

**Comments from HALT – *An Organization of Americans for Legal Reform*
to the American Bar Association Standing Committee on Client Protection
regarding Proposed Model Rule on Financial Responsibility**

Pursuant to the ABA Standing Committee on Client Protection’s request, HALT – *An Organization of Americans for Legal Reform* hereby submits comments regarding the Committee’s proposed Model Rule on Financial Responsibility.

HALT urges the Standing Committee to modify its proposed rule to provide real protection for clients through a mandatory malpractice insurance requirement. If the Committee is inclined to merely require disclosure, we request that the Standing Committee amend its proposal to provide for direct disclosure to clients, in addition to the state’s highest court. And in any case, we urge the Standing Committee to clarify several key provisions in the proposed rule. We believe these modifications will result in a rule that delivers meaningful protection to the client population.

I. A Mandatory Malpractice Insurance Requirement Would Best Serve the Objectives of the Standing Committee on Client Protection.

The mission statement of the Standing Committee on Client Protection provides that the Committee endeavors to help “preserve the integrity of the legal profession and the overall system of justice” and to “serve the best interests of the client population through programs that serve to prevent or redress harm done in the practice of law or the rendering of legal services.” See www.abanet.org/cpr/client.html.

The Committee’s proposed rule on “financial responsibility” merely requires an attorney to state in her annual registration statement whether she is currently covered by professional liability insurance with minimum limits of \$100,000 per claim and \$300,000 policy aggregate. The proposed rule leaves it to the highest court in each jurisdiction to determine how this information is made available to the public. If a lawyer refuses to disclose her insurance status, she will receive an administrative suspension.

This disclosure rule fails to fulfill the Standing Committee’s core mission. The “integrity of the legal profession” is preserved when we take measures to ensure that lawyers fully protect their clients’ interests, not when we allow them to skirt malpractice insurance at their discretion. The “integrity of the overall system of justice” diminishes when the public watches unscrupulous or incompetent lawyers cause financial injury to their clients and fail to provide adequate monetary redress. And the “best interests of the client population” are certainly not served by a rule that continues to leave many victimized clients without a meaningful remedy.

For most clients, a legal malpractice lawsuit is the only recourse when a lawyer's negligence or incompetence has caused financial loss. Attorney discipline systems only rarely impose sanctions for negligence. Our 2002 Lawyer Discipline Report Card revealed that less than four percent of filed complaints lead to formal sanctions by disciplinary bodies nationwide. This trickle of discipline sends lawyers the message that they can freely ignore their duties to clients without any real threat of punishment.

Even when disciplinary bodies do impose sanctions, they do not – as a rule – provide financial compensation to victimized clients. 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 unscrupulousness.

In many cases, client security funds also fail to fully compensate legal consumers when attorneys lie or steal from them. With woefully limited funding, arbitrary caps on awards, and a maze of procedural red tape, these lawyer-controlled systems do not adequately protect clients from attorneys who commit unethical misconduct.

Given the limited nature of the discipline system and client security funds, legal malpractice suits have become imperative for many consumers – but these suits are worthless if the attorney is insolvent. And sadly, our members regularly report that it is often the most incompetent, careless and unethical attorneys who choose to “go bare.”

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 roll the dice 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.

In those states that permit independent paralegals to provide legal assistance, such as California and Arizona, there are strict bonding rules for paralegals. See, e.g., Cal. Bus. & Prof. Code § 6405 (2004). Yet this same requirement does not extend to their attorney counterparts.

Recently, the Consumer Federation of America, one of the nation's oldest and largest umbrella organizations protecting the interests of consumers, adopted a resolution calling for mandatory professional liability insurance. The policy resolution provides:

CFA supports state legislation requiring practicing lawyers, doctors and other professional service providers to carry a minimum level of professional liability insurance. When a

service provider, in whom a consumer has placed a high degree of trust, has acted incompetently, negligently or deceitfully, the consumer should have the right to meaningful restitution.

The consumer assembly agreed that this policy was the only way to guarantee compensation to the countless Americans who fall victim to attorney incompetence and negligence every year.

Those who oppose mandatory malpractice insurance argue that insurance policies are cost-prohibitive for many attorneys. Yet insurance agents have informed us that attorneys practicing in mid-size firms in metropolitan areas typically pay about \$100 a month for a policy that covers \$100,000 per claim, with an aggregate limit of \$300,000. And attorneys with good records, as well as those practicing in smaller communities and those who specialize in lower-risk practice areas will pay substantially less each month.

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. Nearly every high court, such as the Supreme Court of Connecticut, has linked the “unique position [of lawyers] as officers and commissioners of the court” to the special duties held by attorneys. *Heslin v. Connecticut Law Clinic of Trantolo and Trantolo*, 190 Conn. 510, 524 (1983). 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.

Indeed, the principle of protecting clients’ assets pervades the Model Code. Model Rule 1.15, entitled “Safekeeping Property,” provides that a “lawyer shall hold property of clients or third persons that is in a lawyer’s possession in connection with a representation separate from the lawyer’s own property Other property shall be identified as such and appropriately safeguarded.” The comments further state that “a lawyer shall hold property of others with the care required of a professional fiduciary.” Embedded in the letter and spirit of the model rules is a lawyer’s duty to safeguard client assets. Mandatory malpractice insurance guarantees full protection of these assets.

