Francisco, CA 94105. Fax: 415.538.2515.

421 Howland Canal, Venice, CA 90291 • TOLL FREE (800) 837-5880 • TEL: (310) 827-5415 • FAX: (310) 578-1769 • E-MAIL: edpoll@lawbiz.com • WEB: www.lawbiz.com

Statement of Opposition to Proposed Rules
Non-Disclosure of Professional Liability Insurance
September 12, 2006

Argument in Opposition to Proposed Rule Requiring Non-Insurance Disclosure

- One reason for this proposal given in the report of the committee at page 9 suggests that clients may have an expectation that lawyers have professional liability insurance; this conclusion is without empirical support.
- Clients, at the time of engagement, generally focus on their problems. Inserting disclosure of lack of insurance will either have no effect or will negatively impact the economic survival of a major segment of the Bar - sole and small firm practitioners, 30,000 of whom are estimated to be "bare."
- If the public were to choose *not* to engage a lawyer who does not have professional liability (malpractice) insurance, The State Bar of California will be responsible for disenfranchising 18% of its population. **Their sole crime will be to refuse to purchase malpractice insurance. These lawyers have no grievance against them other than that they lack the economic muscle to purchase malpractice insurance.**
- The lack of professional liability insurance does not mean the lawyer is incompetent or a "bad guy." That's the inference, though, of the proposal.
- **If more information for clients is better than less**, why not require lawyers to disclose their won-lost record and other evidence of the results they have obtained in the past for clients?
- **If public information were truly the reason for the proposal**, why not educate the public about the economics of law practice, so that they truly know what to ask their lawyer.
- **If public information were truly the reason for the proposal**, why not educate lawyers about the economics of law practice so they would be better equipped to afford such insurance? Why not mandate law practice management education for MCLE credit?
- Other professions require neither professional liability insurance nor disclosure of the absence of such coverage. Not doctors, not accountants, not architects. Why should the legal profession? While this is not the direct objective of the proposed rules, it is the "backdoor" effort to compel purchase of such insurance.
- The report suggests that the rules should be viewed as consumer protection. There is no empirical support that this will have any benefit for consumers.
- **If the Bar is truly concerned about consumer protection**, then purchasing professional liability insurance should be mandated. **And**, as in Oregon, affordable professional liability insurance should be available.
- Recently, the Board of Governors announced an effort to address the economic concerns of sole and small firm practitioners and to reverse the perception held by many that The State Bar fails to be concerned about their interests. The current effort flies in the face of such effort.

Conclusion

The small firm practitioner is less able to pass the increased cost of this proposal on to his/her clients. It is not reasonable to expect a lawyer to spend 10% of his gross earnings (not gross revenue) for such insurance when he/she can barely subsist now.

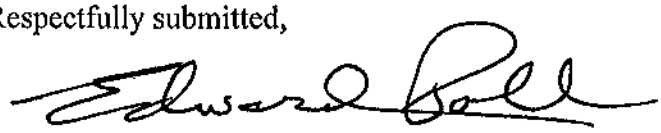
There is no evidence that the public either asked for this information (disclosure) or that the public will do anything with this information if they receive it.

The proposal sub rosa demands something of lawyers - get insurance. But, the Bar fails to provide what they demand. The Bar will enable private enterprise, perhaps even its own insurance provider who pays the State Bar for every policy written, to write policies at premiums most lawyers in this category (currently uninsured) can't afford. There is no policy limit set forth in the proposal. How much insurance is enough to protect the public?

What happened to the promises of the Board of Governors to work for the benefit of sole and small firm practitioners? What happened to the promise of a purchasing cooperative that would allow lawyers to purchase the needs of their practice for affordable prices, including professional liability insurance?

Paraphrasing a cry from our Forefathers, there should "No demand by the State Bar without the economic ability to enable fulfillment of that requirement!" The Bar is attempting to put the cart before the horse.

Respectfully submitted,



Edward Poll (as an individual)
LawBiz® Management Co.
Former Chair of Law Practice Management & Technology Section, State Bar of California
Co-Vice-Chair, Counsel of Section Chairs, State Bar of California
Board approved by SAC® as a Coach to the Legal Profession
Fellow, College of Law Practice Management

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JAMES T. BIGGS
LARA A.S. CALLAS

September 12, 2006

Via Facsimile & U.S. Mail

Saul Bercovitch, Staff Attorney
The State Bar of California
180 Howard Street, 6th Floor
San Francisco, CA 94105

Re: Public Comment to Proposed New Insurance Disclosure Rules

Dear Mr. Bercovitch:

I am writing to offer public comment on the proposed new Insurance Disclosure Rules. I am a member of the State Bar's Committee on Professional Responsibility and Conduct but these comments are submitted in my independent capacity. I am also a former probation monitor, and past member and former chair of the State Bar's Committee on Mandatory Fee Arbitration. My practice is primarily in the field of lawyer-client fee disputes, and legal malpractice cases, both prosecution and defense.

In summary, and subject to my comment below, I support the proposed rules, and believe they have been a long time coming. I wholeheartedly support the recommendations of the Insurance Disclosure Task Force and James Towery's leading efforts in this subject.

There is a much dissension in the legal community on this issue. You undoubtedly have received comments that the State Bar should not get into practice management issues or mandate rules that require lawyers to obtain insurance coverage. These comments entirely miss the point. This is not a mandatory insurance initiative. Instead, it is about disclosure. Clients have the right to know material facts in making the decision to hire a lawyer, and whether to continue to use the services of a lawyer. The absence of malpractice insurance coverage is a material factor in such decisions. When a lawyer's coverage terminates, that is a substantial development affecting the representation not only because it may affect the client's remedies in the event of a claim, but more

importantly, it may cause the client to change counsel. It is material. Every client has the right to know, and every lawyer should have the professional obligation to disclose.

The proposed rules might have the incidental benefit of causing more lawyers to be insured, yet that is not the purpose of the rules. The purpose is simply disclosure of a material fact, and making such information accessible to the public. That is certainly in the public interest, and neither the State Bar nor the Supreme Court should be dissuaded by the hue and cry. The very fact that uninsured lawyers are concerned that disclosure of the absence of malpractice insurance may cause clients to look elsewhere for legal services poignantly demonstrates that such disclosure is material to clients. The State Bar is not here to protect lawyers but rather to serve and protect the public while assisting lawyers in that public service. These proposed rules serve the public interest and they are necessary.

We already have the duty of communication and the proposed rules clarify the scope of that duty. From the discipline perspective, rule 3-500 and Business and Professions Code Section 6068(m) already require disclosure of significant developments affecting the representation. The problem is that many lawyers choose to overlook the absence of insurance or the cancellation of coverage as being a significant development. That is the reason an express rule requiring such disclosure is necessary.

My only reservation in supporting these proposed rules is with respect to Subdivision (C) of Rule 3-410. I think there is uncertainty as to what is meant by "currently rendering legal services" and I don't believe it is adequately explained by the discussion section. Some lawyers, estate planning lawyers in particular, have ongoing attorney client relationships that span decades. Frequently, years go by without client contact, yet the lawyer is performing "*continuing*" legal services in the sense that the lawyer monitors developments in the law and periodically contacts the client. Monitoring involves a current rendition of legal services without necessarily being an active role. Monitoring may take place with respect to a dormant file such as an estate planning matter. I think there is uncertainty in the proposed language as to whether lawyers who have dormant files but still monitor the law for their clients would be involved in "currently rendering legal services" under the proposed rule. Hence, I would encourage changing that terminology to word that denote *activity*, such as "*actively performing current legal services*" rather than current rendition of services. The discussion should perhaps explain that it does not apply to dormant files of existing clients, but in situations where the file is dormant, the notice should be required to be given within 30 or 60 days after the file again becomes active, if it has not already been provided.

I thank you for the opportunity to provide public comment in this important matter, and look forward to adoption of the rules.

Very truly yours,

THE SALL LAW FIRM
A Professional Corporation

Robert K. Sall

RKS/jvb

Cc: James E. Towery, Esq.
Jill A. Sperber, Esq.

Bercovitch, Saul

From: Dye, John
Sent: Tuesday, September 12, 2006 4:03 PM
To: Bercovitch, Saul
Subject: comment re proposed Insurance Disclosure rule

Dear Mr. Bercovitsch,

I am writing to express my agreement with the letters of Michael W. Szkaradek and Michael Mahoney in the September 2006 California Bar Journal expressing their opposition to the proposal to require insurance disclosure, and I would like to add my own intense opposition to the proposed rule. If a (prospective or current) client wants to know if an attorney has insurance, all they have to do is ask. The insurance industry has already infiltrated too many aspects of citizens' lives, and lawyers already have to comply with too many arcane rules and procedures. As Stephany Yablow aptly put it in her letter opposing new rules in general, "stop the madness!"

Sincerely,
John Dye
Law Clerk
Office of General Counsel

University of San Diego

Center for Public Interest Law | Children's Advocacy Institute | Energy Policy Initiatives Center

September 13, 2006

James Towery, Chair
Insurance Disclosure Task Force
Saul Bercovitch, Staff Attorney
State Bar of California
180 Howard Street
San Francisco, CA 94105

FAX: (415) 538-2305

Re: Proposed Malpractice Insurance Disclosure Rules

Dear Chairman Towery and Mr. Bercovitch:

I respectfully ask that the following comments be included in the Bar's consideration of the pending insurance disclosure rules.

The University of San Diego School of Law's Center for Public Interest Law (CPIL) has a longstanding interest in the proposed rules and related subject matter. CPIL has represented the interests of consumers before state regulatory agencies, including the State Bar, since 1980, publishing the CALIFORNIA REGULATORY LAW REPORTER and operating a statewide public interest law firm. From 1987 to 1982, I served as the State Bar Discipline Monitor, appointed by then-Attorney General John Van de Kamp and reporting to California Supreme Court Chief Justice Malcolm Lucas. The nine reports we published over that five-year period were relevant to two sets of legislative changes and numerous Bar rules relevant to attorney standards and discipline enforcement — including the creation of the existing independent State Bar Court structure.

We are especially interested in the subject matter of this proposed rule, having supported strongly required disclosure in 1992 as State Bar Discipline Monitor. And such disclosures were required – regrettably with a sunset date included. It is unclear, as discussed below, how such a basic tenet of consumer protection and ethical legal practice should be subject to sunset elimination. The California Trial Lawyers Association (now Consumer Attorneys of California) regrettably sought to time-limit that requirement and various legislative shenanigans led to its effective termination in 2000.

CPIL cites the following background points as relevant to the proposed rule's discussion. Stepping back from the instant issue – what is the purpose of attorney regulation? A seminal justification relates to consumer reliance on the performance of a publicly licensed attorney. That license is intended to assure some measure of (a) honesty, and (b) competence in practice. These are

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CPIL website: www.cpil.org • CAI website: www.caichildlaw.org

Reply to: □ San Diego Office □ Sacramento Office

the two lynchpins underlying "prior restraint" regulation of trades and professions generally, and — as with the medical profession — lawyers are entrusted with highly personal and often life-altering tasks. The consumers so relying often lack knowledge of the subject matter of the representation, and the regulatory scheme is intended to prevent irreparable harm that comes from dishonesty or incompetence.

The brunt of modern law practice is now specialized into distinct subject areas. A patent attorney does not practice criminal defense, a criminal defense attorney does not practice real estate law, a real estate lawyer does not practice bankruptcy law, a bankruptcy lawyer does not bring plaintiff personal injury actions, *et al.* Each of many areas of subject matter practice has become its own complex domain — respectively requiring its own set of skills, experience, and learning. And in the legal profession, perhaps even moreso than medicine, staying current is critical to competent practice. A single court decision can reverse what may be proper advice to a client.

In this setting, the Bar's performance in assuring competent practitioners is disappointing We give law graduates (including anyone from a mail-order law school lacking reasonable qualification or any accreditation) a single examination — usually at age 25. It is a general information test. We do not test in the actual area of practice upon which a client will rely. We do not prohibit practice outside of one's competent domain. We do not ever retest anyone on any subject, ever — for a lifetime. We have voluntary specialties, and we have required continuing education. But the former is limited in scope and utility and the latter has become a tax-deductible opportunity — often to vacation or visit an interesting locale. Even in this limited arena of continuing education, we do not require any nexus between those courses and areas of actual practice in a manner that assures competence.

We have a special fund to compensate clients (within limits) for intentional attorney wrongdoing, but that system does not pay for incompetence or malpractice — only for attorney theft and dishonesty. Our discipline system is supposed to address incompetent practice, but that requires a pattern of incompetence, and the number of cases effectively sanctioning attorneys on this basis is generally limited to extreme examples involving virtual client abandonment — not inability or error.

We then permit our licensees to practice without any malpractice coverage, and up to 20% of our profession runs "naked" without coverage. Most of these folks are judgment-proof. And, as my work examining consumer complaints suggested, these marginal practitioners are the single richest vein of incompetent and harmful practice.

So to summarize: We license attorneys upon whom consumers rely, and we do so primarily to assure competence and to limit the irreparable harm that flows from incompetent practice. We then do virtually nothing to assure such competence in the subject areas of law relied upon. We do nothing that reliably assures the maintenance of competence over any period of time. We do not cover the damage that comes from such negligence. We do not excise from our profession those who are incompetent with any degree of reliability. And we tolerate thousands of licensees — including the most dangerous groupings — functioning without coverage or practical redress for those consumers damaged by their malpractice.

What the Bar <u>should</u> do is multi-faceted. The extraordinary state intervention in the form of prior restraint licensing is justified because of the need to prevent harm. That prevention traditionally

includes barriers to entry (education, experience, examination requirements). Those barriers properly have a nexus to their justification. Accordingly, Bar licensure should be by subject area — and should be so segmented particularly for subject areas involving consumer adhesion and reliance. Every five to ten years, attorneys should be retested on evolving changes in the law in their respective area of practice (and licensure). Practitioners should be permitted to practice in multiple areas — where and if and as they demonstrate minimum competence. Where a retest examination is not passed, the attorney is on useful notice of a deficiency that should properly be corrected for a retest within thirty days. Such a system of entry relates to competent practice. The current system has a minimal relationship and effect.

The Bar has implicitly assured the body politic that it will protect consumers from incompetence. When it fails to do so, there should be redress. There are two alternative ways to provide such redress. First, the Bar could assess its membership sufficient funds to guarantee payment of all malpractice awards, as well as the damage from attorney dishonesty currently included. If such payments become extraordinarily large — as well might occur — the proper citizens are assessed the costs involved, because the State Bar is controlled directly by the profession it regulates. No other agency of state government has the same cartel structure — where the governing majority is actually selected by the self-interested members of the profession. While CPIL regrets this structure, it would appear that its adherents at least accept the ethical implications of such control. Should not the profession — controlling the prosecution of attorneys and the entry system, *et al.* — bear the costs of its own regulatory failure? Would not such a mechanism provide a useful incentive to prevent such damage because it involves self-assessment? What could be more just than to have those responsible for and in control of a regulatory regime bear the consequences of their performance? CPIL believes that such a structure would lead to consumer-protective regulation of the profession because the costs of failure would be properly and equitably borne. At present, they are too often passed onto the hapless clients suffering damage from the incompetent practice of licensees.

