

Issue Brief:

A National Look at Legal Malpractice Insurance Disclosure Requirements

HALT, Inc. conducted a landmark study exposing that most states allow attorneys not only to practice law without malpractice insurance, but also to conceal their uninsured status from clients. Based on our nationwide research, we have created a model rule on insurance disclosure that we plan to urge state legislators and court officials to adopt, as they establish and refine rules that protect clients from lawyer negligence.

As a nonprofit, non-partisan public interest group committed to improving the civil justice system, HALT has spent three decades advocating policies compelling attorneys to be more accountable to legal consumers. Our Lawyer Accountability Project urges every state to require practicing lawyers to carry legal malpractice insurance. This indemnity offers both peace of mind to individuals unsure about a prospective attorney's skills, as well as critical protection to clients, in the event that a lawyer negligently caused harm to them.

While Oregon is the only state in the country that compels lawyers to carry legal malpractice insurance, HALT has successfully persuaded many states to adopt insurance disclosure rules, which require uninsured attorneys to warn clients that they are not covered by professional liability insurance. Disclosure policies also work as an incentive to propel attorneys to purchase this critical client protection.

In 2004, the American Bar Association approved the Model Court Rule on Insurance Disclosure, which calls for states to require each lawyer engaged in private practice to annually certify to the highest court of that state whether he or she is currently covered by professional liability insurance, and to notify the court if the insurance policy lapses or terminates. In addition, the ABA recommends that the state's highest court make this information available to the public.

HALT's study found that 26 states now have formal insurance disclosure rules, but our analysis shows that only nine—Arizona, Colorado, Idaho, Kansas, Nebraska, Nevada, North Dakota, Virginia and Washington—adhere in whole or in part to the ABA Model Court Rule on Insurance Disclosure.

The remaining 17 states fail to meet the criteria set forth by the ABA. Hawaii, Michigan and Rhode Island, for example, require attorneys to report their insurance status to the state bar or the state supreme court, but do not make the information publicly available. Some states, such as Alaska, California and Pennsylvania, do not require the client or attorney to sign or acknowledge the attorney's disclosure statement.

HALT discovered that none of the states with disclosure requirements make specific information regarding the types and amount of an attorney's coverage available to the public. Even North Dakota, one of the jurisdictions that have adopted portions of the

ABA's model rule, makes insurance information publicly available only upon request from the lawyer referral service, which charges its users a \$30 referral fee.

Despite the flaws we found in most malpractice insurance disclosure rules, our study identified some model practices. New Hampshire, New Mexico and Ohio not only compel both the lawyer and client to sign an uninsured attorney's disclosure statement, but they also require the lawyer to keep a record of the signed document for several years. South Dakota mandates that attorneys include a written disclosure statement on all pieces of the uninsured lawyer's letterhead. Washington State reports insurance information on every attorney's profile page on the State Bar website; each profile page also features a link to a helpful client guide on professional liability insurance. In addition to reporting malpractice insurance information, West Virginia lawyers are also required to disclose whether they have failed to satisfy any past judgments pertaining to legal malpractice.

Based on our findings, HALT drafted language that state legislators and court officials could apply, as they create and enhance rules to protect clients from uninsured lawyers and to persuade lawyers to purchase liability coverage. Our proposed rule derives from some of the best practices applied by states, as well as from some of the criteria adapted by the ABA. We urge states to adapt HALT's proposed rule as part of the communication section of each state's Rules of Professional Conduct or equivalent provision.

HALT's rule, found on the attached page, requires each lawyer's annual court registration (or certification) statement to include specific information pertaining to his or her insurance. The rule requires the state bar or supreme court to post this information on its website and released to the public without a fee. In addition, it compels attorneys to provide clients with a written statement of whether or not the lawyer maintains professional liability coverage. Clients must show that they acknowledge this information by signing the statement and they may receive a copy of the attorney's policy by request. HALT has also drafted a sample client acknowledgment form. Attorneys who fail to disclose the information under HALT's rule, or who provide false information, would receive specific penalties.

Our proposed rule ensures accuracy and consistency in the reporting of attorney insurance information, and achieves a fair balance between compelling lawyers to pay for coverage and ensuring that clients are informed and protected. In addition, our rule improves upon the ABA Model Rule in numerous ways. Unlike the ABA rule, HALT's proposal compels attorneys to state specific information about the type of policy maintained and the monetary amount of coverage provided by their policy. And unlike the ABA rule, HALT's rule places the burden on the lawyer—not the client—to open a dialogue about the attorney's liability protection.

HALT's study offers lawmakers and court officials with a detailed lens into the national landscape, and our proposed rule provides them with specific language to use, as

they draft new rules that protect clients and provide lawyers with good reason to obtain critical coverage.

HALT's Proposed Rule:

i. Rule ___ [Communication]

A. Disclosure of Professional Liability Insurance.

1. Each lawyer admitted to the active practice of law in **[jurisdiction]** shall be required to state as part of his/her annual registration with the **[State Bar/Supreme Court]** (1) whether the lawyer is engaged in private practice; (2) If engaged in private practice, whether the lawyer maintains professional liability insurance; and (3) whether the lawyer intends to maintain their liability insurance coverage for the duration of their employment in private practice. Attorneys who are primarily employed as in-house counsel or in government positions shall be exempt from the reporting requirements stipulated to under the following subsections of Rule 1.4-A.

2. Each lawyer admitted to the active practice of law in this jurisdiction who reports being covered by professional liability insurance shall identify (1) the name of primary carrier, along with carrier's address and phone number; (2) the type of policy coverage maintained by the attorney; and (3) amounts of coverage provided by the policy.

3. The information provided pursuant to subsections 1 and 2 of this rule shall be publicly reported through the **[State Bar/Supreme Court]** websites for every attorney, regardless of whether or not the attorney maintains coverage. Information shall be disclosed under this subsection shall be presented to the public without fee.

4. Attorneys who fail to disclose the information before the registration deadline shall be automatically suspended from practice until the information is disclosed. Those attorneys found to have provided false or misleading information shall be subject to discipline pursuant to **[the rules governing discipline for attorney misconduct]**. Any change in the insured status of an attorney and any lapse, change or termination of policy shall be updated with the **[State Bar/Supreme Court]** by the attorney within 30 days of the policy change.

5. In addition to the foregoing annual reporting requirements, each attorney shall, at or before the time of a fee agreement, provide to their client in writing, using the following language, a statement of whether or not the attorney maintains professional liability coverage:

(a)

NOTICE TO CLIENT

Pursuant to rule 1.4-A of the **[jurisdiction]** Rules of Professional Conduct, I am required to notify you that I **[do/do not]** maintain professional liability malpractice insurance in the amounts of **[amount]** per claim and **[amount]** annual aggregate. The policy that I maintain covers the following types of legal malpractice:

[Types of malpractice covered]

(Attorney's Signature)

(b)

CLIENT ACKNOWLEDGEMENT

I acknowledge receipt of the notice required by Rule 1.4-A of the **[jurisdiction]** Rules of Professional Conduct that **[insert attorney's name]** **[does/does not]** maintain professional liability (malpractice) insurance coverage of the type and at the amounts as disclosed by **[insert attorney's name]**.

(Client's Signature)

6. On every piece of letterhead, each attorney shall include the following statement in black ink and in a font size no smaller than that which is used to display the attorney's or firm's name:

(a)

Pursuant to Rule 1.4 of the **[jurisdiction]** Rules of Professional Conduct, **[attorney or firm name]** hereby discloses that **[he/she/firm name]** **[is/is not]** covered by professional liability (malpractice) insurance.