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July 30, 2007

Chief Justice Wallace B. Jefferson
Texas Supreme Court
P.O. Box 12248
Austin, Texas 78711-2248

Dear Chief Justice Jefferson:

I offer a suggestion for your consideration, in line with the ABA's current initiative and similar projects in several other states concerning legal malpractice insurance:

Legal malpractice insurance carriers estimate that well over 50 percent (perhaps higher than 60 percent) of Texas lawyers do not carry legal malpractice insurance. (Many years ago the State Bar conducted a survey that reached roughly the same result.) The absence of malpractice insurance, of course, sometimes injures clients who are left with no practical remedy when their lawyers make costly mistakes. The failure of so many Texas lawyers to carry malpractice insurance also results in a disparity and unfairness among lawyers and firms: uninsured lawyers obviously save that overhead expense in comparison with the many lawyers who carry malpractice insurance to protect both themselves and their clients.

(I handle both sides of the legal malpractice docket, and when a lawyer shows that he has no malpractice insurance, I almost never take a case, regardless of the wrongdoing. Similarly, on the defense side I have almost always settled very quickly claims against uninsured lawyers for little or nothing, regardless of how seriously the lawyer damaged the client.)

As noted in the enclosed article this month in the Los Angeles Times (Attachment 1), twenty states have adopted some form of malpractice insurance disclosure requirement. Only one state has mandatory legal malpractice insurance (Oregon). Some states–such as Ohio–require that a lawyer inform clients at the outset of the relationship whether the lawyer has malpractice insurance (see Attachment 2). Ohio Rule 1.4(c) provides in part:

> (c) A lawyer shall inform a client at the time of the client's engagement of the lawyer or at any time subsequent to the engagement if the lawyer does not maintain professional liability insurance in the amounts of at least one hundred thousand dollars per occurrence

and three hundred thousand dollars in the aggregate or if the lawyer's professional liability insurance is terminated. The notice shall be provided to the client on a separate form set forth following this rule and shall be signed by the client.

(1) A lawyer shall maintain a copy of the notice signed by the client for five years after termination of representation of the client.

(2) A lawyer who is involved in the division of fees pursuant to Rule 1.5 (e) shall inform the client as required by division (c) of this rule before the client is asked to agree to the division of fees.

(3) The notice required by division (c) of this rule shall not apply to either of the following:

(i) A lawyer who is employed by a governmental entity and renders services pursuant to that employment;

(ii) A lawyer who renders legal services to an entity that employs the lawyer as in-house counsel.

Similarly, Pennsylvania Rule 1.4(c) provides:

A lawyer in private practice shall inform a new client in writing if the lawyer does not have professional liability of at least $100,000 per occurrence and $300,000 in the aggregate per year, subject to commercially reasonable deductibles, retention or co-insurance, and shall inform existing clients in writing at any time the lawyer's professional liability insurance drops below either of those amounts or the lawyer's professional liability insurance is terminated. A lawyer shall maintain a record of these disclosures for six years after the termination of the representation of a client.

Some other states have adopted a version of the ABA's "Model Court Rule on Insurance Disclosure," which the ABA House of Delegates approved in 2004 (see Attachment 3). That model court rule generally requires a lawyer to file a certification concerning insurance status with the state's highest court. Attachment 4 is an ABA table from June 20, 2007, showing the status of implementation of the ABA Model Court Rule and similar provisions.

This sort of proposal has pro's and con's, of course, as well as some complexity. However, it seems to me to be fair and reasonable for a client to know whether his or her lawyer has insurance. Protecting clients–at least to the extent of letting clients know whether their lawyer has insurance–would seem to be a worthy goal for our profession. Adopting a client-notice provision would not require any lawyer to buy insurance, but would let clients have access to what is unquestionably important information.

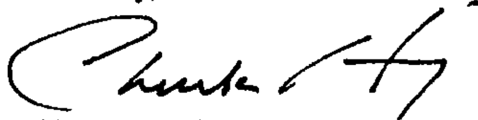
I have enclosed as Attachment 5 a few other pertinent materials, including a pro-con article from the debate on the ABA model court rule in 2004.