The alternative to such comprehensive coverage is to require minimum malpractice coverage of all private practitioners upon whom consumers rely. We require automobile insurance because of the damage that can occur from the negligence of drivers. We require licensed insurers to have sufficient assets to pay projected claims. We even require hundreds of thousands of blue-collar contractors to post a bond to assure some consumer financial redress for negligent or failed performance. But we then let our own colleagues off the hook – favoring their convenience and penurious interests over recovery for consumers for damages caused and adjudicated as attributable to their practice and our own implicit regulatory failure.

CPIL understands that the current proposed rule does not provide either of these meritorious alternatives. All it does is require a private (non-governmental) attorney to inform his client if he or she carries no malpractice coverage. It reduces consumer ignorance that counsel will be able to avoid financial redress for negligent practice. Put another way, it prevents counsel from hiding his possible judgment-proof status to his client.

Given the fact that every attorney owes a "fiduciary duty of the highest order" to his client, it is unclear how the failure to make such a disclosure in unmistakable terms is not a breach of that duty. "If I make a mistake and cost you your life's savings, you will only recover from me personally — if I have reachable assets and if a plaintiff attorney is willing to risk collection, both of which are

unlikely." How can someone who has a "special relationship of trust and obligation" to his client not make such a disclosure if it factually applies?

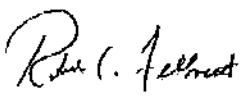
The rule as proposed is modest. It properly should include the element of Internet posting of the insurance status of all private attorneys (as the ABA model rules provide, and as is done by the Contractors State License Board for blue-collar contractors; see www.cslb.ca.gov's "licensee look-up" feature), in addition to the fee agreement disclosure. CPIL believes that ideally such disclosure would include the coverage limits applicable. At the very least, the fact of non-coverage should be disclosed if applicable – and in required bold print.

The committee's discussion of the rule proposal includes some discussion of enforcement. CPIL believes that a failure to disclose should make counsel liable for any judgments obtained, and failure to pay such a judgment within a reasonable period of time should be a basis for presumptive disbarment. At the very least, continued practice must be contingent upon malpractice insurance coverage. Such a mechanism is equitable. An attorney was relied upon and failed to meet minimum standards, resulting in damage. He or she did not insure against that harm and is unable to provide redress. Having visited loss onto one to whom a fiduciary duty is owed, such a practitioner cannot be permitted to continue to practice in such a client-endangering posture.

The proposed rule is modest and the arguments against the historical requirement mounted by the Consumer Attorneys of California lack even the usual measure of facial merit that most counsel are able to muster for almost any proposition. The argument has been that consumers "may not understand" the coverage information, or that some attorneys have their insurance "unfairly cancelled." (See Committee materials at 6, summarizing the Committee report of arguments involving SB 373.) Assuming, on the off chance, that this last argument has some measure of sincerity, the solution is to do what we have done in other areas of mandatory insurance: provide for inclusion for such persons into a Bar-arranged system of coverage as a last resort (as we have with auto insurance). Instead, the *non sequitur* position of those opposing disclosure is to do nothing. No disclosure. No accountability. No assured redress. It is insult on top of injury.

CPIL supports the proposed rule.

Sincerely,



Robert C. Fellmeth, Executive Director
Center for Public Interest Law
Price Professor of Public Interest Law

Former State Bar Discipline Monitor

COMMITTEE ON MANDATORY FEE ARBITRATION
180 Howard Street
San Francisco, CA 94105-1639
(415) 538-2020
September 13, 2006

Saul David Bercovitch, Esq.
Regulation, Admissions and Discipline Committee
of the Board of Governors of The State Bar
State Bar of California
180 Howard Street
San Francisco, CA 94105

Re: Recommendations of Insurance Disclosure Task Force

Dear Mr. Bercovitch and Committee Members:

At its regular meeting on July 21, 2006, the Committee on Mandatory Fee Arbitration ("CMFA") voted unanimously to support the recommendations of the Insurance Disclosure Task Force to amend the Rules of Professional Conduct to require attorneys who do not maintain professional liability insurance to disclose that fact directly to prospective clients in a writing signed by the clients, coupled with disclosure of lack of such insurance to The State Bar, which in turn would make that information available to those who inquire.

Members of CMFA have experience working with the state and local bars and in practice dealing with clients who have learned *after* legal malpractice has harmed them that their attorneys had no liability insurance or other resources to satisfy claims. Clients feel betrayed and defrauded under such circumstances, and CMFA believes that attorneys should have a responsibility to disclose their lack of liability insurance coverage at the outset of the attorney-client relationship. We also favor the mandatory disclosure to all prospective clients at the commencement of the attorney-client relationship, rather than the former statutory requirement of disclosure in written fee agreements, which are not required in all circumstances.

Our committee has provided to all attorneys sample written fee agreements, as approval by the Board of Governors, and they are now available to members on the Bar's website. If rules are adopted requiring disclosure of the absence of liability insurance, we will seek to amend the sample fee agreements to reflect this requirement for attorneys without liability insurance coverage. If we may be of any further assistance, please advise.

Very truly yours,
Committee on Mandatory Fee Arbitration

Gerald G. Knapton, Chair

Bercovitch, Saul

From: Richard H. Dwiggins [rhdwiggins@sbcglobal.net]
Sent: Wednesday, September 13, 2006 12:01 PM
To: Bercovitch, Saul
Subject: Insurance disclosure

Mr. Bercovitch:
Although I am covered by malpractice insurance, and have been for over 20 years. please put me firmly in the camp of those opposed to the proposed insurance disclosure rules. What next? If I am asked to draft a will for a client, I must disclose that I am NOT a certified specialist in estate planning and get my client to acknowledge this in writing? This is an annoying burden that will only hurt the lawyer of modest means while returning no significant benefit to the public.

Richard H. Dwiggins, Esq.
425 Sherman Avenue, Suite 320
Palo Alto, CA 94306
650/321-3540
650/321-0632 (f)

Bercovitch, Saul

From: LaurelT@ri-net.com
Sent: Wednesday, September 13, 2006 1:10 PM
To: Bercovitch, Saul
Subject: Insurance disclosure

Dear Mr. Bercovitch:

The insurance disclosure proposal is ill-conceived. While I am corporate counsel, and thus "insured" by my employer, and although I work within the insurance industry, I still believe this proposal is totally wrong.

If maintaining insurance is a requirement to practice, bar admission standards should be amended to include proof of insurance. Otherwise, the proposal is a way of eliminating perfectly competent solo practitioners and small or public interest firms from practicing in competition with bigger firms that provide firm insurance for their partners and employees.

Most attorneys never face a malpractice claim. While it may be prudent to have insurance, unless insurance is a practice requirement, the disclosure proposal should be rejected.

Thank you for your consideration of these comments.

Bercovitch, Saul

From: Lemoure Eliasson [lemoure@cox.net]
Sent: Wednesday, September 13, 2006 2:17 PM
To: Bercovitch, Saul
Subject: Malpractice Insurance Disclosure

Hello Mr. Bercovitch,

I know now is a little too late, however, as a stay at home mom that is trying to keep one foot in the legal profession until I can immerse myself completely again, I disagree with the disclosure requirement. For those of us working minimal hours, just to stay in the loop, this would kill overhead costs and prevent us from practicing our profession. The Bar seems more interested in protecting others then protecting those that pay dues.

After having said that, what is the status of the disclosure requirement?

Thanks,
Lemoure

Bercovitch, Saul

From: Clinton D. Hubbard [chubbard@cdh-law.com]
Sent: Wednesday, September 13, 2006 3:31 PM
To: Bercovitch, Saul
Subject: Comments on proposed new attorney malpractice disclosure rules

September 13, 2006 [via e-mail and fax]

Saul Bercovitch, Staff Attorney
The State Bar of California
180 Howard Street
San Francisco, CA 94105
415-538-2306 / fax: 415-538-2515

Dear Mr. Bercovitch:

I strongly oppose this proposal in its current form. This comment suggests some changes and points out potential problems and related questions. Thank you for taking the time to review these matters.

This proposal seems more like a boon to the insurance industry than an overall improvement. It will harm many attorneys. It may even do more harm than good to consumers who will have a false sense of security knowing that an attorney is "insured" but where there is actually a poor/low coverage insurance policy, or the coverage is limited/excluded for its matter. E.g., a claims-made policy with no tail.

I do not believe the following questions and objections have been adequately answered yet:

1. The transition is too abrupt, regarding the written-notice-to-client requirement.

1.a Existing clients: The new regime should defer the effective date of the written notice requirement to existing clients for 2 - 3 years. Such notice can be disruptive of the relationship and cause anxiety unnecessarily. What is the hurry? This is a relatively new and untested concept. A decent interval is needed so that the insurance markets can adjust in the interim or the attorney may elect to disclose the no-insurance information without this time pressure. There is no question that the very act of disclosure will be a severely detrimental marketing event.

1.b New clients: There ought to be a period of time to allow the insurance markets to adjust: 1 - 2 years before this requirement becomes effective for engagement by new clients.

2. What is the likely cost of insurance for an attorney who has been operating without it for the past 2 years? 5 years? 10 years? It could be a major financial blow, and possibly not available. Have you generated good data on this point? What is the likely cost and availability at these different intervals?

3. Apparently the State of Oregon has a mandatory insurance plan but with guaranteed "affordability" and availability. Is it possible to create such a plan in California before launching this radically new disclosure regime?

4. This proposal takes the unusual step of recommending both forms of disclosure: (I have heard 2nd hand that) 11 states require attorneys to disclose their lack of malpractice insurance on annual registration statements. 5 other states require direct disclosure to clients instead. California would be the only state requiring both. Why is this necessary? It seems overkill. Disclosure to the State Bar would be a

better first step, leading later to direct client disclosure.

5. Will this rule really provide much protection to the consumer? The term "malpractice insurance" has little hard meaning. Depending on policy limits and coverage exclusions, an insurance policy may provide very little 'deep pocket' indemnity protection (other than defense costs for fighting a client's malpractice claim). So this requirement could actually give the unsophisticated consumer a false sense of protection. E.g., consider a claims-made policy, with limits of $10,000, and where defense costs reduce the indemnity limits; and exclusions for some existing cases and clients. Even if this kind of limited policy is not actually available, this hypothetical still illustrates the parameters that can be altered to reduce price and effective coverage. E.g., a claims-made policy with no tail. This language invites form over substance abuse in order for an attorney to be able to market itself as being "insured."

-- The consumer may be less vigilant than it would otherwise be (in selecting an attorney, &etc.) because it believes that the attorney is "insured."

6. Simply because attorneys have malpractice insurance doesn't mean they have enough coverage for a medium/low dollar claim or that they're necessarily competent. The financial net worth and credibility and reputation and educational background of the attorney are the key forms of confidence for the consumer. A vigilant consumer will evaluate that information.

Thank you,
Clinton D. Hubbard

LAW OFFICES OF
CLINTON D. HUBBARD
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Government Contracts (Claims & Consulting)
Business Litigation

Th, 9/14/06
Dear Mr. B:

The 2 proposed rules mandating malpractice insurance disclore & reporting ~~and~~ are unreasonable and unjust. Such rules would unfairly discriminate against sole practitioners and small firms. Potential clients are often litigious, and some of them are outright goniffs.

(SBN 66,559) Yours truly, Harold B. Lee

HALT *An Organization Of*
AMERICANS FOR LEGAL REFORM

FAX TRANSMITTAL

TO: Saul Bercovitch, Attorney, The State Bar of GA

FROM: Suzanne M. Blonder and Rachel E. Jecker

WITH:

DATE: September 14, 2006

FAX NUMBER: 415. 538. 2515

PAGES: (*including cover sheet*) 4

MESSAGE:

We are sending a hard copy via mail for your convenience as well.

1612 K STREET NW ■ SUITE 510 ■ WASHINGTON, D.C. 20006
(202) 887-8255 ■ (202) 887-9699 FAX ■ www.halt.org

HALT *An Organization Of*
AMERICANS FOR LEGAL REFORM

Comments from HALT – *An Organization of Americans for Legal Reform* to the State Bar of California Insurance Disclosure Task Force Regarding California's Recent Proposed Rules Concerning Legal Malpractice Disclosure

Pursuant to the California State Bar Insurance Disclosure Task Force's request, HALT – *An Organization of Americans for Legal Reform* hereby submits comments regarding the Bar's proposed rules regarding required direct malpractice insurance disclosure to clients and the state bar.

HALT supports the California State Bar's recent recommendations concerning malpractice insurance disclosure. As part of our advocacy efforts, HALT works to make information easily available to the public and to better inform consumers of their rights within the legal system. The Bar's set of passed recommendations not only allow for much more accessible public information, but also require greater accountability for lawyers.

I. Direct Disclosure of Malpractice Insurance to Clients is a Strong Step Forward for California.

In its June 6, 2006 report, the California State Bar's Insurance Disclosure Task Force proposed rules "requiring direct disclosure to the client if an attorney is not covered by professional liability insurance, and the other requiring disclosure to the State Bar, to be followed by the public's ability to ascertain if an attorney is not covered by professional liability insurance."

Direct disclosure of professional liability insurance to clients is the most important recommendation for adoption. Clients are the true victims when an attorney refuses malpractice coverage. Lawyers are expected to fully protect their clients' interests and it is through rules such as these that clients are better informed when choosing their representation.

A lawyer may be put on probation, admonished, reprimanded, suspended or even disbarred, but this does not recompense a client who has lost her day in court due to a lawyer's carelessness or pay the bills of an attorney hired to remedy harm caused by a previous lawyer's misconduct.

A disclosure requirement serves two purposes: (1) to inform clients of whether a lawyer or prospective lawyer is insured and (2) to encourage lawyers to obtain insurance coverage. Neither purpose is served if the information is kept secret from clients or if clients do not understand how to access the information.

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It is also crucial that such disclosure take place at the time of engagement and is provided in writing and signed by the client. This written acknowledgement is a promise provided to the client of accurate and accessible information. The task force has proposed the correct provisions to accompany the proposed direct disclosure rules.

According to the American Bar Association, five other states—Alaska, New Hampshire, Ohio, Pennsylvania and South Dakota—require direct disclosure to clients. South Dakota has seen a marked increase in the number of insured attorneys since the state began requiring uninsured attorneys to disclose their uninsured status on professional letterhead. By requiring direct disclosure to clients and proposing provisions to strengthen the requirements, California helps set a precedent and a standard that all states can adopt.

In August 2004, the American Bar Association adopted the Model Code Rule on Insurance Disclosure, requiring all lawyers to disclose malpractice insurance status on annual registration statements. While this model rule does make an attempt to protect clients, it unfortunately falls short of truly preserving and protecting the integrity of the legal profession. In proposing to require direct disclosure to clients, California has surpassed the ABA's recommendations, successfully demonstrating the state's dedication to its client population.

II. The Bar Should Increase Accessibility of Information as Well as Adopt a Web-Based Service for Consumers.

California has taken great strides in proposing a requirement for direct disclosure to clients and the State Bar. However, California can go one step further and make this information accessible to everyone, instead of simply relying on lawyers to inform their clients at the time of service. The Bar should adopt a policy of immediate access to this information, offering to make it available to any prospective client searching online, via telephone or through the State Bar in hard copy form.

The Virginia State Bar's Web site allows the public to find full registration information for every lawyer licensed in the state. Illinois, Nevada and North Carolina follow the same example, making information on a lawyer's malpractice insurance status public. As well, Nebraska and West Virginia currently have plans to make information public in a variety of forms.

It is critical that clients are allowed the utmost freedom and information in making an important decision regarding representation. In an era when more and more consumers find answers to their inquiries on the Internet, a Web-based service would provide such information in a simplified and convenient way.

