

[LEGAL ethics]

IT'S TIME TO SPEAK UP

Don't Miss Out on Debate Over Professional Liability Insurance

by BRUCE A. CAMPBELL

By February 2010, the State Bar of Texas board of directors will make its recommendation to the Texas Supreme Court concerning the controversial issue of whether attorneys in Texas should be required to disclose — either through the State Bar Web site or directly to their clients — whether they carry professional liability insurance.

This fall, State Bar directors are holding meetings and soliciting feedback in their districts in anticipation of the vote at the State Bar board of directors' meeting in January. The meetings this fall may be the last opportunity for Texas lawyers to express their views on this issue before the Texas Supreme Court acts.

According to an Oct. 20 chart, "ABA Standing Committee on Client Protection, State Implementation of ABA Model Rule on Insurance Disclosure," on the American Bar Association's Web site, 35 other states have considered whether attorneys are required to disclose that they do or do not carry professional liability insurance. Oregon is the only state that requires all attorneys to carry a minimum amount of professional liability insurance.

Oregon allows attorneys to purchase insurance from the State Bar and maintains records of all claims asserted against lawyers.

Only eight states — Alaska, Nebraska, New Hampshire, New Mexico, North Dakota, Ohio, Pennsylvania and South Dakota — currently require disclosure directly to clients; all eight states enforce this requirement pursuant to their Rules of Professional Conduct, according to the chart.

The California Supreme Court recently adopted Rule 3-410 of the California Rules of Professional Conduct, which requires written disclosure that an attorney does not carry professional liability insurance if the representation will exceed four hours, according to an April 27 article in the *Metropolitan News-Enterprise*.

Nineteen states — Arizona, Colorado, Delaware, Hawaii, Idaho, Illinois, Kansas, Maine, Michigan, Minnesota, Nebraska, Nevada, North Carolina,

North Dakota, Rhode Island, South Dakota, Virginia, Washington and West Virginia — require attorneys to disclose whether they carry professional liability insurance on their annual registration statements. Fifteen of those 19 states also disclose such



information to the public, either on the state bar's Web site or upon request.

Four states — Arkansas, Connecticut, Florida and Kentucky — have declined to adopt a rule requiring disclosure.

Three states besides Texas are considering adoption of a rule requiring attorneys to disclose whether they carry insurance: New York, Utah and Vermont.

In the last session, the Texas Legislature declined to pass H.B. 2825, which would have required lawyers to disclose whether they carry insurance.

Pros and Cons

Whether attorneys in Texas or elsewhere should be required to disclose if they carry professional liability insurance has been a controversial issue for a long time.

THE MEETINGS THIS FALL MAY BE THE LAST OPPORTUNITY FOR TEXAS LAWYERS TO EXPRESS THEIR VIEWS ON THIS ISSUE BEFORE THE TEXAS SUPREME COURT ACTS.

Arguments in favor of requiring attorneys to carry malpractice insurance or to disclose that they do not do so include the following:


- Attorneys owe their clients a fiduciary duty to disclose their insured status.
- Insurance should be available to protect the public, and coverage is a cost of doing business.
- The private practice of law is comparable to other industries, such as securities and health care, which state and federal laws and agencies regulate.
- It tarnishes the reputation of the profession when clients harmed by their attorneys are unable to receive compensation.
- There may be a disincentive for attorneys to represent plaintiffs in legal malpractice claims if a would-be defendant-lawyer does not carry insurance.
- The amounts of coverage required in most states have

been small and typically the minimum limits are \$100,000 per claim with an aggregate of \$300,000 per year.

Arguments against requiring attorneys to carry malpractice insurance or disclose that they do not do so include:

- There is no evidence that disclosure is a problem.
- Disclosure would encourage frivolous suits by disgruntled clients.
- Other professionals do not have to make such disclosures.
- The State Bar of Texas is engaging in unneeded bureaucratic regulation.
- Such a requirement unfairly would impact certain segments of attorneys, including solos, newly admitted lawyers and part-time lawyers.
- Disclosure actually misleads the public, since knowing

whether a lawyer has insurance at the time of representation does not ensure he will be covered when a claim is made or that the policy will adequately compensate for damages.

Now is the time for Texas lawyers to provide input on whether they should be required to disclose if they carry malpractice insurance. The question remains, will Texas lawyers provide their input on this controversial question? And, what position will Texas take on this issue? 



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