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Forum

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## ENCOURAGING TRANSPARENCY

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In a decision that defies the modern trend of transparency, the California Bar's recent move to shelter attorneys has left the state's client population in the dark about whether lawyers offer a fundamental consumer protection.

This fall, the bar's Board of Governors rejected rules that would have required attorneys to disclose to clients and the bar whether they are covered by basic professional liability insurance. Running counter to both conventional wisdom and new regulations in states across the country, Bar President Sheldon Sloan cast the deciding vote to deny Californians access to attorneys' liability coverage on the bar's Web site. Although we know that consumers in this digital age think nothing of turning to the Internet for basic information, Sloan dismissed this straightforward proposal as "over the top."

Fortunately, the battle for sunshine has not come to a complete close yet. Since the Board of Governors could not agree on whether the bar should divulge malpractice information upon an individual's specific inquiry, members ultimately voted to take up the issue at its November meeting. But the sound and fury coming from members of the legal establishment simply because they have been asked to report whether they are covered for negligence does not bode well for the state.

Since 2004 — when the American Bar Association advised states to make attorney malpractice informa-

tion available to the public through its Court Rule on Insurance Disclosure — 25 state bars have considered such proposals. Of the 25, a whopping 23 have adopted some form of disclosure requirement. Should the California Bar ultimately refuse to ask lawyers for their insurance information, the state will find itself in the company of only Arkansas and Kentucky.

**The attorney-client relationship requires lawyers to provide clients with sufficient information to make educated decisions about their representation.**

While the bar falters on this important issue, the clients of some 31,200 California attorneys currently estimated to be uninsured — approximately 20 percent of licensed lawyers in the state — remain vulnerable. The attorney discipline system does not recompense a client who has

lost her day in court because of a lawyer's carelessness, nor does it cover the bills of an attorney hired to remedy harm caused by a previous lawyer's inattention. The client security fund only alleviates losses resulting from fraudulent conduct. A legal malpractice suit is the appropriate remedy for attorney negligence, but this is a meaningless option when the attorney does not carry professional liability insurance and is therefore often unable to pay a judgment.

Requiring disclosure of insurance status directly to clients and on the bar's Web site serves the purpose of consumer protection in two important ways. First, these simple means of informing clients whether a lawyer or prospective lawyer is insured enable consumers to protect themselves. Second, such disclo-



sure provides lawyers with an incentive to obtain insurance coverage, because legal consumers prefer to work with attorneys who can guarantee a safeguard if malpractice occurs. In this way, disclosure not only ensures recourse for the victims of attorney negligence, but also encourages conscientious practice.

According to the ABA, five states — Alaska, New Hampshire, Ohio, Pennsylvania and South Dakota — require direct disclosure to clients. At least five additional states — Arizona, Delaware, Illinois, North Carolina and Virginia — post malpractice insurance status online. Since South Dakota began requiring lawyers to disclose their uninsured status on professional letterhead, the state has seen a marked increase in the number of insured attorneys.

The arguments raised by opponents of disclosure have been at best illogical and at worst self-interested. At the recent Board of Governors hearing, some lawyers speculated that disclosure of insurance status would cause members of the profession to raise fees to the point that lower-income individuals would be denied access to justice — a conjecture that has not been borne out in those states requiring attorneys to inform clients of their liability coverage.

While a disclosure rule would encourage attorneys to carry insurance in order to attract more clients, it does not mandate them to obtain coverage. Attorneys remain free to decline malpractice insurance, and Californians of all income levels

are free to incorporate insurance coverage into their choice of representation if they so choose.

Other opponents objected to this proposal on the grounds that disclosing malpractice insurance status would brand those attorneys who fail to obtain coverage as secondrate. However, consumers take a wide array of factors into account when deciding on representation. The bar's concern should not be maintaining a level playing field in the competition for clients, but rather upholding the highest ethical standards for the profession and protecting the client population.

Rule 3-500 of the California Rules of Professional Conduct requires attorneys to keep clients "reasonably informed about significant developments relating to the employment or representation." Implicit in this mandate is the principle that the attorney-client relationship requires lawyers to provide clients with sufficient information to make educated decisions about their representation. Professional liability insurance coverage is certainly one of the critical considerations in both selecting representation and addressing conflicts that may arise over the course of representation if malpractice occurs.

Despite the concerns of lawyers across the state fearful of the burdens of greater accountability for the profession, California's proposal did not go nearly as far as regulations in other states. In Alaska and New Hampshire, for example, lawyers must obtain a signed acknowledgement

from clients affirming that they have read and understood information related to the attorney's malpractice coverage in the written fee agreement.

California attorneys would have simply had to include insurance status among the other introductory business to be discussed with potential clients, while California consumers could have accessed information about insurance coverage online in the course of researching potential representation.

When it meets on this issue again later this month, the Board of Governors should — at a minimum — adopt a rule requiring the bar to provide information about insurance status to all consumers who contact the bar with an inquiry about a specific attorney's liability coverage.

However, if the Board truly wants to achieve its unanimously stated commitment to client protection, members should require lawyers to directly communicate to clients and prospective clients whether they are covered by a professional liability insurance policy. Informed consumers are protected consumers, and consumer protection and professional integrity go hand in hand.

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