If the court decides to pursue this proposal, the court might consider setting up a task force to study the issue in detail, as the court has done with several other issues. I think it would be important to develop a consensus on this proposal among Bar leaders before going forward with any rule. I think that the issues are sufficiently complex that the matter requires careful analysis and, if possible, a carefully, methodically developed consensus. I understand that two current committees, one Bar committee and one supreme court committee, are studying possible disciplinary rule amendments generally, but that both of those committees are moving relatively slowly with that very large project, and I suspect that they would be unlikely to be able to devote the careful attention and time that this issue merits. If the court appoints such a task force, I would suggest that the group include recognized Bar leaders, representatives from one or more legal malpractice insurance carriers (e.g., Jett Hanna from TLIE), and representatives from both sides of the legal-malpractice docket (e.g., former Bar Presidents Broadus Spivey (plaintiffs) and David Beck (defense)).

You may well choose to reject this suggestion, and that's fine. I just wanted to mention it because I think it is a worthwhile project, and obviously the issue is currently receiving substantial attention from courts and bar associations across the country, as well as from the ABA.

I appreciate your considering this suggestion.

Sincerely,



Charles Herring, Jr.

Attachments

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Bar Task Force Studies Insurance Disclosure Rule

Mary Alice Robbins
Texas Lawyer
11-19-2007

Should Texas lawyers be required to disclose whether they carry legal malpractice insurance?

A 10-member task force appointed by State Bar of Texas President Gib Walton will try to answer that question over the next several months as it studies the controversial issue.

In a close vote on Aug. 9, 2004, the American Bar Association's House of Delegates adopted a model rule that would require lawyers to certify annually to their state bar regulators whether they carry professional liability insurance. Approved on a 213-to-202 vote, the rule calls for each lawyer admitted to the active practice of law to certify not only that the lawyer currently has malpractice insurance coverage but also that the lawyer "intends to maintain insurance during the period of time the lawyer is engaged in the private practice of law."

According to a chart posted on the ABA's Web site, five states currently have rules requiring lawyers to disclose directly to clients whether they have malpractice insurance coverage, while18 other states require disclosure on annual bar registration statements.

Austin attorney Charles "Chuck" Herring Jr. suggested in a July 30 letter to Texas Supreme Court Chief Justice Wallace Jefferson that the court consider the insurance disclosure issue.

"I think clearly it merits study," Herring, a partner in Herring & Irwin, says in an interview.

In his letter to Jefferson, Herring wrote that legal malpractice insurance carriers estimate

that more than 50 percent, and possibly more than 60 percent, of Texas lawyers do not carry legal malpractice insurance.

Based on a 2006 survey conducted by the State Bar's Research and Analysis Department, 63.8 percent of the Texas lawyers in private practice carried legal malpractice insurance in the previous year, says Kim Davey, a spokeswoman for the Bar. That percentage is based on 1,515 responses from private practitioners who responded to the insurance question included in the State Bar's 2005 Income Survey.

Jefferson says the court asked the State Bar if the malpractice insurance issue is something the Bar would have an interest in studying. Walton responded in the affirmative and named Herring to the task force.

But Walton, a partner in Houston's Vinson & Elkins, says he has asked the task force to study the pros and cons of the disclosure issue and report its findings and recommendations to the State Bar board of directors.

"No one has suggested what the outcome should be," Walton says.

David Beck, chairman of the task force, says he is going into the study with an open mind on the issue.

"But I guess I do go in with the point of view that a client ought to be able to know whether or not, if his or her lawyer makes a mistake, that there will be an opportunity to be compensated for that mistake," says Beck, a partner in Houston's Beck, Redden & Secrest.

Other members of the task force are Kim Askew, a partner in Dallas' Hughes & Luce; David Hurst Brown, a partner in Houston's V&E; Jo Ann Merica, a shareholder in Austin's Merica & Bourland; Mark Osborn, a partner in El Paso's Kemp Smith; Lee Ann Reno, a shareholder in Amarillo's Sprouse Shrader Smith; Eduardo Rodriguez, a senior partner in Brownsville's Rodriguez, Colvin, Chaney & Saenz; and Fidel Rodriguez Jr., a principal in San Antonio's Law Offices of Fidel Rodriguez Jr. Walton also appointed George Edwards of Houston, a certified public accountant with ExxonMobil Corp., as a public member of the task force.

