

August 15, 2005

John Baldwin
Executive Director
Utah State Bar
Via email: diretor@utahbar.org

Dear Mr. Baldwin:

Our organization read the call on the Bar Web site for comments on the proposed change to Rule 1.4 of the Rules of Professional Conduct, which would require lawyers without liability insurance of \$100,000 to disclose this fact to clients in writing along with the written fee disclosure required by Rule 1.5. HALT strongly supports this recommendation because it allows consumers to make a more informed choice when deciding whether to retain a particular lawyer. In an era that places a premium on principles of sunshine and transparency, we believe this requirement is long overdue. In addition, we urge the Bar to consider requiring attorneys to carry professional liability insurance, as this action would guarantee a measure of protection to legal consumers.

HALT is a nonprofit public interest group dedicated to increasing access and accountability in the civil justice system. HALT's Lawyer Accountability Project works to make lawyers more responsive to the needs of legal consumers and to empower legal consumers to protect themselves from negligent, unscrupulous and incompetent attorneys. Through our Report Cards, appellate litigation, media campaigns, legislative work, white paper releases, and grassroots lobbying, HALT has been on the forefront of efforts to improve systems in place to weed out unethical lawyers and provide recourse to victimized legal consumers.

Recently, we have directed much of our reform work toward advocacy for legal malpractice insurance requirements and, at a minimum, mandatory disclosure of malpractice insurance status. We have made these efforts a priority because members of the public tell us that the secrecy surrounding lawyers' insurance status is a significant obstacle facing legal consumers.

In 2004, we collaborated with the American Bar Association's Standing Committee on Client Protection to implement a model rule requiring lawyers to disclose whether they carry a minimum level of professional liability insurance. During the fall of last year, we worked with officials in Illinois to persuade the state Supreme Court to adopt the ABA model rule and to go a step further by providing this critical information on the disciplinary commission's Web site.

As you know, the vast majority of state client protection funds, including Utah's, limit coverage to losses stemming from theft. In addition, attorney discipline systems, including Utah's, do not provide financial compensation to victimized clients. As a result, a legal malpractice case is frequently a client's only recourse when her attorney's negligence has caused financial loss.

We hear every week from consumers who have fallen victim to an attorney's negligence and are shocked to learn, long after they have filed a malpractice lawsuit, that their former lawyer is uninsured. Understandably, they believe that they should have received that information upfront and that they, in all likelihood, would have retained a different attorney had they known that this lawyer did not carry malpractice insurance.

To obtain a license an individual must typically demonstrate that she has the ability to protect the public if anyone is injured by her negligence in her use of that license. For example, a person must carry auto insurance if he wants to register a vehicle (see *Utah Code Ann. § 41-12a-301*). If an individual drives

irresponsibly, his vehicle insurance compensates those injured by his negligence. Professional liability insurance serves the same function for attorneys.

By carrying adequate legal malpractice insurance, an attorney safeguards her clients, because insurance supplies financial recourse in the event that an attorney behaves negligently or even criminally and her client is entitled to financial compensation. Surprisingly, neither Utah nor any other state, save one, requires attorneys to protect their clients in this way.

The notable exception to the status quo is Oregon, which began requiring lawyers to carry legal malpractice insurance in 1978. Attorneys in Oregon make a mandatory contribution to a universal risk pool that pays out claims to wronged clients. In addition to guaranteeing protection to legal consumers, Oregon also has lower costs for liability insurance, according to local insurers from the Professional Liability Fund of Oregon.

In the event that the Bar does not follow Oregon's model, Utah's legal consumers should be entitled to take matters into their own hands. To make a responsible choice, prospective clients deserve to know the insurance status of their possible attorneys. Merely requiring disclosure to the highest court, as the ABA recommends, is insufficient; clients deserve direct access to this critical information.

In addition to informing legal consumers, direct disclosure of insurance status provides another important protection for clients because it appears to create the motivation for attorneys to choose to have adequate malpractice insurance. A few years ago, the Virginia State Bar decided to provide information about lawyers' insurance status on its public Web site. While the state has not compiled formal statistics yet, officials at the Virginia Bar tell us they have seen a dramatic increase in the number of lawyers that carry malpractice insurance since the rule was implemented.

In 1999, HALT was pleased that South Dakota enacted a rule requiring uninsured lawyers to disclose their uninsured status on letterhead. This reform also led to a meteoric rise in the number of insured lawyers. More than 98 percent now carry professional liability insurance – a figure that's more than twice the national average of 40 percent. These examples indicate that requiring disclosure about malpractice insurance leads to the benefit of encouraging attorneys to carry sufficient insurance. This incentive could be important for Utah attorneys, since the Bar estimates that up to half of them do not currently carry liability insurance of at least \$100,000, as it referenced in its call for comments on the Utah Bar Web site.

Success in Virginia and South Dakota is largely attributable to the fact that the rule requires *direct* disclosure of insurance status to clients, not simply to the state's highest court. 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. These goals are only advanced if the information is communicated directly to clients.

Admittedly, direct disclosure to clients 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.

Some critics of direct disclosure may complain that the cost of malpractice insurance is too high. However, our research indicates that it costs only a few dollars a day to provide security for clients through insurance. NCMIC (The Lawyer's Protector Plan), an insurance company that carries policies in Utah, estimates that small to medium-sized firms in Utah (with 50 or fewer attorneys) can buy a policy for less than \$4000 a year.

HALT recommends that the Commission consider requiring Utah attorneys to carry adequate malpractice insurance. In the absence of that consideration, we support the Bar's proposal to require direct disclosure of malpractice insurance status. By taking this long-overdue step, the Bar can satisfy its vital mission to protect Utah's client population and help restore honor and integrity to the legal profession. Should you need any further information about the necessity of a direct disclosure rule, please do not hesitate to contact me at (202) 887-8255. We will be happy to provide you with additional data and research that supports this critical recommendation.

Sincerely,

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