III. A Mandatory Malpractice Insurance Requirement Is Needed to Fully Protect Both Lawyers and Clients.

We ask attorneys to pay several hundred dollars every year in bar dues because we recognize that those given the honor to serve as members of the legal profession carry great responsibility. While most lawyers will never commit malpractice, a few dollars a week is a small price to pay to guard the client population and protect the integrity of the profession.

The only way to ensure reimbursement for aggrieved clients is to require that lawyers carry malpractice insurance. Although most clients assume that their lawyers are covered by professional liability insurance, the reality is that many of them take a chance and avoid insurance coverage. It is difficult to obtain precise figures on the number of uninsured lawyers practicing in the United States. Some studies, such as one cited by the Louisiana State Bar in its Oral Report to the bar's House of Delegates (January 19, 2002), show that as few as half the nation's lawyers are insured.

Only one state, Oregon, currently requires lawyers to carry malpractice insurance. Requiring malpractice insurance not only prevents greater instances of malpractice, but more importantly, protects clients. It is our hope that California follows Oregon's example in order to better protect their lawyers, along with their clients. We urge the Bar to consider going one step further by requiring its members to obtain malpractice coverage.

Conclusion

HALT respectfully supports the recommendations set forth by the State Bar of California Insurance Disclosure Task Force. We urge the task force to consider adoption of a web-based accessible service that would also provide information regarding a lawyer's malpractice insurance status. We also urge the task force to consider a mandatory malpractice insurance requirement.

Respectfully submitted,

HALT, Inc.
By:
Suzanne M. Blonder
Associate Counsel
Rachel E. Decker
Program Assistant

Bercovitch, Saul

From: Melissa Pritchett [mmp-law@cox.net]
Sent: Thursday, September 14, 2006 10:41 AM
To: Bercovitch, Saul
Subject: Comment on Insurance Disclosure proposed rules

Dear Mr. Bercovitch,

I am a solo, part-time practioner in Santa Barbara, CA. My practice is in the areas of Business Law, Estates and Trusts, and Trademarks.

I am very strongly against the proposed Insurance Disclosure rules. I have tried diligently for 9 months to obtain professional liability insurance for my practice for my own peace of mind to no avail. Either because of my part-time status or my area of practice or the solo status of my practice all of the insurers that I have been able to find refuse to offer me any coverage whatsoever.

I am ready, willing and able to pay for coverage. I have not had any complaints filed about me nor communicated to me. I have not had any disciplinary actions taken against me. As far as I can tell, all of my clients are happy with my efforts. I think I would be a great, low risk client for an insurer to insure, but they obviously do not agree.

If the State Bar wishes to offer insurance coverage to ALL practioners, so that I can be guaranteed the ability to obtain insurance then it would be a choice to be uninsured and a choice to have the additional burden of notifying clients. But to add the insult of having to publicly wear the scarlet letter of being uninsured to the injury of not being able to obtain insurance in the first place is not fair.

Until insurance is available to all, the proposed rules of disclosure are not equitable and practical. I oppose them strongly.

Best regards,

Melissa Pritchett
--
Melissa M. Pritchett
Attorney at Law

(805) 403-1800
(805) 966-9493 fax
mmp-law@cox.net

Bercovitch, Saul

From: Calvin F. Gunn [calvingunn@yahoo.com]
Sent: Thursday, September 14, 2006 11:19 AM
To: Bercovitch, Saul
Subject: Insurance Disclosure

Dear Mr. Bercovitch:

I have been a member of the Cal Bar for 53 years with a spotless record. I still practice within a few miles of where I (and my 8 children) were born. For decades I headed a small firm in Palo Alto but now operate, full time, as a solo practitioner.

I am outraged that the Bar has become the shill for the liability insurance industry, in total derogation of its responsibility to its own members, particularly in the light of the Legislature permitting the expiration of B & P Sec. 6147. Now the Bar proposes to substitute its own force for that of the Legislature?

If the supposed purpose is to protect clients, then Kenneth G. Petrulis' argument for ACCESS TO AFFORDABLE COVERAGE should be pursued! If insurance coverage is to be forced upon lawyers, then the State Legislature is the only body with that authority and would also have the responsibility to ensure that reasonable and affordable coverage be made available. Your "behind the scenes" sponsors, the liability insurance industry, would not be pleased because it introduces the specter of control over their obscene profits.

I also object to the conflict of interest posed by this power play against members of the Bar by James E. Towry whose law firm, Hoge, Fenton, Jones & Appel Inc. is one of the leading counsel for the liability insurance industry which is the profit-making sponsor behind this power grab.

If the client wants to know what insurance I carry, they have only to ask. This proposed Rule is for no purpose other than to coerce attorneys such as myself, to financially support the insurance industry, whether we receive any value for our dollars or not. If this coms to pass I will actively consider seeking a judicial ruling as to whether or not the Bar has the authority to do what they threaten and whether it can be ordered by persons with a patent conflict of interest.

Sincerely, Calvin F. Gunn **SBN 025036**

Bercovitch, Saul

From: McCarthy, Nancy
Sent: Wednesday, October 04, 2006 4:16 PM
To: Bercovitch, Saul
Subject: FW: Malpractice Insurance rule

-----Original Message-----
From: CBJ
Sent: Thursday, September 14, 2006 2:57 PM
To: McCarthy, Nancy
Subject: FW: Malpractice Insurance rule

-----Original Message-----
From: msnitow@gmail.com [mailto:msnitow@gmail.com]**On Behalf Of** Martin Snitow
Sent: Thursday, September 14, 2006 1:30 PM
To: CBJ
Subject: Malpractice Insurance rule

Dear Editor,

I favor mandatory disclosure to clients about whether a lawyer has malpractice insurance. I do not favor disclosure to the State Bar, unless it is investigating a specific problem with an attorney. I do not favor disclosure to the general public, particularly not on the internet. Essentially, I believe that former Business & Professions Code §§ 6147 and 6148 worked well and should be revived.

I never stopped making disclosures in my fee agreements despite the sunset of these statutes. I never heard any other lawyer complain that those disclosures were burdensome. I am not aware of any problem for clients with those disclosures. Let's go back to what worked well.

--
Martin S. Snitow
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snitow@aya.yale.edu
www.msslc.com

Bercovitch, Saul

From: Andrew Elowitt [elowitt@adelphia.net]
Sent: Thursday, September 14, 2006 4:43 PM
To: Bercovitch, Saul
Cc: 'Sections: Law Practice Mgmt.'
Subject: Public Comment on the Proposed Rules on Disclosure of Absence of Malpractice Insurance

BY FAX AND EMAIL

September 14, 2006

Mr. Saul Bercovitch
Staff Attorney
The State Bar of California
180 Howard Street
San Francisco, CA 94105

Dear Mr. Bercovitch

This letter is written on behalf of the Law Practice Management & Technology (LPMT) Section of the State Bar of California as public comment on the proposed Rule of Professional Conduct and Rule of Court requiring that California attorneys disclose to their clients that they do not have professional liability (malpractice) insurance. Following robust discussion of this issue, **the LPMT Executive Committee has concluded that further study of this complex issue is essential before any of the proposed changes are approved and implemented.** The opinions and concerns expressed in this letter have been approved by the voting members of the Executive Committee and have the support of virtually all of our section advisors and liaisons.

While there is no question that serving the public interest is of paramount importance, we have concluded that many of the proposed changes, once implemented, may in fact work against rather than for the public interest. We believe that the principal effects of the proposed rules changes – whether desired or not – will be to compel attorneys to obtain malpractice insurance and to place attorneys lacking malpractice insurance at a competitive disadvantage. It's easy to jump to the conclusion that this is in the public's best interests, but it ignores several unintended secondary consequences.

- ***Solo attorneys and small firms*** without malpractice coverage (representing approximately 30,000 members of the bar) will be the ones most effected by the proposed rules changes, even though they are generally the least capable of affording malpractice insurance. When confronted with the added cost of malpractice insurance, they will face the dilemma of either passing it on to their clients or absorbing it themselves. Neither alternative bodes well for the public. If the cost is passed on, clients of these solo attorneys and small firms – often that portion of the public least capable of affording legal services in the first place – will face higher legal bills. This we believe will be a further disincentive for them to seek the assistance of lawyers. If on the other hand the cost is absorbed, these solo attorneys and small firms (generally the least prosperous portion of the Bar) will become even less profitable and some may very well disappear. Fewer solo attorneys and small firms will mean fewer choices for consumers – something which hardly seems to be in the public interest or the intent of the proposed rules changes.

- ***New attorneys*** entering solo practice will find the cost of obtaining malpractice insurance to be an additional barrier to entering the profession. Since they are just starting out (and have yet to establish a predictable cash flow), they are among those least likely to be able to afford malpractice insurance. As new entries into the marketplace for legal services, they are already at a competitive disadvantage; not being able to afford malpractice insurance and being forced to tell clients they do not have it will further increase that disadvantage. This additional barrier will likely translate into fewer attorneys entering the profession, once again providing consumers of legal services with fewer choices. The impact of this will probably fall disproportionately on new attorneys who are ***minorities***, a group who are already underrepresented in the profession. Though certainly not an intended consequence, the proposed rules changes may end up undercutting the Bar's efforts to promote diversity through encouraging minorities to join the practice.

We are not aware of any data that would disconfirm these two predictions about the unintended consequences of adopting the proposed rules. That in itself gives us pause – we wonder whether this issue has been adequately studied and reviewed? Why not look at how similar rules changes have and are working in other states that have adopted the ABA model provisions? If there is no data, or it's inconclusive, or it's simply too early to tell, this is further reason to defer a decision on the proposed rule changes.

As practicing attorneys and law practice management specialists, our executive committee members also have grave concerns about ***the actual implementation of these new rules and the specifics of attorney disclosure***. Any idea, no matter how well-intended, may falter if it is confusing and difficult to put into practice. We fear this will be the case with the proposed rules changes, and we anticipate the following problems and dilemmas if disclosure of malpractice coverage becomes mandatory.

- Will attorneys bear the <u>additional</u> burden of explaining to clients and prospective clients the <u>specifics</u> of their malpractice insurance coverage, such as the amount of coverage, rating of insurer, type of insurance, coverage period, policy expiration date, etc.?

- We think it is disingenuous to believe that these sorts of detailed conversations <u>won't</u> take place as a result of mandatory disclosure. This, in turn, will force attorneys to become insurance industry practice experts just to be able to explain the fine points of malpractice policies to their clients and prospective clients.

- It's not only fair to assume that prospective clients will ask about the specifics, but also fair to assume that the accuracy and adequacy of an attorney's explanations about his or her coverage will itself become a part of any malpractice litigation. The additional burdens on attorneys and insurers in these situations would be significant.

- Finally, we are at a loss to understand how the proposed rules will address disclosure requirements for lawyers and firms that self-insure. Adequate self insurance is in the public interest, and this should be recognized in the proposed rules, rather than leaving the impression that such firms and individuals offer their clients no protection whatsoever.

As practicing lawyers and law practice management specialists, we firmly believe that the proposed changes will ***not*** do an effective job of protecting and informing the public. Requiring disclosure without better educating the public about malpractice insurance is at best a half-way measure of limited value that will unfortunately cause much confusion and hardship. We are also left with the uneasy feeling that the proposed rules changes dance around the core issue and are a half-way measure towards mandatory malpractice insurance. As mentioned earlier, we believe the effect of the proposed changes will be to compel California attorneys to obtain malpractice insurance. If this is indeed in the public's

interest, then why not take a cleaner approach and require it outright while providing a cost-effective way for all California attorneys to obtain it. Absent better, more easily obtainable public information and cost-effective solutions to getting insurance, the proposed rules are piecemeal and premature.

Rather than merely criticizing the proposed rules changes and raising troubling questions about their implementation and effect, our executive committee would also like to provide the following recommendations.

- ***Because there are so many important unanswered questions, adoption of the proposed rules should be deferred until the issue has been studied in greater detail.*** There is little to be lost from taking a cautious approach and much to be gained in getting it right the first time. Further deliberate study will demonstrate the Bar's sensitivity and commitment to solo, small firm, and minority attorneys. Further study could also help the Bar develop a cost-effective way for more (if not all) California attorneys to obtain malpractice insurance.

- Regardless of whether the proposed rules are adopted, ***public education about malpractice insurance should be emphasized,*** including expanded information on the State Bar and other websites about the need for and desirability of malpractice insurance. The State Bar should also prepare and publish standardized informational brochures and forms on malpractice insurance that attorneys can provide to clients (and thus avoid controversies about the adequacy and accuracy of their explanations about their malpractice insurance coverage).

- Greater emphasis should also be placed on ***lawyer education about malpractice and malpractice insurance.*** Such education is a cost-effective approach to the problem and will likely result in less malpractice and more insurance coverage. It's critical that the Bar increase its commitment to help attorneys learn what constitutes malpractice, when and why it most commonly occurs, how to avoid it, and how to insure against it. It's important for lawyers to recognize how tightly malpractice is tied to other larger problems with practice management. At the risk of beating a dead horse, we once again suggest that the State Bar require one hour of mandatory MCLE in law practice management.

- Lastly, since this issue deals with and impacts the economics of law practice, we suggest that a representative from our LPMT executive committee sit as an advisory member on the Board of Governors' task force and committee on this topic.

Upon your request or that of the Board of Governors, I will be happy to make myself available for further discussion and/or clarification of the points raised in this letter.

Respectfully submitted,

Andrew Elowitt

Andrew Elowitt
LPMT Chair 2005-2006

Bercovitch, Saul

From: oliviangel27@netzero.net on behalf of alexseiberthatty@netzero.net
Sent: Thursday, September 14, 2006 5:02 PM
To: Bercovitch, Saul
Subject: Malpractice insurance

Read latest issue of bar paper with some great letters bringing up other points.

They would be one way to go. But here's another:

Add to official language. "This notice is required in the interest of disclosure according to ...blah blah... Furthermore:

1. There is no requirement to have malpractice insurance.

2. There is nothing wrong with having no malpractice insurance and no negative inference is to be drawn from an attorney's being uninsured.

3. Going uninsured lowers that attorney's annual expenses, and is solely an incentive to better performance.

4. Malpractice insurance is rarely called into action even among the poorest of attorneys, yet is expensive and must be paid by the clients of those attorneys who exhorbitantly indulge in it.

5. If your decision whether to hire an attorney hinges in any major part on whether that attorney has malpractice coverage, you should not even be considering hiring that attorney.

6. The fact, if true, that this attorney is NOT covered by malpractice insurance is to the benefit of all parties involved, on a micro- and macro-level of economic analysis, because only those substandard clients of substandard attorneys need to be involved in it.

7. In any event, all the factors involved in the issue of malpractice insurance are "a wash,"

because clients who don't worry about their attorney having it are in an equal position with those who do, and attorneys without it are in an equal position with those who do.

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September 15, 2006

Mr. Saul Bercovitch
Staff Attorney
The State Bar of California
180 Howard Street
San Francisco, CA 94105

RE: PROPOSED NEW INSURANCE DISCLOSURE RULES
PUBLIC COMMENT

Dear Mr. Bercovitch:

I am writing to express my opinion concerning the proposed new insurance disclosure rules. In order for the Bar to appreciate my perspective, it may be helpful for the reader to know a little bit about me and my practice of law. I have been practicing law for over 19 years. I began my practice in the Legal Department of the United Farm Workers Union in 1987, after completing a law apprenticeship program at the Union's headquarters. During the course of my nineteen years practicing law, I was a member of a law corporation that I and four other attorneys formed to better serve the needs of the UFW and the farm worker population. I was later employed as a staff attorney at a legal services program for ten years, and for the last six years I have been a sole practitioner in Oxnard.