Beck says he expects the task force to not only study the insurance disclosure issue but also to look at a related topic — whether lawyers ought to be obligated to carry professional liability insurance. As noted on the ABA Web site, Oregon is the only state that has a statute requiring lawyers to carry such insurance.

If the task force finds lawyers should be required to disclose whether they have malpractice insurance coverage, Beck says, it will have to consider how lawyers should make that disclosure. Beck says lawyers could disclose their coverage status when prospective clients come to their law offices, or they could make such disclosures in a

filing with the state Supreme Court.

Ohio is one of the states that requires lawyers to inform clients directly regarding whether the lawyers are covered for legal malpractice. Under Ohio Rule of Professional Conduct 1.4 (c), a lawyer must make that disclosure at the time a client hires the lawyer. The rule also requires disclosure if, at any time subsequent to the hiring, the lawyer fails to maintain the coverage in the amounts of at least $100,000 per occurrence and $300,000 in the aggregate, or if the carrier terminates the lawyer's insurance. In addition, the Ohio rule requires a lawyer to maintain a copy of the disclosure notice, signed by the client, for five years after the lawyer's representation of the client ends.

Arizona took a different approach. Under Rule 32(c)(1) of the Arizona Supreme Court, a lawyer must certify to the State Bar of Arizona on the annual dues statement that he or she has malpractice insurance. The Arizona bar posts that information on its Web site.

Walton says the Texas task force will begin its work at a Dec. 21 meeting in Austin. He has requested, if possible, that the task force report its findings at the State Bar board's April 25, 2008, meeting in San Antonio.

Deciding whether to adopt an insurance disclosure rule has proved controversial in California, where the State Bar of California Board of Governors has struggled with the issue for more than a year. Jeffrey Bleich, the California bar's president, says the board voted in favor of disclosure at its Nov. 9 meeting.

"The 10-9 vote was for some form of disclosure, but the devil is in the details," says Bleich, a partner in San Francisco's Munger, Tolles & Olson.

Bleich says the board disagreed over a proposed amendment that had not been included in the original draft of the rule and referred the amendment to a bar committee for more work. But Bleich adds, "I expect we will have disclosure."

He's just not sure when.

Lawyers debate malpractice insurance disclosure rule for Texas

Public likes idea of knowing whether lawyer is insured; most lawyers don't.

By Robert Elder
AMERICAN-STATESMAN STAFF
Wednesday, May 21, 2008

Today, a task force of lawyers appointed by the Texas Supreme Court is likely to vote on a proposal that could require lawyers to tell clients whether they have malpractice insurance.

The idea would seem to have a lot going for it. Legal malpractice insurers estimate that at least half of all Texas lawyers — and about two-thirds of sole practitioners — don't have insurance, leaving clients who been harmed by malpractice without much recourse.

Malpractice can include missing a filing deadline that gets a case thrown out or ignoring evidence that might help a client's case. If the lawyer is not insured, clients who sue have little chance of recovering any money because law firms typically are structured to protect themselves against such liability.

Public support is deep: Seventy percent of respondents favored the proposal in a poll the State Bar of Texas conducted in April, and 80 percent said the issue was "very" or "moderately" important to them.

The American Bar Association endorses the idea, and 23 states have some form of disclosure requirement.

Still, the proposal is far from a sure thing, having drawn opposition from small-firm lawyers and the president-elect of the State Bar, Fort Worth lawyer Roland Johnson.

Sole practitioners and lawyers in small firms complain about the cost of malpractice insurance and argue that clients will be more inclined to file a malpractice claim if they know insurance coverage is there.

"I believe it's fairly self-evident that any disclosure of carrying insurance is like painting a target on your back," said Charles Awalt, a Plano sole practitioner and a director of the State Bar's general practice, solo and small-firm section.

"I don't think it gives clients a piece of information that is useful," added Charles Hood, a lawyer in Port Lavaca. "Are you not going to hire a good lawyer because he doesn't have malpractice insurance? Or because he doesn't have enough?"

