

July 10, 2007

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

Pursuant to the California State Bar Insurance Disclosure Task Force’s request, HALT hereby submits comments regarding the Bar’s revised rule proposals concerning malpractice insurance disclosure requirements.

HALT supported the California Bar’s original recommendations for these disclosure requirements. 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 original recommendations allowed for accessible public information, and required greater accountability for lawyers. Although an insurance disclosure rule would be a step forward for California, failing to require a signed acknowledgement by the client and only applying these rules prospectively limits the positive effect these proposals will have on the California legal system.

**I. A Rule Should be Adopted that Disciplines an Attorney who Fails to Inform a Client that He or She Does Not Have Professional Liability Insurance.**

The Task Force’s original proposal would have required a lawyer to disclose a lack of professional liability insurance to a client when he or she was not insured. The revised proposal states that a lawyer must disclose this information to a client when a lawyer “knows or should know that he or she does not have professional liability insurance.” This revision weakens the Task Force’s original standard, as an attorney can fail to disclose this important information and still avoid professional discipline.

HALT supports the original proposal as it establishes a higher standard of attorney conduct and urges the court to adopt the following language: “A member who is not covered by 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 original proposal would have encouraged attorneys to take the proactive step of inquiring about whether they are covered by professional liability insurance. If an attorney could be disciplined for failing to disclose to a client that he or she was not covered by malpractice insurance, that attorney would most likely find out if he or she was insured. In a law firm, for example, an associate may not have been told whether his or her professional conduct is covered by the firm’s malpractice insurance, but the original proposal created a strong incentive for all attorneys to find out whether they are insured. The revised proposal decreases this motivation.

Whether or not an attorney is insured can be an important factor in a client's decision to hire an attorney. Lawyers should know their insurance status and a lawyer can obtain this information with greater ease than a potential client. The original proposal established a strict standard that would have served as a strong incentive for attorneys to learn whether they were covered by malpractice insurance. Disclosing to a client that an attorney is not insured for malpractice might have a negative impact on business, and this revised proposal could allow attorneys to shirk these new rules by simply claiming ignorance. The original proposal did not allow for such a loophole.

If the revised proposal is adopted, attorneys can fail to disclose that they are uninsured, but avoid discipline by claiming that they were unaware of the status of their malpractice insurance. Attorneys have less of an incentive to disclose this information under the revised rule, and in turn, clients would often be unable to make a fully informed decision when hiring an attorney. The California Rules of Professional Conduct were intended to protect clients and this revised rule offers less protection to clients than the original proposal.

## **II. These Proposed Rules Should Apply Retroactively to Those Cases that Fall Within California's Statute of Limitations for Legal Malpractice.**

The Task Force's original proposal would have required an attorney to "inform in writing all existing clients for whom the [lawyer] is currently rendering continuing legal services if the [lawyer] is not covered by professional liability insurance." The revised proposal only "applies with respect to new clients and new engagements with returning clients."

Although these proposed rules may help future clients become fully informed when hiring an attorney, they offer no protection for past or present clients. The California legislature has declared that both past and present clients have enforceable rights for legal malpractice claims. In California, the statute of limitations for legal malpractice is four years from the date of the wrongful conduct or one year after the client discovers, or should have discovered, the misconduct. Past and present clients have the right to bring a legal malpractice claim in California, but this revised proposal does not give these same clients the right to know whether their attorney has malpractice insurance.

The Bar should follow the lead of the legislature and require attorneys to notify all clients whose cases fall within the four-year statute of limitations for legal malpractice if they do not have professional liability insurance.

The legislature has given past and present clients the right to file malpractice claims against their attorneys up to four years after the wrongful conduct. If these past

and present clients are entitled to sue for legal malpractice, they should also have the right to know if their lawyers are insured. Past, present, and future clients have equivalent rights under the California malpractice statute and consequently, the Bar should protect all classes of clients under the Rules of Professional Conduct.

### **III. The California Rules of Professional Conduct Should Require a Client to Sign a Written Acknowledgement that He or She has Been Informed About the Lawyer's Lack of Malpractice Insurance.**

The Task Force's original proposal would have required an attorney to obtain a signed acknowledgment from a client that stated that he or she had been informed that the attorney was not insured. The revised rule requires an attorney to notify a client in writing when he or she does not have malpractice insurance, but the client does not need to acknowledge this disclosure. HALT supports the original proposal as it gave greater protections to clients.

The original proposal stated that a lawyer without malpractice insurance "shall obtain from the client a signed and dated acknowledgement of receipt of that notice." A client should be fully informed when hiring an attorney and this original requirement would have helped ensure that clients were aware of their attorney's liability insurance status. There is some risk to the client when his or her attorney is practicing law without any malpractice insurance. The Task Force recognized this in its original proposal, but has since dropped the requirement that a client knowingly consent to being represented by an uninsured attorney.

The goal of California's new disclosure rule is to ensure that clients are aware of an attorney's malpractice insurance status when hiring a lawyer. The rule loses much of its strength if it does not require a signed acknowledgment from the client. Without this requirement, lawyers could simply include a brief clause in lengthy paperwork that he or she is uninsured.

HALT urges the Task Force to require an attorney to receive a signed acknowledgment from a client. California legal consumers may be greatly benefited from the protections offered by these new rules, but failing to require a signed client acknowledgment could render these proposals ineffective.

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The recent revisions significantly weaken the Task Force's original proposals. HALT supported California's efforts to require a system of dual disclosure where uninsured attorneys would be required to inform their clients, and the Bar, about their insurance status. Under the new proposals, however, an attorney could simply claim ignorance as a reason for failing to tell a client that he or she was not covered by

professional liability insurance. These rules offer no protections to past or present clients, even though these clients may have rights to sue an attorney under California's statute of limitations for legal malpractice. Lastly, the purpose of these new rules is to protect clients, but failing to require a lawyer to obtain a signed client acknowledgement, could negate any consumer protections that these proposals originally offered.

We respectfully urge the Bar to reject the recent revisions.

Respectfully submitted,

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