My legal career has been dedicated to serving the legal needs of the working poor, with a particular emphasis on issues of importance to farm workers. The focus of my current practice has been in the areas of affordable housing, education, landlord-tenant, labor and employment law, and public policy issues. Over half of my time is spent working on cases and client matters on either a pro bono basis or at very low cost. About a quarter of my time is dedicated to the administrative aspects of running my practice, and the balance

of my time is spent serving business clients so I can pay the bills.

With the exception of my employment at Channel Counties Legal Services, I have never had professional liability insurance. At CCLSA, all of the staff attorneys were covered under the firm's malpractice insurance policy, with the cost borne by the employer. In my private practice I have gone without professional liability insurance for economic reasons, as this expense would increase the cost of running my practice by over 10%. When I started my practice six years ago I made a conscious decision to keep my overhead as low as possible so I would be able to continue to serve the same clientele. Of course it would be nice to have professional liability insurance, but that would require me to make more money. However, I believe my time is better spent focusing on issues of importance to my clients.

That said, I offer the following comments on the proposed new insurance disclosure rules:

1. Any Insurance Disclosure Rules Should Apply Equally to All Attorneys.

I do not have a problem advising my clients that I do not have professional liability insurance. In fact, that has been my custom and practice since I began the practice of law, and my standard engagement letter includes a paragraph advising the client that "I do not have an errors and omissions insurance policy applicable to the services to be rendered.. . ."

I do not agree with, and do not understand the reasoning behind a rule that would place the burden to disclose only on those who do not have insurance. The disclosure should be made to the client in either case, and every case. If the State Bar thinks disclosure to the client is important, then disclosure should be required across the board by all attorneys. Some argue that disclosing the existence of insurance encourages litigation. But the same can be said for disclosing the absence of insurance. An attorney without malpractice insurance may be viewed by some lawyers as easy prey, since there is no defense counsel waiting in the wings; and while not every lawyer is making the "big bucks," relatively speaking, lawyers as a group are probably in better financial shape than many of their clients. The threat of losing one's home or other major asset can be enough to induce the uninsured lawyer to come up with money out of his or her own pocket to remove that risk, even when the plaintiff's case has no merit or was filed for an improper purpose.

My preference is that every lawyer should be required to disclose whether or not there is professional liability insurance coverage for the matter for which he or she is being retained. I do not believe that the disclosure has to convey all the details of the insurance coverage in those instances where the lawyer has insurance. The client is free to request that the lawyer provide more detail, and since the client can terminate the lawyer at will, the attorney's decision not to cooperate with a client would likely spell the end of that attorney-client relationship.

2. Disclosure Should be Made to the Client Only, and Should Not be Public Information or Reported to the State Bar.

As a public interest lawyer, I am very concerned with the proposal that would require attorneys to certify to the State Bar whether they are covered by insurance and further provides that the State Bar will make publicly available the identity of individual attorneys who inform the State Bar that they are not insured.

My concern stems from experience. Those of us who represent unpopular clients or causes at times find ourselves at the center of controversy. For us the problem is not that we committed malpractice or did not adequately represent our client, but rather that our client may have demanded more justice than certain members of our society are willing to accept. I have never had a client file a complaint against me with the State Bar. But I have had a complaint filed against me by an opposing party who did not believe that the people I represented in the lawsuit were entitled to representation. Fortunately, the State Bar dismissed the complaint after the preliminary investigation. But still the ordeal was stressful and uncalled for.

In this regard, I share the same concern about being made a target of potential litigation as a result of public disclosure as do lawyers who are covered by professional liability insurance. In today's litigious society, I certainly do not want those who have no need to know whether I carry professional liability insurance (i.e. people who are ***not*** my clients), have public access to that information. This information in the wrong hands could very well be misused and abused. It is hard enough practicing law in a hostile environment without providing kindling to those who would like to incinerate the lawyer or his or her client because of political, social or moral opposition to one's cause.

The other concern with respect to disclosure to the State Bar is that some attorneys, primarily contract lawyers, purchase professional liability insurance coverage which is limited to particular clients or cases that they handle in conjunction with a law

firm that represents an institutional or business client. Thus, there are an unknown number of attorneys who have malpractice coverage for some of their legal work, but not for all of their practice. This poses two reporting problems under the proposed rule. First, how would that be reported to the Bar, and second, how would that report be conveyed to the public? Regardless of how it is cast, the information in all probability would be misleading to some segment of the general public, and in turn, it could have a negative impact on the reporting attorney.

3. The Best Way to Protect the Client is to Require that the Attorney's Retainer Agreement Contain a Notice Advising the Client of His/Her Right to File a Complaint with the State Bar.

If the purpose of the disclosure rules is to protect the client, it would seem that the easiest and most efficient way to accomplish that is to require the attorney's retainer agreement to contain a paragraph at the end of the retainer stating that if the client has a complaint with the lawyer, he or she should contact the State Bar.

It is not unusual in other industries for the consumer to receive notice of what to do or who to contact in the event of a problem with a product or service. A number of California statutes have been adopted that require certain disclosures be made to the consumer regarding the complaint procedures that they may utilize at various state agencies, in the event of a problem. The State Bar could do the same thing by requiring that a standard disclosure be included in every attorney's retainer agreement. The attorney could be subject to disciplinary action, in the event he or she fails to provide the appropriate disclosure to the client in the retainer agreement. Also, hopefully the lawyer might be a bit more diligent knowing that his client has the contact information for the disciplinary arm of the State Bar. Thus, if the concern is truly about protecting the client's interests, this approach would accomplish much more than posting a list on the Bar's website of all the attorneys in the State who cannot afford professional liability insurance.

I appreciate your consideration of the problems that the proposed disclosure rules may create for many of the attorneys in this state who are faithfully representing the legal interests of California's under-served populations. I believe that it is in the best interests of the judicial system to make it easier for lawyers to serve these populations. I urge you to reject the proposed disclosure rules because I believe that the disclosure rules, as currently drafted, will have the opposite effect, making it even harder for the poor to

receive legal representation.

Thank you for the opportunity to comment on this important issue.

Sincerely,

Barbara Macri-Ortiz

xc: M. Carmen Ramirez, Board of Governors, District 6 Representative

MARSH

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a service of Seabury & Smith, Inc.
160 Spear Street, 15th Floor
San Francisco, CA 94105

September 15, 2006

Saul Bercovitch, Esq.
Staff Attorney
The State Bar of California
180 Howard Street
San Francisco, California 94105

Subject:
Proposed New Insurance Disclosure Rules

Dear Mr. Bercovitch

I write to offer comment upon the proposed new insurance disclosure rules, Proposed New Rule 950.6 of the California Rules of Court, and Proposed New Rule 3-410 of the California Rules of Professional Conduct.

In both of the proposed new rules, the phrase "covered by professional liability insurance" embodies a critical concept. An attorney who is not "covered by professional liability insurance" is under specific disclosure obligations both to clients and The State Bar, and those obligations arise and must be satisfied within specific time limits.

For those attorneys who obtain a professional liability insurance policy in which they (or their professional entity) are the "named insured" there can be little, if any doubt, about whether those attorneys are "covered by professional liability insurance."

In contrast, for the large number of California attorneys in private practice who do not obtain their own policies, but instead rely upon the policies obtained by the law firms of which they are members or employees, or the policies of lawyers or law firms for whom they perform legal work as independent contractors, there may be substantial reasons for uncertainty as to whether such attorneys are "covered by professional liability insurance," both in general and in certain specific kinds of situations.

As the examples below will attempt to illustrate, the proposed rules would, in my opinion, benefit from the addition of provisions that would clarify for the member subject to the disclosure obligation what kinds of information (short of an insurance policy issued in that member's own name) would suffice as the basis for a reasonable and informed belief that the member is "covered by professional liability insurance" and may therefore certify such to The State Bar and be relieved of the obligation of disclosure of the absence of such coverage to

clients. Further, because in my experience the information necessary for such a member to form a reasonable and informed belief that the member is covered by professional liability insurance will usually be under the control of others (such as a managing partner or administrator of a law firm, or a lawyer who has hired the member as an independent contractor), I believe the proposed rules would also benefit from the inclusion of a provision that imposes upon a member who is in possession of such information relevant to the professional liability coverage of another member with whom he or she is or was affiliated or associated in some capacity, an obligation to provide such other member with such information regarding the other member's professional liability coverage as will enable the other member to fulfill his or her disclosure obligations in a timely manner under the proposed new rules.

The following examples illustrate realistic situations in which a member who does not have his or her own professional liability insurance policy may (or may not) be covered by a policy issued to another member or a law firm.

Example 1

Member A is an employed associate of X,Y & Z, LLP, a large law firm. X,Y & Z has been issued a professional liability insurance policy which contains the following provision:

"II. PERSONS INSURED
Each of the following is an Insured under this policy to the extent set forth below:

A. The entity or person named in Item 1 of the Declarations as the Named Insured;

. . .

C. Any current partner, director, stockholder or employed lawyer of any person or entity specified in Item A. or B. above, but only while acting within the scope of their duties on behalf of such person or entity:"

Member A undertakes, outside the scope of his duties as an associate of X,Y & Z ("moonlighting" as it is commonly called), an engagement from an acquaintance to form a business entity for the acquaintance.

In this example, Member A, even though "covered by professional liability insurance" for his regular activities on behalf of X, Y & Z, has no coverage under the firm's policy for his moonlighting engagement. As an employed associate, however, it is extremely unlikely that

Member A has ever seen the firm's policy, and he may thus be unaware that he lacks coverage for this engagement.

Example 2

Member B, a recent admittee, does not have her own professional liability insurance. She is seeking to help cover expenses while building her own practice by accepting independent contract assignments from other attorneys. She accepts an assignment from the Law Offices of Member C, a sole practitioner, to assist in discovery in a pending litigation matter. Upon accepting the assignment Member B asked Member C about professional liability insurance and was advised that Member C's policy would cover her. Member C's policy would have provided coverage for contracted attorneys, but only if such contracted attorneys were identified to the insurance company and named in an endorsement to the policy. Member C neglected to take these steps. Member B performed her duties so well that Member C essentially turned over the litigation to her, and she interacted directly with the client, opposing counsel and the court, thus forming a direct attorney-client relationship with the client. Since Member C's policy was never endorsed as required, Member B has no coverage and has a disclosure obligation in connection with her ongoing engagement with the client, but may be under a continuing mistaken belief that Member C's policy provides such coverage.

Example 3

Member D is a partner in a law firm whose professional liability policy is negotiated and administered by the firm's managing partner. The policy contains the following provision in the "Exclusions" section"

"This insurance does not apply to Claims:
. . .

G. Arising out of any negligent act, error, omission or Personal Injury in the rendering of or failure to render Professional Services performed for any organization, corporation, company, partnership, or operation . . . while any Insured or their spouse has more than 10% equity interest in such entity;"

Member D serves as outside general counsel to a business corporation in which her spouse owns 20% of the outstanding shares. Therefore, although Member D has professional liability coverage for her other activities as a member of the firm, there is no coverage with respect to this client due to her spouse's equity interest. Member D may be unaware of this fact because she has no involvement in the negotiation or administration of the firm's professional liability insurance.

These examples illustrate real-world situations that affect thousands of attorneys. I believe the purposes of the proposed disclosure rules would be served by two clarifications.

First, in making the disclosures required by the rules, a member may rely on professional liability coverage afforded to the member under a policy issued to another member or law firm, if the member, after written inquiry to the other member or law firm relating to the purpose of disclosure, has (a) been advised in writing that the member has professional liability coverage, or (b) been given a copy or written summary of the other member's or law firm's policy provisions that afford, limit or exclude coverage for the member and upon that basis reasonably believes that the member has professional liability coverage.

Second, a member or law firm that has been issued a professional liability policy and receives an inquiry from a member who was or is a member, partner, shareholder, employee, independent contractor or "of counsel" attorney to such member or law firm, seeking verification of the existence and scope of professional liability coverage for such inquiring member under the professional liability policy issued to the member or law firm, has an obligation to advise the inquiring member in writing whether such coverage exists and the scope of and limitations on such coverage. This obligation may be satisfied by giving the inquiring member a copy or a written summary of the provisions of the policy that afford, limit or exclude coverage for the inquiring member.

I believe that the proposed disclosure rules will, in addition to strengthening protection of the public, increase members' awareness of the importance of professional liability insurance for their own protection. Clarifications such as those suggested above would provide those members

who do not purchase their own professional liability insurance policies a way to become better informed about the coverage they have, as well as a more certain basis upon which to satisfy their disclosure obligations under the proposed rules.

Sincerely,

Paul Dorroh
Senior Vice President

LAW OFFICES OF
RINA HIRAI
101 BROADWAY
OAKLAND, CA 94607
(510)839-6633 TEL. (707)566-7628 FAX

FACSIMILE TRANSMITTAL SHEET

TO: SAUL BERCOVITCH	FROM: RINA HIRAI
COMPANY: STATE BAR OF CALIFORNIA	DATE: September 15, 2006
FAX NUMBER: 415-538-2515	TOTAL NO. OF PAGES INCLUDING COVER: THREE
PHONE NUMBER:	SENDER'S REFERENCE NUMBER:
RE: PROPOSED NEW INSURANCE DISCLOSURE RULES	YOUR REFERENCE NUMBER:

☐ URGENT ☐ FOR REVIEW ☐ PLEASE COMMENT ☐ PLEASE REPLY ☐ PLEASE RECYCLE

NOTES/COMMENTS:

SEE ATTACHED COMMENTS.

MEMORANDUM

LAW OFFICES OF RINA HIRAI
101 BROADWAY
OAKLAND, CA 94607
510-839-6633

TO: SAUL BERCOVITCH, STAFF ATTORNEY,
STATE BAR OF CALIFORNIA – FAXED TO: 415-538-2515

FROM: RINA HIRAI

SUBJECT: PROPOSED NEW INSURANCE DISCLOSURE RULES

DATE: SEPTEMBER 15, 2006

I wish to comment on the proposed rule requiring mandatory disclosure of malpractice insurance. I object to such a rule based on a lack of evidence that such a rule is necessary, and offer alternatives if some client protection is necessary.

I have read the Board Committee Report published on the website and most of the published arguments for the rule, but have not seen any evidence of a problem resulting from lack of malpractice insurance. The Board Committee report indicates that issues related to malpractice claims were considered (Reference is made to supplementary background material, but that was not published with the report.), but there is no indication of what evidence exists that consumers have suffered due to lack of insurance. There is only a conclusion that clients probably assume that attorneys do have insurance, so consumer protection requires a report.

I suggest that it is important to know if such insurance is necessary before establishing a requirement of mandatory reporting. First, is there any evidence that there are many malpractice claims made? If so, are there many of those found to be meritorious? Finally, are there many meritorious claims that are not satisfied due to lack of insurance or other assets? Are attorneys sufficiently self-insured? One nagging concern I have is whether or not this insurance requirement is related to the problem of attorneys with drug and alcohol problems. If they are the main source of malpractice claims, then it doesn't seem reasonable to require the majority of attorneys to purchase insurance. It seems to me that you should answer these questions, at minimum, before requiring implementation of a rule that most opponents and some proponents agree will drastically affect a large number of lawyers. I recommend that you do a study to determine the extent to which there is a need for malpractice insurance based on the current facts and problems (if any) before proceeding with adoption of this rule.