The vast majority of lawyers without insurance are sole practitioners or work in small firms of two to five lawyers, according to the State Bar.

There are about 80,000 licensed Texas lawyers; the disclosure would apply to the approximately 49,000 who are in private practice.

Most Texas lawyers don't like the proposal. In telephone and online surveys, about 70 percent of lawyers opposed the idea.

Even if the Supreme Court task force approves the proposal, it must be adopted by the State Bar board of directors and the Supreme Court.

The idea of requiring disclosure in Texas has been talked about since the ABA in 2004 adopted a model rule for disclosure, meant to be a template for state bar associations.

In July, Austin lawyer Charles "Chuck" Herring Jr. asked Texas Supreme Court Chief Justice Wallace Jefferson to appoint a task force on disclosure. Herring is an Austin litigator who handles malpractice cases for both plaintiffs and defendants and is the author of the book "Texas Legal Malpractice & Lawyer Discipline."

"Protecting clients — at least to the extent of letting clients know whether their lawyer has insurance — would seem to be a worthy goal for our profession," Herring wrote.

"A lawyer is obligated to disclose all material facts to clients so they can make informed decisions," he said Tuesday.

Herring said he almost never takes a case from someone who wants to sue a lawyer who has no insurance. When he is on the other side, defending lawyers without insurance, Herring said, he almost always settles claims "for little or nothing, regardless of how seriously the lawyer damaged the client."

States vary in how they tell the public about legal malpractice insurance. Most of the 23 states that have such rules post the information on the state bar association's Web site or make it available upon request.

Five states require a lawyer to tell a client directly whether he or she carries malpractice insurance.

South Dakota, which adopted its provision in 1998, has the strictest rule, requiring the disclosure on the lawyer's letterhead on correspondence to clients. Lawyers must also tell the state bar association their policy number, insurance carrier and amount of coverage.

"If a state can mandate insurance to drive a car, how can you argue for keeping a lack of insurance from your client?" asked Tom Barnett, executive director of State Bar of South Dakota.

"You have a fiduciary relationship. Why not disclose that you don't have any resources if you blow the statute of limitations (on filing a lawsuit) and cost the client the case?"

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A legal task force rejects a proposal to require lawyers to tell clients if they have malpractice insurance

Texas joins Arkansas and Kentucky as the only states to have rejected disclosure

By Robert Elder
AMERICAN-STATESMAN STAFF
Wednesday, May 21, 2008

HOUSTON — Despite warnings about damage to the image of lawyers and a backlash from the Legislature, a legal task force on Wednesday rejected a proposal to require lawyers to tell clients whether they have malpractice insurance.

The task force, authorized by the Texas Supreme Court, voted 6-5 to reject mandatory disclosure of insurance.

The issue has divided lawyers in Texas; opponents say the proposal would stigmatize lawyers without insurance, could lead to mandatory insurance and wouldn't provide much protection for the public.

Legal malpractice insurers and the State Bar of Texas estimate that at least half the state's lawyers do not carry malpractice insurance, which can help compensate clients whose cases have been mishandled.

For now, the task force vote means that Texas joins Arkansas and Kentucky as the only states to have rejected disclosure, and Kentucky is reconsidering the issue.

By contrast, 23 states require some form of disclosure, with California poised to become the 24th after the state's bar association recommended disclosure to the California Supreme Court.

"This has developed into a classic clash of lawyers versus the public interest," said Austin lawyer Charles "Chuck" Herring Jr., a legal malpractice expert who supported the proposal. "I've never seen one quite like this."

A State Bar poll of the public found that 70 percent of respondents favored disclosure of insurance.

Opponents of the rule brushed off the results, saying the public generally holds a dim view of lawyers.

"If you asked them if you wanted to put shock collars on lawyers, they'd probably go for that," said Ron Bunch, a sole practitioner in Waxahachie.

The issue isn't dead. Supporters say they will bring it before the State Bar board of directors in June and perhaps ask the Supreme Court to implement the requirement.

Houston lawyer David Beck, the chairman of the task force and a legal malpractice specialist, warned of a possible backlash.

"If we do nothing, what effect will that have in the public and in the Legislature?" he asked, adding, "Or even at the Supreme Court?" which could implement a rule on its own.

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