A Bigger Burden

Mandatory Malpractice Insurance Disclosure: Who Benefits?

BY ED POLL

Fifteen years ago, in my home state of California, I testified against a mandatory continuing legal education (MCLE) requirement. I argued that good lawyers already do the right thing, that inept lawyers never will, and that sole and small-firm practitioners would be burdened by expenses they cannot pass on to consumers. Under the guise of "protecting the public," the MCLE proposal passed.

Time, however, has proven me right. Disciplinary and malpractice claims have continued to rise, individuals and organizations that provide training programs have financially profited (including at least one bar association that went from near bankruptcy to a $1 million surplus), and sole and small-firm practitioners have borne unnecessary expenses imposed by an organization that purports to represent them.

Well, as the saying goes, "it's déjà vu all over again." In June, The State Bar of California approved a resolution for and sought public comment on a new Rule of Professional Conduct that requires each California lawyer to disclose at the start of an engagement, and for the state bar Web site to disclose generally, whether the lawyer has malpractice insurance coverage. Law firm administrators and executive directors should be aware that this represents a nationwide effort, at the urging of the American Bar Association, which now has enlisted nearly one-third of all U.S. states (although some have resisted). It will be a greater burden on all but the megafirms, just as MCLE has been. It also raises troubling questions about what bar associations are really trying to accomplish – and for whom.

Mandatory malpractice insurance disclosure imposes a major financial hit on the majority of bar association members – solos and small firms – who can least afford it.

HOW BIG IS THE MALPRACTICE INSURANCE BURDEN?

Malpractice allegations are obviously a major concern for the legal profession. In California, lawyers spend 80 percent of their dues each year to support their state bars' disciplinary systems. Typically these complaints are not about gross malfeasance such as misappropriation of trust funds. To the contrary, more than half of disciplinary actions involve clients' allegations of practice management failings by their lawyers: poor service, unreturned phone calls, inaccurate arithmetic on the billing statements, and so on.

Because such conduct is so prevalent, malpractice insurance is expensive. The least costly annual premiums range from $4,000 to $7,000 per lawyer. It's not surprising that this burden falls heaviest on small firms and solo practitioners. In California, where one-quarter of all lawyers earn $50,000 a year or less, nearly 20 percent of the lawyer population goes without malpractice insurance coverage. A recent survey of lawyers in Illinois showed that 20 percent of all lawyers – and

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40 percent of solos – similarly forgo coverage. Why? They can't afford it. Yet state bar associations want them to advertise that fact – not because they've committed malfeasance, but because it somehow will "protect" the public!

WHAT ABOUT THE MEGAFIRMS?

If bar associations are interested in full disclosure of all factors that influence client deliberations on hiring a lawyer, why is there is no movement to require a large law firm to disclose that it is self-insured or insured with a captive group rather than a state-rated, traditional insurance company? Why is there no pressure to make a large law firm disclose its profit and loss information, a factor that might cause a client to negotiate a little more diligently in the fee-setting process? These questions are particularly relevant when *The American Lawyer's* annual survey of the 100 largest law firms showed that in 2005, for the first time, profits averaged more than $1 million per partner. In a story on this number, *USA Today* quoted a professor at Loyola University Law School as saying, "The average (American) lawyer is working at a small firm making $60,000 to $100,000 a year."

Many firms already carry malpractice insurance and are not concerned that their clients will worry about coverage.

However, placing this issue in the engagement agreement may raise clients' consciousness about the potential for malpractice. Before, clients might not have been so ready to sue, but since the lawyer mentions coverage, why not sue?

"If a potential client asks me whether we carry errors or omissions insurance, I will disclose that fact to them and then promptly show them the door. We are here to help our clients and I ... do not want clients who will feel better knowing they can sue me for my insurance money, said one sole practitioner."

STATE BAR ASSOCIATIONS: WHAT'S THEIR ROLE?

Law firm administrators generally are well aware of how much money their firms spend on bar association dues every year. In several states this is a mandatory expense; in all, it is considerable. For many years, bar associations have contended that they have two purposes behind this expense: to serve and advance the interests of their members and to protect the public. The push for mandatory malpractice insurance disclosure certainly belies the first purpose, because it imposes a major financial hit on the majority of bar association members – solos and small firms – who can least afford it.

In recent years, the perception has grown that bar associations are simply licensing agencies for their members, and that any association's primary purpose is to protect the public. That has brought such absurdities as the passage of a law in New Jersey requiring every lawyer licensed in the state to contribute $75 annually to a Medical Malpractice Liability Insurance Premium Assistance Fund. For "the public good," lawyers are taxed to subsidize doctors' medical malpractice insurance premiums. (The New Jersey State Bar unsuccessfully sued to enjoin collection of this money from lawyers.)

Such thinking shapes the primary argument about legal malpractice disclosure: it is in the best interests of the public to know this information. I have yet to hear an answer as to why. There is no reporting requirement to disclose auto, fire, liability, homeowners, or other insurance premiums. What is the difference here? One can only conclude that at least 15 state bar associations believe solos and small firms, who can least afford malpractice insurance, are a danger to the public.

GIVING THE PUBLIC *REAL* PROTECTION

If bar associations really cared about "the public

good," they would take two important steps: educate the public about what malpractice insurance costs add to their legal bills and make affordable malpractice insurance available to all lawyers. The California mandatory disclosure proposal in fact recognizes the need to communicate the complexities of the malpractice insurance industry and to work with the insurance industry to create affordable malpractice insurance coverage. However, the proposed rule is not tied to the requirement that such insurance be made available. More to the point, California already has a client security fund for malpractice claims of up to $50,000. No insurance is required of any attorney for a client to claim that amount, and the state's lawyers contribute $40 a year to the fund. This constitutes real protection for clients.

So, too, is the state of Oregon's Professional Liability Fund, the mandatory provider of primary malpractice coverage for Oregon lawyers. Since 1978, the fund has provided coverage of $300,000 per claim/$300,000 aggregate to all attorneys engaged in the private practice of law in Oregon. This is inclusive of defense costs, and there is a $50,000 claims expense allowance. In 2006, the basic assessment for this coverage is $3,000 for each attorney. The coverage provided by the fund is on a "claims made" rather than an "occurrence" basis. Note that the assessments are much less than the nationwide average payment for malpractice insurance and that all lawyers are covered. The playing field, if not level, is at least manageable. And the public is truly protected.

WHAT CAN LEGAL ADMINISTRATORS DO?

Mandatory disclosure of malpractice insurance is a growing nationwide trend. With California joining the 15 other U.S. states that have already approved it, watch for growing momentum to impose it elsewhere. As the pressure builds, legal administrators at firms of all sizes can play an important role in resisting the trend by standing firm on one principle: no insurance disclosure requirement without provisions enabling lawyers to obtain affordable malpractice insurance before disclosure takes place. The Oregon model shows that it can be done.

The real issue here is that, as administrators know, law firms are businesses. Running a law firm in a businesslike way improves the professionalism of the practice of law. Yet bar associations and law schools alike continue to hold the archaic attitude that The Business of Law® is unprofessional. Law firm administrators have the business knowledge to bring some sanity to the issue – before it's too late. ❄

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