Even if some consumer protection is needed to prevent financial losses arising from large numbers of attorneys, I believe that there should be alternatives to requiring purchase of insurance. Current offerings from malpractice carriers are not very flexible or varied in prices. Most policies I have checked cost upwards of ten percent of my annual income. Unlike

automobile insurance, which is required, there are no minimal offerings for those who can not afford huge premiums. If the State Bar believes that all attorneys need coverage to protect consumers, the rule should so specify and should provide coverage that is affordable. Requiring notification does nothing to provide realistically affordable insurance to those who don't have it now. It is unreasonable to create a requirement for insurance if you don't have any idea what effect it will have and don't have the ability to regulate insurers to provide affordable coverage. I recommend that you determine the types of coverage available, the associated costs, and the probable impact on the majority of attorneys before proceeding.

The fiscal impact should also consider whether or not clients will be adversely affected because many attorneys may be required to purchase expensive insurance. Many clients already have difficulty obtaining legal assistance because they can not afford to pay attorneys, whose cost of doing business makes their rates too high for many clients. Adding an expensive insurance policy is certain to increase the cost to clients and make it more difficult to find affordable legal assistance. Unless the losses associated with lack of malpractice insurance are significant, the losses of available legal assistance to low and moderate income consumers is an even greater problem. I believe that most of the uninsured attorneys who would be affected by the proposed rule are the solo and small firm practitioners who serve these clients.

If your studies conclude that there is, in fact, a problem requiring consumer protection, I suggest another alternative. You can implement an increase in contributions to the client security funds from all attorneys based on some equitable formula, similar to the current requirement that we contribute to the attorney rehab fund. This fund should be the source for consumer protection. Attorneys who wish to purchase additional insurance are free to do so, just as they do now. This would have a direct benefit for the consumers, while enabling attorneys to practice without supporting insurance companies and without decreasing their affordability to the consumers who need them.

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September 15, 2006

VIA E-MAIL saul.bercovitch@calbar.ca.gov
and FACSIMILE 415-538-2515
Saul Bercovitch, Esq.
Staff Attorney
THE STATE BAR OF CALIFORNIA
180 Howard Street
San Francisco, CA 94105

RE: DISCLOSURE OF MALPRACTICE INSURANCE STATUS

Dear Mr. Bercovitch:

I am submitting a few brief thoughts regarding the proposed Rule of Professional Conduct and Rule of Court requiring that California attorneys disclose to their clients that they do not have professional liability insurance.

Without a requirement that all active lawyers in the State of California have professional liability insurance, there will always be some who for various reasons do not or cannot obtain legal malpractice insurance. Some attorneys will not be able to afford the insurance. Others will elect not to purchase professional liability insurance because they are willing to undertake the risk, or possibly, because they believe that the lack of such coverage will limit or eliminate legal malpractice lawsuits by their clients who may not otherwise want to attack the personal assets of the attorney. There will also be some attorneys with a significant loss history which limits the number of insurers who may be willing to provide coverage or they may simply be priced out of the market. Whatever the circumstance, the issue of disclosure regarding the individual attorney's malpractice insurance status is significant.

If I were a consumer of legal services, I would consider it important to know that the attorney who was going to represent my interests maintained malpractice insurance. The same question is relevant with others who provide services to consumers such as contractors, architects and other

professionals. I realize that many of these professionals are not required to maintain malpractice insurance. However, I believe that as attorneys we should adhere to a very high standard of professionalism. We are customarily placed in the position of protecting our clients which often involves, as it should, disclosure of relevant information. Most often, clients will not ask if an attorney has malpractice insurance. I do not believe that means they do not care. They simply do not know the potential benefits of malpractice insurance coverage in case of an error or omission in their representation.

On balance, it is our duty as attorneys licensed to practice in the State of California to take the "high road." This is especially true in areas where the consumer/client may not have the education and level of sophistication to be able to ask for relevant information from his or her prospective attorney. We are fiduciaries to our clients which imposes a very high duty of care. Failure to make such a disclosure seems a breach of such duty.

As stated above, without a requirement for mandatory professional liability insurance, there will always be some who do not maintain such coverage for the protection of their clients. If the rule is implemented requiring disclosure if the attorney does not have insurance, some will purchase the insurance but probably not all. Therefore, the choice is still available to the attorney - purchase the insurance or not. If they choose to not purchase the coverage, they should disclose that fact to their prospective clients to enable them to make an informed decision regarding whom they wish to represent their interests.

I urge the committee to require disclosure, because on balance the client's right to be fully informed about relevant circumstances is more important to the integrity of the Bar than allowing a member to be silent on the issue.

Thank you for considering my remarks and conclusion.

Very truly yours,

BERMAN, BERMAN & BERMAN, LLP

RONALD S. BERMAN

RSB:cf

Bercovitch, Saul

From: Dana Miles [dana.miles@asmnet.com]
Sent: Friday, September 15, 2006 12:33 PM
To: Bercovitch, Saul
Subject: Proposed New Insurance Disclosure Rules

Dear Mr. Bercovitch

As an attorney who splits my time between my own solo practice and working for a corporate employer, I am adamantly opposed to the proposed rules regarding disclosure of malpractice insurance.

I choose not to carry malpractice insurance for my solo practice because I just do not believe the benefit justifies the cost. My view is that I need to do my job properly whether I have such insurance or not. If in fact I do my job properly, there will be no basis for a malpractice claim against me, and if someone brings a bogus malpractice claim against me, I can defend it the same way I defend my clients against bogus claims. Does that decision make me a less competent or effective lawyer?

I find the unspoken assumption underlying this proposed rule change to be both offensive and misguided, that assumption being that lawyers will inevitably commit malpractice and thus their clients need to be protected. Lawyers do NOT inevitably commit malpractice, lawyers buy malpractice insurance to protect themselves, not to protect their clients, and anyone who thinks a client is going to base his or her decision to hire a lawyer on whether or not the lawyer has malpractice insurance just doesn't understand the world of small firms and solo practitioners. Almost all clients simply do not care, and those that do are sophisticated enough to ask the question.

Please do not implement this foolish and ineffectual change.

Regards,

Dana E. Miles
State Bar No. 109629
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dana.miles@asmnet.com

Bercovitch, Saul

From: Barry Kahn [barry@barrykahn.com]
Sent: Friday, September 15, 2006 12:54 PM
To: Bercovitch, Saul
Subject: comments on insurance disclosure

Sept. 15, 2006

Saul:

I just received my California Bar Journal yesterday and read the letters to the editor pro and mostly con regarding the proposed insurance. Having been a member of the Bar since 1977, I wanted to share my thoughts with you on this issue. Although I am not sure of the details of the history of "insurance disclosures" in California, I thought there was a time when there was an "insurance disclosure in fee agreements" (IDIFA) as required by the Bar. I also seem to recall that the IDIFA requirement lapsed or was rescinded at some point thereafter. My memory on the history of IDIFA is not precise, and it was never of concern to me since I have always carried appropriate insurance. I have been a sole practitioner in Sausalito since 1981. When I first purchased insurance (after 1 or 2 years in private practice), it was inexpensive. I believe it was $300 per year, then $500 per year, and now it is 10 times the original cost, just like my house, my cars, and my hourly rate!

Here is my point and suggestion. I believe that the requirement for mandatory disclosure of insurance may not be the most appropriate way to address the issue(s)\problem(s). These issues and problems are not simple matters and, to some extent, the process of addressing them involves considerations of the individual lawyer (expense, type of practice, level of coverage, type of coverage, exposure, personal wealth, etc.), as well as consideration of the consumer. I may be wrong, but I know of no other profession or occupation which mandates such a disclosure or requirement in the engagement agreement. However, there are some occupations that I know of that have dealt with this issue to a limited extent. My practice is limited to real estate and construction law. Contractors are required to have a minimum surety bond ($10K) as a condition of obtaining a contractor's license from the State of California. Contractors are not required to maintain liability insurance, and today many don't because it is too expensive or such insurance is of limited availability, limited coverage, etc. Many of the insurer's who sell insurance to California contractors are out-of-state and sell policies on the cheap to grab the market, then fold-up when the claims start rolling in...which is where CIGA comes into the picture. My point is that the issues and details of the proposed legislation, simply put, do not hit the nail on the head. Perhaps in lieu of addressing the issue of IDIFA in the fee agreement, the State Bar could look into other ideas. For example, the idea of a "minimum licensing bond" that would serve the same benefit to consumers as with the Contractor State Licensing Bond.

Let's face it. The cost of insurance for lawyers is "relatively" high. For some, it's not affordable and for others it is not a big expense. My opinion is that it should be left to the individual Bar Member whether or not they can afford the insurance, whether or not they want to offer it to their clients, whether or not they need it to protect their personal assets or whether or not they need it for their type of practice. Don't forget, not every lawyer has exposure in their practice. While I believe that most areas of the practice of law involve some risks, some lawyers after many years of practice in a particular specialty in reality have very little risk. So, in the end, I believe that purchasing insurance and "disclosing it" to the client, should be a "business" decision each member should be free to make on their own.

Having said this, I believe that the concept of a minimum surety bond as a requirement for obtaining a license would be a good idea, for several reasons. First, the public image of the Bar and lawyers would be improved if consumers knew that if their lawyer made a mistake, then they would be able to make a claim on the Bond, without having to hire a lawyer. Secondly, all consumers would know that they would have some minimum protection. Thirdly, there may be a strong incentive for Bonding Company's to come into the market because, unlike contractors, the practice of law is not fraught with the potential problems.

I could go on and on with the problem and possible solutions. But, I have work to do, thank goodness! In conclusion, I would urge the State Bar not to go forward with a proposal at this moment. The letters that I have read are a bit emotional, but do strike a chord of truth. Let's have a proposal that serves the consumer (our

clients), that serves the profession (both the sole practioner, the small firm and the big firm), one the suits both the have and have-nots, one that is financially feasible, one that will attract insurers. I think that there is room in the market for both insurers and perhaps a surety bonding business to meet the minimum needs. I could be wrong because I don't know that business too well. But, I do know a bit about the insurance end because I worked for about 3 years as a claims attorney\adjustor for Travelers from 1978 to 1981 when Traveler's had a big part of the legal malpractice business, both through their own policies and the CIGA overflow. This is when the legal malpractice bomb exploded and the entire field has matured and evolved over the past 30 years, both in terms of insurance and case law. So right, my opinion is that the issues of professional liability and insurance are ripe for a thoughtful solution. And taking a swipe at it with a mandatory disclosure is more of "strike" and not a "hit" or anything close to a "home run". In addition to my experience with Travelers, I also wrote case summaries for a professional liability publication (and was actually an editor for a few issues). This was in the old days, but I do have some experience and interest. This is not part of my practice today, which as I said, is limited to real estate, construction and leasing. I still write the big check once a year to Lawyer's Mutual, but they are one great company! Run by lawyers and they are a model of success.

Good luck!

Barry A. Kahn
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Bercovitch, Saul

From: Bukanza@aol.com
Sent: Friday, September 15, 2006 4:38 PM
To: Bercovitch, Saul
Subject: Insurance Disclosure, a comment

Dear Mr. Bercovitch,

Please consider this a statement in opposition to the proposed insurance disclosure rules.

1. **What's the Problem?**

I have seen it said by a proponent that "The problem of uninsured lawyers is pervasive." Yet, "hard data is lacking."

It would seem that the "problem" only arises if a client has an unsatisfied judgment against a lawyer, AND that client would not have hired the lawyer had he known of the lack of coverage.

Has the task force truly examined the data and determined the "problem to be so pervasive" as to require a whole new layer of bureaucracy?

2. **Why can't a client just ask?**

Nobody quarrels, I suppose, with a client's right to know if the attorney is insured. But, all he has to do is ask. Is there any data suggesting that attorneys have lied about their coverage, to the client's ultimate detriment?

3. **We don't need a Wall of Shame.**

Not only will the reporting requirements be tricky and cumbersome (and very sensitive in some client relationships), but there is a sense of unfairness in posting on the web a new category of members who have somehow deserved this notoriety for their "problematic" behavior.

Would there be space on the web for a member to explain to the public why the member chooses not to maintain coverage at this time?

For example, I have been practicing for over 40 years, and I have a small AV rated solo practice serving a diverse population. I manage to keep overhead to a minimum, in part by not buying coverage. The savings enable me to keep my rates, and my practice, available to more people. When I do contingent fee work, I make the disclosure in my contract even though not required to do so. If anybody else asks, I tell them. There has never been a problem.

The notion seems to be that to be uninsured is somehow irresponsible. That ignores each such individual's awareness of the potential for personal liability and the steps he or she have personally taken to provide for that.

4. **Make Insurance Affordable.**

If there is such a crisis as some would portend, why not address one of the possible causes, instead of just wailing aloud?

Determined efforts should be made to make affordable insurance available to the sole practioner and small firms.

Is the task force report available, as online?

Thank you,

Timothy D. Regan, Jr.
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(415)398-4552
tdrjr@mindspring.com

Bercovitch, Saul

From: annelmendoza@comcast.net
Sent: Friday, September 15, 2006 4:56 PM
To: Bercovitch, Saul
Subject: Insurance Disclosure

Dear Sir:

Please consider this letter my objection to both proposed insurance disclosure rules.

I am a solo practitioner who once served in the public sector as legal counsel to state regulators responsible for licensing and policing professionals.

It is evident that the proposed rules represent an indirect and thus dishonest effort to mandate malpractice insurance in a climate deemed too hostile for direct action.

First, this form of policy pretexting stands in violent contrast to a profession whose standards of conduct forbid it.

Second, the proposed rules fail the reality test and thereby invite an enforcement nightmare. Specifically, the burdens placed on uninsured members are both odious and unreasonable.

Neither do the proposed rules serve their purported purpose. If consumer protection and "informed consent" are really the point, members should be required to disclose the amount of their coverage which is surely relevant. Because the past is the most reliable indicator of the future, members should also be required to disclose malpractice actions taken against them and whether successful or not. After all, a history of malpractice actions is far more probative vis-a-vis client relations and professional competence than insurance coverage.

Finally, there is the not insignificant matter of basic fairness. Before the State Bar seeks to impose coverage requirements on members, either directly or indirectly, affordable insurance must be available. In this regard, the State Bar has an obligation to create a climate of compliance by offering an alternative fund to those
in the for-profit private sector.

Sincerely,

Anne L. Mendoza
SBN 87859

Bercovitch, Saul

From: robin yeager [robiny@yeagermediation.com]
Sent: Friday, September 15, 2006 6:15 PM
To: Bercovitch, Saul
Subject: Comment in opposition to proposed insurance disclosure rules

Dear Mr. Bercovitch:

I am writing in opposition to the proposals to require attorneys to disclose to clients and the State Bar whether they carry malpractice insurance. Whether to carry such insurance is a business decision, which should not be mandated by the State Bar. It would be tantamount to indicating the attorney has done something wrong when in fact the attorney has done nothing improper. Certainly, this information should not be posted on the State Bar's website nor should it be obligatory to advise a client. I have never had a doctor or an accountant provide me with this information and it is grossly unfair and unwarranted to place a stigma on attorneys who don't carry such insurance or to force some attorneys to purchase it when they otherwise wouldn't solely to avoid that stigma.