To satisfy the mission of the Standing Committee on Client Protection and to live up to the principles rooted in the Model Code, the Committee should modify the proposed rule to require lawyers to obtain malpractice insurance coverage.

II. A Rule Requiring Insurance Disclosure is Toothless without Transparency.

The essence of a disclosure rule is undermined when the required information is disclosed but not visible. Indeed, part A of the proposed rule provides that the purpose of

the rule “is to make information available to the public about the financial responsibility for professional liability claims of each active lawyer admitted to practice law.”

A disclosure requirement attempts to serve 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.

The proposed rule provides that a lawyer’s insurance disclosure should be made in his annual registration statement. The rule leaves it up to a state’s highest court to determine how this information is made available to the public. Currently, registration statements in most states are not widely available. Although most jurisdictions claim that registration statements are a matter of public record, they do not make it easy for the public to access this information. Virginia is one notable exception. The Virginia State Bar’s Web site allows the public to find full registration information for every lawyer licensed in the state. Unfortunately, several state bars do not even host Web sites – let alone provide comprehensive information about an attorney’s registration status.

A requirement that insurance information be disclosed in registration papers is merely an assurance that the state’s highest court will be informed of an attorney’s insurance status; it is not a guarantee that *clients* will have access to this information. Even if every state bar radically remodeled its Web site to include this attorney-specific information, most clients would not think to look for information about an attorney’s insurance status on a Web site.

It is crucial that the Standing Committee recognize that it is *clients* who stand in harm’s way when an attorney refuses malpractice coverage, not the state’s highest court. In light of this important principle, the Standing Committee’s rule should require direct public disclosure to clients.

South Dakota’s rule provides a useful model. The state code requires uninsured attorneys to disclose on professional letterhead that they are not “covered by professional liability insurance.” Specifically, South Dakota Rule of Conduct 1.4(c) provides:

If a lawyer does not have professional liability insurance with a limit of at least \$ 100,000, or if during the course of representation, the insurance policy lapses or is terminated, a lawyer shall promptly disclose to a client by including as a component of the lawyer’s letterhead, using the following specific language, either that: (1) “This lawyer is not covered by professional liability insurance;” or (2) “This firm is not covered by professional liability insurance.”

The Comments to this rule indicate that disclosure must be made at the beginning of the attorney-client relationship, and that clients must be notified if the policy lapses or is terminated. As a result of this client direct disclosure rule, South Dakota has seen a marked increase in the number of insured attorneys.

Admittedly, letterhead disclosing that an attorney has chosen to “go bare” may discourage some prospective clients from hiring that attorney. But this should be the client’s prerogative. That kind of choice on the part of a consumer is one of the bedrocks of American society, not to mention a guiding principle of this Standing Committee.

We urge the Standing Committee to modify the proposed rule to effectuate the true principle behind the disclosure requirement. We suggest that the Standing Committee model its rule after South Dakota’s law so that clients have direct access to this critical information through letterhead disclosure.

III. The Committee’s Proposed Rule Requires Clarification and Specific Instructions.

In addition to our reservations about the proposed disclosure rule, the lack of clarity in several provisions concerns us. First, the proposed rule fails to establish the specific form of proof required to demonstrate insurance coverage. Second, the proposal does not specify the means by which the public will have access to an annual registration statement. Finally, the rule does not explain the meaning of an “administrative suspension,” the form of discipline imposed if an attorney refuses to provide his insurance status on a registration statement.

The Standing Committee’s proposed rule provides that an attorney must disclose whether he is covered by a specified minimum level of malpractice insurance. Surely this Committee does not expect that all that is required is a simple check in a “yes” or “no” box. This Committee undoubtedly recognizes that proof of insurance coverage is necessary to ensure that clients are armed with complete and accurate information.

In addition, the Standing Committee should amend the proposed model rule so that it clearly sets forth the means by which the annual registration statement should be made available to the public. We urge the Standing Committee to provide clear guidance that the information should be made immediately available to anyone making a request. The information should be available on the telephone, through the state bar’s Web site as well as the state supreme court’s Web site, and in hard copy form.

Finally, we ask the Standing Committee to define an “administrative suspension.” As the Committee knows, this term has different meanings in different jurisdictions. In some states, an “administrative suspension” means that an attorney will be automatically reinstated once he complies with a requirement. In other jurisdictions, the attorney must

prove his competence and integrity at a disciplinary hearing in order to receive reinstatement. We believe that the latter procedure should be required for those attorneys who deprive clients of this vital information from the outset.

We urge the Standing Committee to amend the proposal to provide clear guidance and specific instructions on these critical provisions.

Conclusion

HALT respectfully requests that the Standing Committee on Client Protection modify this rule to provide real safeguards for clients through a mandatory malpractice insurance requirement. Should the Committee be unwilling to accept this fundamental client safeguard, we ask that the Standing Committee amend its proposal to provide for direct disclosure to clients. Under any circumstances, we urge the Standing Committee to clarify the proof required to demonstrate insurance coverage, the means by which insurance status is made available to the public and the specific form of discipline imposed if an attorney refuses to disclose or lies about his status.

Respectfully submitted,

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