Very truly yours,

Robin Yeager

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September 18, 2006
Via Fax [415.538.2515] and Mail

JAMES ELLIS ARDEN
direct phone (818) 752-4848
direct fax (818) 752-4841

Saul Bercovitch, Staff Attorney
THE STATE BAR OF CALIFORNIA
180 Howard Street
San Francisco, California 94105

Re: Proposed New Insurance Disclosure Rules
[Proposed CRC Rule 950.6 and RPC Rule 3-410]

Dear Mr. Bercovitch:

I write in comment of the captioned proposals. I apologize for not writing sooner, noting the comment cut-off date of September 15, 2006, however, I only became aware this afternoon of these pending proposals and that public comment on these matters had been requested.

Prefatorily, I have been involved with litigation of legal malpractice matters for nearly twenty years. I write solely on my own behalf, although I am a member of the Association of Professional Responsibility Lawyers, past president of the Lawyers' Club of Los Angeles County, a former trustee of the Los Angeles County Bar Association and a current member of its Professional Responsibility and Ethics Committee.

I strongly oppose making insurance disclosure duties into a rule of professional conduct for several reasons. There is no consistency in coverage and so, the coverage disclosure will be completely fraudulent to those clients whose claims will not be covered, whether because of policy exclusions, or because the carrier ultimately denies coverage. Even the proponents of these measures admit that some people may be fooled, and I think that is a serious problem, especially considering our profession's extant public image problems.

Much better, I think, would be for the State Bar to post and, or, otherwise disseminate a "malpractice insurance for dummies" piece, explaining to the public some of the ins and outs of malpractice coverage. The State Bar could that way explain to the public that some claims do not qualify for coverage, some claims will be less than the amount of the deductible, that policies can lapse or be cancelled, and that claims can be anyway denied by the carrier. If the State Bar publicized such a piece, it would make the public aware of such concepts, enabling the public to ask about coverage, and to ask about particulars they might never have know to ask about.

If the goal is to educate people and better equip them to hire lawyers, then educate the people. Requiring lawyers to simply state they do or do not have coverage provides little education and does very little good for the public we are trying to serve. Besides being much less efficient, the proposals will cost a lot more to effect than a public information campaign.

Please feel free to contact me if you have any questions. Thank you very much.

Sincerely,

James Ellis Arden

THE STATE BAR OF CALIFORNIA

— COMMITTEE ON ALTERNATIVE DISPUTE RESOLUTION

180 Howard Street
San Francisco, CA 94105-1639
Telephone: (415) 538-2306
Fax: (415) 538-2305

September 24, 2006

Saul Bercovitch
Staff Attorney
The State Bar of California
180 Howard Street
San Francisco, CA 94105

Re: Proposed New Insurance Disclosure Rules

Dear Mr. Bercovitch:

The State Bar's Committee on Alternative Dispute Resolution has reviewed and discussed the proposed new insurance disclosure rules. The ADR Committee has not taken a position on the overall proposal. These comments are limited to one particular aspect of the proposal that has a potential impact on full-time ADR neutrals, assuming the proposal moves forward.

Proposed rule 950.6 would require all active members who are not exempt under the rule to certify to the State Bar 1) whether they are currently covered by professional liability insurance; and 2) whether they represent clients. The proposed rule does not state what the State Bar intends to do with the response it receives concerning an attorney's representation of clients. The rule does, however, provide that the State Bar will identify those members who certify that they are not covered by professional liability insurance by making that information publicly available upon inquiry and on the State Bar's website.

Full-time ADR neutrals – such as arbitrators and mediators – do not "represent clients." As a result of proposed rule 950.6, full-time ADR neutrals would be treated the same as attorneys who *do* represent clients, in terms of the insurance disclosure requirements and the information made publicly available. It appears as though the intent of the proposed insurance disclosure rules is to address the question of professional liability insurance in the context of the attorney-client relationship. As drafted, proposed rule 950.6 is broader in scope than this intent.

In the event this proposal moves forward, the ADR Committee recommends that proposed rule 950.6 be amended so it is structured in a way that is similar to the rules in several other states that require disclosure of insurance information to a state bar or court. Although some states frame the question in terms of whether an attorney "represents" clients, that language may be construed by some as limited to the representation of clients in the litigation context. That interpretation would be narrower than the presumed intent of the rule, and would not include, for example, an attorney

who provides legal advice to his or her client in the context of a transaction. The ADR Committee recommends that subdivision (a) of the rule be amended to read as follows:

> "Each active member who is not exempt under subdivision (b) must certify to the State Bar in the manner that the State Bar prescribes:
>
> (1) Whether the member represents clients or provides legal advice to clients; and
> (2) If the member represents clients or provides legal advice to clients, whether the member is currently covered by professional liability insurance"

We appreciate the Insurance Disclosure Task Force's consideration of these comments.

Disclaimer

This position is only that of the State Bar of California's Committee on Alternative Dispute Resolution. This position has not been adopted by the State Bar's Board of Governors or overall membership, and is not to be construed as representing the position of the State Bar of California. Committee activities relating to this position are funded from voluntary sources.

Very truly yours,

/s/

John Toker
Chair, 2005-2006
The State Bar of California
Committee on Alternative Dispute Resolution

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VIA FAX TO (415) 538-2515 AND U.S. MAIL

October 4, 2006

Saul Bercovitch, Staff Attorney
The State Bar of California
180 Howard Street
San Francisco, California 94105

Re: Proposed New Insurance Disclosure Rules
Proposed CRC Rule 950.6 and RPC Rule 3-410

Dear Mr. Bercovitch:

I write on behalf of the Los Angeles County Bar Association's Committee on Professional Responsibility and Conduct ("LAPREC"). LAPREC wishes to comment on Proposed CRC Rule 950.6 and RPC Rule 3-410, relating to insurance disclosure. The opinions of LAPREC are those of the members of the committee acting collectively and do not necessarily represent the position of the Los Angeles County Bar Association, which has not adopted a position on this subject.

The consensus of the LAPREC membership was that any rule on insurance disclosure is properly a matter of legislative judgment. LAPREC believes that the Bar should exercise caution when enacting rules in an area where the Legislature has already made a policy decision.

In California, whether a lawyer should be required to make disclosures about insurance coverage has been a legislative question. Through the legislative process, in which all points of view are vetted and tested, the California legislature amended Bus. & Prof. Code Sections 6147 and 6148 to include an insurance disclosure requirement in 1992. The disclosure requirement was repealed by its own terms on January 1, 2000. In allowing the lapse of these requirements, with no new legislation in the area, the California legislature has spoken on the issue.

LAPREC was divided on the question of whether insurance disclosures are appropriate.[1] Some members felt that insurance disclosure is merely prophylactic. Other members felt that insurance disclosure may or may not be material in a given circumstance, and that there are many other potential disclosures which might be more important and material to a client, such as, by way of example, whether the lawyer had ever tried a case to a jury before, or whether the lawyer had ever drafted a similar contract. There was a strong consensus, however, that any disclosure requirement is best incorporated into statutory provisions relating to fee agreements, and not placed into a Rule of Court or into a rule of ethics, the breach of which subjects an attorney to discipline by the State Bar. LAPREC believes that where, as here, there is a wide divergence of opinion regarding the wisdom of an insurance disclosure rule, the question is best suited to legislative treatment.

Thank you for extending the time within which to comment on this important issue.

Sincerely yours,

Louisa Lau
Chairperson, Los Angeles County Bar Association
Professional Responsibility and Ethics Committee

cc: Charles E. Michaels, President
Stuart A. Forsyth, Executive Director
LAPREC Members

[1] LAPREC's membership is very diverse, consisting of judges and former judges, attorneys from large, medium and small law firms, solo practitioners, criminal and civil lawyers, government attorneys, public interest attorneys and in-house attorneys.

THE STATE BAR
OF CALIFORNIA

COMMITTEE ON PROFESSIONAL
RESPONSIBILITY AND CONDUCT

180 HOWARD STREET, SAN FRANCISCO, CALIFORNIA 94105-1639

TELEPHONE: (415) 538-2161

October 5, 2006

Saul Bercovitch, Staff Attorney
The State Bar of California
180 Howard Street, Sixth Floor
San Francisco, CA 94105

Re: Public Comment to Proposed New Attorney
Professional Liability Insurance Disclosure Rules

Dear Mr. Bercovitch:

The State Bar's Standing Committee on Professional Responsibility and Conduct ("COPRAC") appreciates this opportunity to comment regarding the proposed new attorney professional liability insurance disclosure rules.

Proposed Rules of Court 950.5 and 950.6

COPRAC supports the proposed rules of court with the view that clients and prospective clients should be informed whether or not a lawyer practices without malpractice insurance coverage. Proposed Rule 950.6 will have the benefit of making such information accessible to members of the public by means of the State Bar's website, and may have the incidental benefit of causing more lawyers to carry insurance, which is in the public interest. However, beyond the question of disclosure, the proposed new Rules of Court do not raise issues involving professional responsibility or legal ethics and COPRAC therefore declines further comment.

Proposed Rule 3-410 of the Rules of Professional Conduct

The stated purpose of the rules of professional conduct is "to protect the public and to promote respect and confidence in the legal profession." [Rule 1-100(A).] While the negotiation of the initial fee agreement is generally considered an arm's length transaction, the rules of professional conduct and case law nevertheless impose upon lawyers a duty to make disclosures at the commencement of the relationship where the failure to do so leaves the client unaware of information relevant to the decision whether to retain the lawyer.

For example, lawyers have a duty to disclose pertinent facts to prospective clients (a) when proposing a fee arrangement that grants the attorney a pecuniary interest adverse to the client [Rule of Professional Conduct ("RPC") 3-300], (b) when the lawyer has a business or financial interest in the outcome of the representation [RPC 3-310(B)(3)], (c) when the proposed

representation will be of more than one client and there is a potential conflict of interest [RPC 3-310(C)]), and (d) when the lawyer has an intimate relationship with the lawyer for another party [RPC 3-320]. Moreover, while current RPC 2-200 requires disclosure and consent to a fee splitting arrangement before the fee is divided, the Rules Revision Commission has proposed a modification of that rule to require disclosure and consent from the outset of the relationship.

Thus, there is substantial precedent for imposing duties upon lawyers to disclose information to their clients at the commencement of the relationship. And, of course, once the attorney-client relationship is established, lawyers have a continuing duty to keep their clients informed of significant developments pertaining to their representation. (See, Business and Professions Code section 6068(m); RPC 3-500.)

Some lawyers argue that disclosure is not required because the information is not material to a client's decision in hiring a lawyer. Yet, many lawyers and professional organizations are opposed to the proposed rule on grounds that its adoption would unfairly hurt sole practitioners and small firms who cannot afford to carry insurance. That argument, which is based upon a presumption that informed consumers would choose lawyers who carry professional liability insurance, both establishes and underscores the fact that the absence of professional liability insurance is a fact that warrants disclosure to prospective clients. Many lawyers make mistakes during the course of their careers and some of those mistakes result in financial injury to their clients. Clients often have no viable remedy when they have been damaged by the malpractice of uninsured attorneys. The absence and/or cessation of professional liability insurance coverage is therefore significant, potentially affecting both the client's interest and the client's willingness to hire or to continue to use the services of the particular lawyer in question.

Others lawyers and professional organizations suggest that it is up to the client to initiate the inquiry about whether a prospective lawyer carries malpractice insurance. However, lawyers frequently interact with prospective clients who do not understand, or do not think about, the ramifications of the absence of insurance coverage at the commencement of the relationship. In fact, many clients assume that lawyers have professional liability insurance, and some believe that professional liability insurance, like automobile liability and workers' compensation insurance, is legally required. Perhaps most important, many clients, particularly those who are inexperienced in dealing with attorneys and who are consulting a lawyer at the most vulnerable point in their lives, are understandably hesitant to start a relationship of trust and confidence by asking the lawyer if he or she carries malpractice insurance. Thus, COPRAC rejects the notion that the underlying objectives of the rules of professional conduct -- to protect the public and to promote respect and confidence in the legal profession – are met by placing the burden on clients to discover that the lawyer they are hiring is not covered by insurance in the event the lawyer makes a mistake that results in financial damage.

COPRAC is aware of yet other comments from lawyers and professional organizations that the proposed rule is one of practice management and should not be the subject of a disciplinary rule. They add that requiring the disclosure of the absence of malpractice insurance is ineffective because there is no related requirement for lawyers who are insured to disclose specific

information about the nature (claims made), quality (scope of coverage, declining limits, etc.), or amount (per claim and aggregate limits) of their coverage. However, for purposes of a new disciplinary rule, COPRAC agrees with the task force that the focus of any new disclosure requirement should be on those attorneys who are not insured, rather than on those who carry professional liability insurance.

As noted, the stated purpose of the rules is "to protect the public and to promote respect and confidence in the legal profession." [RPC 1-100(A).] Experience teaches us that clients who learn after the fact that they have no recourse against the uninsured lawyers whose mistakes have caused their losses do not feel they have been protected by the justice system and lose respect and confidence in the legal profession. On the other hand, while no client is guaranteed that he or she will prevail on a claim against a lawyer or that a valid claim will be covered by the lawyer's malpractice insurance, experience also teaches us that the vast majority of clients with valid legal malpractice claims against insured lawyers have some recourse. COPRAC therefore believes that the proposed rule furthers the overall objectives of the rules of professional conduct by providing members of the public with important knowledge that both protects their interests and promotes respect and confidence in the legal profession.

For all of the foregoing reasons, COPRAC believes that the absence or cessation of professional liability insurance is a significant fact which clients have a right to know. Thus, with the minor proposed modification discussed below, COPRAC supports the adoption of Proposed Rule 3-410 with the accompanying Discussion section.

Recommended Modification of Rule 3-410(C)

COPRAC has considered the practical ramifications of the notice requirements upon implementation of the rule. For some lawyers, especially sole practitioners or lawyers enmeshed in trial or other exigencies, it may be unduly burdensome, even impossible, to notify every currently active client within thirty days. Moreover, extending the time for compliance may enable more lawyers to purchase professional liability insurance prior to the effective date of the rule. Accordingly, COPRAC suggests that the time deadline for compliance with rule 3-410, subdivision (C) be extended from thirty days to sixty days.

Accordingly, COPRAC recommends that the Proposed Rule of Professional Conduct 3-410 be adopted after due consideration to the suggested revision set forth above.

Alternative Proposal

Some members of COPRAC would prefer a rule of professional conduct triggered by a lawyer (a) failing to satisfy a judgment for legal malpractice, including breach of fiduciary duty, and (b) failing to establish that he or she took reasonable steps to be financially responsible to clients. Still other members of COPRAC believe that no rule of professional conduct requiring insurance disclosure is warranted.

In closing, the members of COPRAC would like to express our appreciation to you for extending our time to comment so that we could consider the proposed rule at our October 5, 2006 meeting. Thank you for your consideration of our comments and concerns.

Respectfully submitted,

Steven A. Lewis, Chair
Committee on Professional
Responsibility and Conduct

cc: Members, COPRAC

Bercovitch, Saul

From: Chris Cockrell [ccockrell@bpclaw.com]
Sent: Wednesday, October 11, 2006 6:39 AM
To: Bercovitch, Saul; execdir@cdcba.org; tony.vittal@abanet.org
Cc: karpethics@aol.com
Subject: FW: Requirement to Disclose the Absence of Insurance

I sent the below e-mail to Diane Karpman after the article in the State Bar Journal opposing the requirement to disclose the absence of insurance. Ms. Karpman, unfortunately without the time to read my e-mail, responded with material from her and/or Mr. Vittal of the Beverly Hills Bar Association. While I understand the points made, in my mind they do not overcome what I perceive is a duty to the consumer to provide appropriate information to make a knowing decision.

I pass my comments along to you for thought. The below situation actually occurred. A person was actually hurt by it. The State Bar Security Fund was of no use. All could have been prevented by the disclosure of no insurance.

The Beverly Hills Bar Association points out the outcome may be that some attorneys will lose clients. Fair enough. They are not selling the same product as the attorney with insurance. A fee, hourly or contingency, may include a percentage to purchase insurance. The attorney without insurance is not including within his fee the cost of insurance. Hence, the product sold to the consumer is different and the consumer needs to be so informed.

Chris

Christopher L. Cockrell, Sr.
Borton, Petrini & Conron LLP
290 North "D" Street, Suite 500
San Bernardino, California 92401
909-381-0527 Voice
909-381-0658 Fax

From: Chris Cockrell
Sent: Tue 10/10/2006 5:44 PM
To: karpethics@aol.com
Subject: Requirement to Disclose the Absence of Insurance

Ms. Karpman:

Have just read your column in the California Bar Journal for this month. While I appreciate your position that such a requirement would interfere with our self-regulation, I could not disagree with you more on your conclusion.

Our desire to self-regulate -- if that were even possible -- should take second seat to our overriding obligation to protect our clients. Your conclusion means that the public may very well not have needed information to make a decision on hiring counsel. The outcome may be devastating. I know.

I am just finishing up a case in which my client received what I believe to be horrendous representation resulting in my client having to forego a slam dunk breach of contract case and the damages he might have recovered over a twenty year period. A judgment would have been collectible. But, due to the conduct of my client's then attorney, all was lost. After abandoning the client to an in pro per status, the attorney sued the client for some $55,000 in fees. Well before this suit, the client had retained a local attorney to file the malpractice action. So, it was time to move when the client was sued for fees. Repeated requests by me -- the attorney who got him out of having to pay the defendant in the underlying case a judgment for over $240,000 in attorney's fees incurred -- for information on the attorney errors and omissions coverage were refused. The attorney would not state whether he did or did not have insurance! Of course the local attorney dropped out as there may have been no collectible judgment against the attorney and it was well known this attorney was going to create hell in any litigation. My firm has chosen not to be counsel of record for a plaintiff in a legal malpractice case. All of my efforts to find other counsel for the client were of no benefit because each and every time I was told they would not take the case unless there was insurance.

In the interim, the attorney pursued -- very unethically as so found by the court later -- his action for fees. I had to ghost write the cross-complaint and help the client on my off time. My client had a choice, pay the $55,000 fee demand or pay us. We repeatedly advised our client it may be cheaper to pay the attorney that which he was clearly not owed. But, our client tried to stick to his principles. He incurred over $140,000 in fees and costs fighting a claim for $55,000 and getting some assistance on cross-over issues on the cross-complaint.

The State Bar was of no help, not even on the $10,000 the attorney refused to refund the client out of his trust account that had been paid into the account for settlement on a completely different matter.

Finally, after three months worth of discovery attempts, the attorney verified he had no insurance.

The client spent over $1,000 on an asset check only to find out the chances of recover were really "iffy". The attorney even told our mediator he would

just leave the state if he got hit (or so I was told). \

The result at mediation was the complaint was to be dismissed. The attorney would pay $50,000 to get out of the cross-complaint with $10,000 of that being from the trust funds the client had deposited. Net then was only $40,000!

The client's economics were devastated by this. The client, a great guy, would never have hired this attorney if he knew there was no errors and omissions coverage. He would have know if he was required to sign something acknowledging he had been so informed.

I am aware of your efforts and practices before the State Bar. I implore you to reconsider your position and be vocal about the change. We, the members of the State Bar of California, must put the public before ourselves. Being required to advise a client before retention that we have no malpractice coverage is a minimal, at best, intrusion.

If you are aware, please advise of the proper recipient of my "public comment" on this issue. My quarter century of practice leads me to believe this is an issue with which lack of involvement is harmful to the public to whom we offer our services.

Chris

Christopher L. Cockrell, Sr.
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RESOLUTION ELF-02-2006

Opposition to Proposed Mandatory Insurance Disclosure Rules

RESOLVED, that the Conference of Delegates of California Bar Associations urges the Board of Governors of the State Bar of California not to adopt proposed Rule 3-410 of the Rules of Professional Conduct, which would mandate the disclosure, by a lawyer to the lawyer's client, the fact that the lawyer is not covered by lawyers' professional liability insurance.[1]

FURTHER RESOLVED, that the Conference of Delegates of California Bar Associations urges the Board of Governors of the State Bar of California not to recommend to the California Judicial Council that it adopt proposed Rule 950.6 of the California Rules of Court, which would mandate that an active member of the State Bar of California certify to the State Bar whether the member represents clients and, unless the member is employed as a government lawyer or as in-house counsel to the exclusion of all other clients, whether or not the member is covered by lawyers' professional liability insurance.[2]

FURTHER RESOLVED, that the Conference of Delegates of California Bar Associations urges the Board of Governors of the State Bar of California not to recommend to the California Judicial Council that it adopt the proposed amendment to Rule 950.5 of the California Rules of Court, which would mandate public disclosure of the information certified under proposed Rules 950.6.[3]

FURTHER RESOLVED, that the Conference of Delegates of California Bar Associations urges the California Judicial Council not to adopt the proposed amendment to Rule 950.5 and proposed Rule 950.6, of the California Rules of Court.

FURTHER RESOLVED, that the Conference of Delegates of California Bar Associations urges the State Bar of California to determine why over 18% of the active members of the State Bar in private practice do not maintain lawyers' professional liability insurance coverage; to evaluate whether the establishment of a captive lawyers' professional liability insurance carrier would achieve coverage of all active members in private practice; and, if so, to propose the enactment of appropriate legislation.

Proponent: Beverly Hills Bar Association

STATEMENT OF REASONS:

Existing Law: There currently is no requirement that an active member of the State Bar maintain lawyer's professional liability insurance ("LPL") coverage or that he or she disclose to anyone whether or not he or she maintains LPL coverage.

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1. The language of the proposed rule is included as an attachment to the Report of the Insurance Disclosure Task Force (June 2, 2006), a link to which is posted on the CDCBA web site, and which can be downloaded from the State Bar web site at the URL http://calbar.ca.gov/calbar/pdfs/public-comment/2006/Insurance-Disclosure_Agenda.pdf.

2. *Ibid.*

3. *Ibid.*

This Resolution: Consistent with the position taken by the Conference of Delegates of the State Bar in 1993, this resolution urges the State Bar and the Judicial Council not to adopt the proposed rules. Instead of the proposed rules, this resolution urges the State Bar to determine why active members of the State Bar in private practice do not maintain LPL coverage; to evaluate whether the establishment of a captive LPL carrier would achieve coverage of all active members in private practice; and, if so, to propose the enactment of appropriate legislation.

The Problem: Setting a precedent for the regulated professions, the proposed rules will require a lawyer in private practice to publicly disclose to the State Bar, and to disclose to every client, whether or not he or she is covered by malpractice insurance – and to keep those disclosures current. While offered as a "consumer information" proposal, the indirect effect of the proposed rules will be to force uncovered lawyers to obtain and maintain malpractice insurance, while directly imposing a substantial notification burden – both immediate and ongoing – on all lawyers in private practice.[4]

The most important obligation lawyers owe their clients is honesty. The proposed mandatory disclosure of the mere existence or non-existence of malpractice coverage is antithetical to the fundamental fiduciary duty of honesty. The proposed mandatory disclosures fail to explain the intricacies of insurance coverage, and "public education" groups will not solve the problems created by the current proposal. Further, the proposed mandatory disclosures may create a false sense of security that will engender a host of unintended consequences.[5]

Disciplinary rules should not be imposed on us as "chicken soup." With no showing of compelling need for regulation, the proposal should be rejected.

IMPACT STATEMENT:

This resolution will not affect any other law, statute, or rule.

AUTHOR AND/OR PERMANENT CONTACT: J. Anthony Vittal, The Vittal Law Firm, 1900 Avenue of the Stars, Suite 2500, Los Angeles, California 90067-4506. Telephone: (310) 339-2520; eFax: (603) 484-5374; tony.vittal@abanet.org. Diane L. Karpman, Karpman & Associates, 9200 Sunset Boulevard, Penthouse 7, Los Angeles, California 90069-3502. Telephone: (310) 887-3900; Fax: (310) 887-3901; karpethics@aol.com.

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4. In addition, the proposal applies without exception to every member who is representing clients, wherever the member may be located, without regard to where the client may be located. Thus, the proposal applies to the 18.3% of the State Bar membership who practice outside California and may be subject to different and/or inconsistent obligations in their "home" jurisdictions.

5. Given the principle in fiduciary duty law that any disclosure, if made, must be sufficiently complete as not to be misleading, a requirement that a lawyer disclose to a prospective or continuing client the "absence" of LPL insurance, if there is no coverage for any part of the lawyer's engagement, despite the existence of an LPL policy otherwise covering the lawyer, arguably requires the lawyer to disclose that fact as well, with a discussion of the reasons for the exclusion (which may be beyond the particular lawyer's competence, thus arguably necessitating the engagement of coverage counsel for the purpose of making the disclosure). Those are unnecessary and unwarranted burdens to impose on any lawyer.

RESPONSIBLE FLOOR DELEGATES: J. Anthony Vittal and Diane L. Karpman

ARGUMENT OF THE BEVERLY HILLS BAR ASSOCIATION IN FURTHER SUPPORT OF EMERGENCY LATE-FILED RESOLUTION CONCERNING PROPOSED MALPRACTICE DISCLOSURE RULES

The Beverly Hills Bar Association is pleased to present this argument in further support of its Emergency Late-Filed Resolution concerning the proposed mandatory malpractice disclosure rules.

Historical Background:

By amendment to Sections 6147 and 6148 of the Business & Professions Code effective January 1, 1993, the Legislature mandated disclosures of the existence or absence of lawyer's professional liability insurance ("LPL") coverage and, in certain circumstances, the policy limits of that coverage, in lawyers' engagement agreements. (Stats. 1992, ch. 1265, §§ 3-4.) In 1993, the Conference of Delegates approved a resolution proposed by the Beverly Hills Bar Association, joined by the Los Angeles County and Long Beach Bar Associations, calling for the repeal of the then-existing statutory disclosure requirements, because those disclosures were inherently deceptive to consumers. The Legislature tinkered with the disclosure requirements in an effort to remedy their inherent deficiencies, but added a sunset provision. (Stats. 1993, ch. 982, §§ 4-6.) After extending the sunset provisions at the behest of the State Bar, the Legislature ultimately repealed the disclosure requirements effective as of January 1, 2000. (Stats. 1996, ch. 1104, §§ 8-11.)

In 2004, the ABA House of Delegates narrowly adopted a Model Court Rule on Insurance Disclosure, mandating annual disclosure, by a lawyer to his or her licencing authority, whether or not the lawyer maintains LPL coverage. In response, in 2005 the State Bar established its Insurance Disclosure Task Force to consider the propriety of adopting the ABA model rule. The Task Force proposes not only that the State Bar and the Judicial Council do so, but that the State Bar re-adopt by rule a variation of the discredited client disclosure requirements previously imposed, and then repealed, by the Legislature.

The Board of Governors of the State Bar has circulated the proposed rules for public comment without recommendation. The State Bar has agreed to extend the comment deadline to permit this Conference to express its views on the proposed rules.

This Resolution:

Consistent with the position taken by the Conference of Delegates of the State Bar in 1993, this resolution urges the State Bar and the Judicial Council not to adopt the proposed rules. Instead of the proposed rules, this resolution urges the State Bar to determine why active members of the State Bar in private practice do not maintain lawyers' professional liability insurance coverage; to evaluate whether the establishment of a captive lawyers' professional liability insurance carrier would achieve coverage of all active members in private practice; and, if so, to propose the enactment of appropriate legislation.

The Problem:

These mandatory malpractice insurance proposals will disproportionately burden recently admitted attorneys and the attorneys who serve minorities, the legal aid-eligible population, and that

segment of the population ineligible for legal aid but generally unable to afford counsel. The reporting requirements in proposed Rule 950.6 accomplish little more than establishing a two-tiered bar and, absent full disclosure of the limitations and exclusions on coverage in the relevant policy or policies applicable to each attorney, will afford consumers of legal services cold comfort. Similarly, the negative disclosures to current and prospective clients proposed by Rule 3-410 are as likely to cause misinformation as to provide useful information to those clients.

Although the proposals would facially appear to be consumer oriented, in effect they will increase the costs of legal services. Lawyers will have little choice but to obtain coverage or be branded. This negative branding has little relationship to competent delivery of legal services and will unduly impact small-firm and solo practitioners, whose practices may be unable to support the premiums required by carriers for meaningful professional errors and omissions coverage.

In effect, the proposals will impair the ability of those lawyers least able to afford coverage to continue in practice, possibly driving some out of the practice of law. Those are the very lawyers who are most likely to provide legal services to minority clients and the otherwise unserved and underserved segments of the population. Therefore, these disclosure proposals will adversely affect access to justice. A bar with almost 155,000 active members (lawyers eligible to practice without restriction) should be able to mandate a policy for all its members, rather than a policy which functionally exempts large firms and powerful attorneys and targets small firms and solo practitioners.[1]

These proposed reporting and disclosure requirements will be unduly burdensome and misleading. In addition to the initial report and disclosures upon adoption of the rules and the initial negative disclosure at the time the lawyer is engaged, if a lawyer who originally is covered subsequently ceases to be covered, the lawyer must inform each client of the loss of coverage, in writing, within 30 days of the loss of coverage.

The mechanics of this proposed rules will be a severe shock to those lawyers who are currently without coverage. There not only will be the time and cost involved in notifying clients, but also the backlash when clients, receiving a notification that their attorney is not covered by insurance, decide to seek new counsel. The process becomes more onerous when initial or replacement malpractice coverage is difficult to obtain or is accidently dropped and additional notices need to go out to the client.

If this weren't enough of a burden on the lawyer without malpractice insurance, the lawyer must also be concerned about the possibility of a gap in coverage – either when obtaining coverage and failing to obtain "nose" coverage[2] or when switching carriers. The failure to notify clients of such a gap, which may not be clear to the practitioner at the time it occurs, may subject the lawyer to suspension as called for by the rule. It also may give the malpractice plaintiff an unexpected bonus

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1. In addition, the proposal applies without exception to every member who is representing clients, wherever the member may be located, without regard to where the client may be located. Thus, the proposal applies to the 18.3% of the State Bar membership who practice outside California and may be subject to different and/or inconsistent obligations in their "home" jurisdictions.

2. Coverage for errors and omissions occurring before the effective date of the policy, which requires an endorsement and a potentially substantial additional premium.

(the violation of the rule and a breach of fiduciary duty claim for failure to disclose the limitations on coverage) when suing.

The most important obligation lawyers owe their clients is honesty. The proposed mandatory disclosure of the mere existence or non-existence of malpractice coverage is antithetical to the fundamental fiduciary duty of honesty. The proposed mandatory disclosures fail to explain the intricacies of insurance coverage, and "public education" groups will not solve the problems created by the current proposal. Further, the proposed mandatory disclosures may create a false sense of security that will engender a host of unintended consequences.[3]

Is the public going to understand that policies typically are issued on a hybrid "claims made/occurrence" basis, so that coverage is triggered only when a client complains – but even then exists only if the claim also arises when the policy is in force absent "nose" coverage [a prior-acts endorsement]? What about exclusions, deductibles, "PacMan" Clauses,[4] and other issues involving policy lapses? Professional errors and omissions coverage is an extremely complicated issue. Although the proposal may look good on the surface, what assistance does it really provide to the consuming public? Simply mandating disclosure begs these and a number of other important questions.

It is important to remember that coverage has nothing to do with the acts of dishonest lawyers, because intentional misconduct cannot be covered by insurance.[5] For example, the media recently has been fixated on allegations of illegal wiretapping at the behest of members of the legal community. Obviously, those acts will not fall within the penumbra of a law firm's coverage, but will the carriers also disclaim coverage for innocent partners of the firms, who knew or should have known what their miscreant partners were doing?

While efforts to mandate these types of disclosures are in vogue, it is important to note that the Rules Revision Commission (Ethics 2000) of the American Bar Association rejected the concept of mandatory disclosure in its proposed amendments to the Model Rules of Professional Conduct.[6]

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3. Given the principle in fiduciary duty law that any disclosure, if made, must be sufficiently complete as not to be misleading, a requirement that a lawyer disclose to a prospective or continuing client the "absence" of LPL insurance, if there is no coverage for any part of the lawyer's engagement, despite the existence of an LPL policy otherwise covering the lawyer, the lawyer arguably would have to disclose that fact as well, with a discussion of the reasons for the exclusion (which may be beyond the particular lawyer's competence, thus arguably necessitating the engagement of coverage counsel for the purpose of making the disclosure). Those are unnecessary and unwarranted burdens to impose on any lawyer.

4. Clauses permitting costs of defense of a malpractice claim to diminish liability coverage limits.

5. This is an express public policy position of the State of California, stated in the Insurance Code. That said, injuries from intentional misconduct already are addressed by the Client Security Fund, which will not be affected by this proposal.

6. After that proposal was rejected, at its 2004 Annual Meeting, the ABA House of Delegates did adopt (by the very narrow margin of 213-202) the proposed Model Rule on Insurance Disclosure(Recommendation 108), revised "to harmonize the rule with respect to states which already have such a rule," over the objection of the ABA Standing Committee on Lawyers' Professional Liability (the "LPL Committee") and the objection of various members of the California Bar. (See Report on the ABA Annual Meeting (August 23, 2004) at 13, available at http://www.abanet.org/leadership/2004/annual/

The existence of coverage has little to do with a lawyer's recognition of fiduciary obligations, with which the organized bar is supposed to be concerned. Lawyers are one of the few remaining self-regulating professions.

A secondary, less vetted, level of lawyer regulation is effectuated independent of the statutes and rules governing lawyers; it is imposed by carrier exclusions.[7] For example, serving on a board of directors or as an officer of a client or even a non-profit organization can be excluded, as can joint client/lawyer investments or acquisitions. Under the Rules of Professional Conduct, those activities are permissible, so long as certain formalities are satisfied. Nevertheless, carriers can deny coverage to policy holders if they engage in them. Is it good for our clients for carriers to be increasingly involved in the regulation of the legal profession? Generally, the states that have regulations involving disclosure and/or coverage are small and have relatively homogeneous lawyer populations. By contrast, states with large populations of lawyers, with varied types of legal practice, do not mandate disclosure.[8]

Annual premium rates range anywhere from around $4,000 to $7,000 or more per lawyer, depending on a lawyer's practice area and the amount of coverage requested. Some areas of practice, such as patents and class actions, are almost uninsurable.

Because California has an enhanced disciplinary system, with full time State Bar Court judges, which is funded at a cost of more than $40,000,000 a year, issues of lawyer misconduct are vetted at the State Bar and are fully resolved in that system. The issues investigated by the California disciplinary system include the leading predicates for claims of professional negligence, such as poor communication, calendering problems, and suing a client over a bill – issues unrelated to the existence or absence of LPL insurance coverage. The proponents of these proposals offer no evidence that the same conditions exist in California, with its unique disciplinary system, as may justify these requirements in other states.

SelectCommitteeReportFINAL.doc.) As stated in the Executive Summary of the Report accompanying Recommendation 108:

> The LPL Committee . . . believes that the topic of lawyers' professional liability insurance is complex and unfamiliar territory for most of the public and many lawyers. Given the nature of claims-made coverage, the LPL Committee believes it is likely that the general public's idea and expectations of what "insurance coverage" means at the time a client hires a lawyer is much different than actual reality. Therefore, simply telling a client that insurance coverage exists at the time of hiring can be tantamount to telling the client nothing.

(Available at http://www.abanet.org/leadership/2004/execsumm04.pdf.) In January of this year, the Arkansas Bar rejected adoption of the Model Rule.

7. See Davis, Anthony E., Professional Liability Insurers as Regulators of Law Practice, 65 FORDHAM L. REV. 209 (1996).

8. New York, Texas, Florida, New Jersey, et al. (See chart detailing state implementation of Model Rule (8/11/06), available at the website of the ABA Standing Committee on Client Protection; see also Report of the Committee on Professional Responsibility of the Association of the Bar of the City of New York to the Chair of the ABA Task Force, available at www.abcny.org/pdf/report/victor_report2-b.pdf.

Simply stated the proposed rules will do nothing more than invite malpractice suits by dissatisfied clients, who will view their suits as nothing more than a way to extract money from an LPL carrier without regard to the consequences to the lawyer.

The Beverly Hills Bar Association urges you to support this resolution and, by so doing, to communicate to the State Bar the rejection of the proposed rules by the voluntary bar associations of this state, on behalf of all California lawyers in private practice.

October 17, 2006

Regulation, Admissions & Discipline
Oversight Committee
State Bar of California
180 Howard Street
San Francisco, CA 94105

In Re: Proposed Rule 3-410, Rules of Professional Conduct
Notice of Opposition

I am opposed to proposed Rule 3-410, regarding disclosure of malpractice insurance. If potential clients are going to be informed whether or not an attorney carries malpractice insurance, remedies should be civil, not disciplinary.

The proposed Rule of Professional Conduct on this subject does nothing to increase consumer protection. All it does is add the threat of lawyer discipline. It does not pay back the damaged consumer, but it does cost the attorney more money.

I believe the former remedies in Bus & Prof 6147 and 6148 were adequate. If an attorney was supposed to have insurance and failed to make the appropriate disclosure, the client had the **option** to declare attorney client agreement void and pay "reasonable value" of services. The advantage of that law was to discourage clients who were not damaged by the omission from seeking a windfall or forfeiture of a portion of the fees. It left the incentive only to a client who was actually damaged by the situation. It was something that most attorneys were aware of. In fact, many attorneys still believe that the code section is in place.

If an attorney can be disciplined for failure to make a disclosure, the consumer gets no benefit from the discipline. Either the attorney has properly represented the consumer or not. If the attorney has committed malpractice, the consumer has the same cause of action against the attorney, with or without disclosure. The Rule of Professional Conduct does not add to consumer protection.

I have been both a State Bar prosecutor and a State Bar defense attorney. Periodically, prosecutors get more intense about prosecuting some technical violations that have caused no harm to people. Therefore, this is one more Rule that an attorney can violate, without any demonstration of harm to anybody. It simply becomes another trap and adds a few more unnecessary clients to my client base.

The following areas are ripe for litigation, because they are not addressed by the proposal.

1. Court appointed counsel. When Judges appoint private attorneys, typical in criminal defense and some dependency cases, does the attorney have an obligation to notify the client about malpractice insurance?

2. When government attorneys represent private parties, such as in dependency or government tort cases, is disclosure is required our not? The distinctions in proposed CRC 950.6 are more nuanced than Rule recognizes.

3. Is Rule of Professional Conduct going to be violated if an attorney, without overt agreement with the client, is later held to have entered into an attorney client relationship by conduct or implied contract?

4. Can we expect to see an ethics prosecution in those fuzzy situations, where it is not entirely clear when the attorney client relationship ends.

Lest you think I make up some of the hypotheticals in the previous section, I consider the following situation I have personally worked on:

Husband and wife go to an attorney for a joint divorce. Lawyer agrees to represent only one spouse. In subsequent malpractice litigation, it is held that the attorney's conduct is such that the other spouse can reasonably believe there was an attorney client relationship, in spite of the attorneys overt refusal to represent both spouses.

Two men turn in to a business venture, under which both agree to encumber their own personal real estate as security. Both are married, so the signatures of

their respected spouses are required on the deed. One of the spouses claims that she is represented by the attorney in the transaction.

Two people go to an attorney to prepare a lease. Attorney expressly disclaims any attorney client relationship, prepares draft lease, then advises the parties to get impendent counsel. One now sues the attorney for damages because the underlying business venture failed.

Prosecution under a Rule of Professional Conduct requires no intent to violate the Rule, nor knowledge of the Rule. The standard is general knowledge that you have committed the underlying conduct Under this proposed Rule, it is not clear if the attorney has to "know" if a person is a client, or simply know that the attorney is uninsured.

There are an increasing number of predatory clients. They attempt to manipulate the Rules of Professional Conduct in a way so as use the threat of a State Bar complaint to get an attorney to reduce or withdraw a legitimate bill. In the 14 years that I have been representing attorneys in ethics matters, I have seen a steady increase in the innovative ways in which clients try to blackmail attorneys over a Rule violation that had nothing to do with the success or failure of the representation. It is simply a bargaining chip in an attempt to avoid paying an attorney fee for a job otherwise well done.

I have no strong feelings about the disclosure requirement. It has some pros and cons. As I said above, when a client is damaged by the failure of the attorney to give notice, the client has a remedy with the fees. But a problem with the proposal is that it assumes all malpractice claims are valid and therefore consumers are better protected. In fact, there are many malpractice cases that are not well taken. Or there is liability but the consumer overstates damages. Those are the sort of situations where an insurance disclosure tends to encourage marginal litigation. I do hope that all attorneys carry malpractice insurance, but it's not my issue.

My issue is more specific. I oppose elevating this issue into a disciplinary offense. Thus, I oppose proposed RPC 3-410. I oppose making nondisclosure a disciplinary offense.

Sincerely,

October 2006

California Bar Journal

Insurance rule will be a scarlet letter for some

By DIANE KARPMAN

A proposal is circulating for public comment that would require lawyers to disclose the absence of malpractice coverage to the client and get signed acknowledgment. If not, you could be disciplined or the fee agreement may be unenforceable. Since you cannot be disciplined for the absence of a written fee agreement, this proposed rule makes disclosure of coverage more significant than a written contract. Of course you want to have written fee agreements with your clients. They protect you. But this proposal also presents problems in the regulation of the profession.

Beyond all the esoteric insurance issues (such as policies being on a "claims-made" basis, "tails" and "diminishing limits"), insurance policies include exclusions that can render the policies voidable. Exclusions allow carriers to privately and quietly regulate the practice of law. Lawyers who are paying premiums recognize an "obligation to perform their contracts conscientiously." Anthony E. Davis (1996) Professional Liability Insurers as Regulators of Law Practice (65 Fordham L. Rev. 209).

Once in a while (sure) lawyers can be heard complaining that they are overly regulated. Just think about this additional layer of regulation imposed by the exclusions in insurance policies. Our ethical rules are developed after a period of public comment and vetting within the profession, such as speaking to the media ("O.J. Simpson rule"). Some-times we have a "gee whiz" moment, and jointly realize that some conduct should have been prohibited a long time ago, like sex with clients ("Arnie Becker rule"). We lawyers collectively evaluate and contemplate, and usually enact rules after a democratic "group think" process.

The problem with policy exclusions is that they can be triggered by perfectly acceptable conduct that conforms to our rules, such as going into business with a client, making an acquisition or serving on a client's board of directors. Our rules may consider those acts to be risky, but provide client protections and safeguards, through appropriate disclosures, consents and advice to consult with independent counsel (Rule 3-300). In some policies, mergers and lateral hires can trigger exclusions, as can strategic alliances or networks, office sharing, and hiring temporary lawyers. All of these acts can be beneficial and assist in the delivery of legal services. Exclusions can close those doors, slamming them shut on some clients obtaining counsel.

The proposed rules will profoundly impact solo/small practitioners, who are most likely to provide legal services to minorities and the poor. Therefore, this becomes a critical issue regarding access to justice. Of course, it is axiomatic that these costs will be passed on to the clients.

Enactment of the proposed rules will result in more lawyers being forced to obtain coverage or be marked with a scarlet letter. That would mean more secret regulations from outside our community, regulations that strike at core issues central to the practice of law. The American Bar Association's Ethics 2000 Project specifically rejected such a rule in 2002 because what does coverage have to do with ethics?

The legal profession is one of the few remaining self-regulating professions. Enactment of this rule is tantamount to a relinquishment of that self-regulation.

Bercovitch, Saul

From: Michael G. Evans [Michaelgevans@pacbell.net]
Sent: Tuesday, October 31, 2006 3:03 PM
To: Bercovitch, Saul
Cc: karpethics@aol.com
Subject: Public Disclosure- New Insurance Rules

Please accept this belated objection and comments concerning the new proposed rules to require members to have malpractice insurance and require that the Bar publish the names of those lawyers who do not submit proof of insurance. I just recently became aware of the proposal. I adopt the entire article by Diane Karpman,Esq. published in the October, 2006 Calif Bar Journal.

My practice resembles an in house counsel, as 90% of my work is for one client, a statutory indemnitor for member companies. However, I am also "Of Counsel" to another law office to provide services as needed for litigation defense of small cities. The legal fees are paid by their self-insurance plan. Lastly, I occasionally provide services to consumers in unlawful contractor and contractor bond claims, manufactured housing fraud and small business issues. During the past two years, all of these smaller consumer matters involved amounts in controversy between $10,000 - $25,000, although one was a $105,000 successful restitution claim.

I estimate my total fee income over the past 18-24 months for this third category of clients was less than $16,000, which is probably less than or equal to the premium costs for malpractice insurance. Were I required to pay the premiums for mandatory malpractice insurance to keep my name off of what will eventually become known as the "Class B" attorney bar member list, then my representation of this third category of clients would become de facto pro bono work, unless I significantly raised my fees to a level these clients could not afford, in which case they would probably have to find legal representation elsewhere. Incidentally, I prevailed in every one of these consumer cases.

The affect of the new proposal on my "Of Counsel" relationship is far too complex to discuss here, other than to note the co-insurance issues, the possibility of conflicting coverage's, etc. would result in more, not less litigation, were a malpractice claim filed. Also, my annual fee income for that work is similarly small, so I could find the premium costs for a malpractice policy actually imposed an incentive to not engage in that very rewarding work. Incidentally, I have never lost a case or motion in this line of work, either.

In my 26 years of practice, I have never been accused of malpractice and have never had a claim stated against me by any client, including those of my former 15 person law firm which dissolved in 2001.

Lastly, a personal economic impact of mine probably affects the many other Bar members who are paying college tuition for their children, which continue to rise but for which there is no tax relief.

The decision to buy what is probably unnecessary malpractice insurance carries a cost - some consumers with meritorious claims will be without legal representation; an office may loose their "Of Counsel" assistance and decline case assignments; a college student may need to work to help pay tuition, taking fewer credits per quarter and remain in college for a longer time. If forced to make the decision, I will choose to keep my son in school, full-time. I am confident many similar scenarios are faced by my colleagues.

Please submit this objection to the new proposal. Thank you,

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