

PROPOSED PUBLIC DISCLOSURE OF MALPRACTICE COVERAGE

Issue

Should the State Bar of Michigan be directed to develop an efficient and effective process to make attorney malpractice coverage information readily available to legal consumers?

RESOLVED, that the State Bar of Michigan supports public disclosure of malpractice coverage to promote public confidence in the integrity of the legal profession.

FURTHER RESOLVED, that the State Bar of Michigan be directed to develop an efficient and effective process to make attorney malpractice coverage information more readily available to legal consumers.

Synopsis

Michigan does not require that attorneys maintain malpractice coverage. Although Michigan does require disclosure of malpractice coverage on the State Bar registration form, Michigan does not provide malpractice coverage information to the public. This proposal is intended to address concerns that legal consumers are not making fully informed decisions in the selection of a lawyer without access to information regarding a lawyer's malpractice insurance coverage. The State Bar of Michigan 21st Century Practice Task Force (Task Force) was convened in March of 2015 to recommend how the State Bar can best serve the public and support lawyers' professional development in a rapidly changing legal marketplace. The Task Force concluded its work on March 1, 2016, making a wide-ranging set of recommendations intended to embrace the innovation underway in the legal profession. Consistent with its charge, the Task Force has recommended that malpractice insurance information be made more readily available to legal consumers.

Background

Many clients expect lawyers to have malpractice insurance. Such coverage provides a measure of assurance to clients that they are protected against loss in the event of negligence by their lawyer. This assurance is important in maintaining public confidence in the integrity of the legal profession.

Other countries with "modernized" regulatory systems require lawyers to have malpractice coverage. However, in the United States mandatory malpractice coverage has not been the preferred regulatory measure to protect the public. Oregon remains the only US jurisdiction with mandatory malpractice coverage for all practicing lawyers in the state.

A more temperate approach has been taken in the United States by implementing disclosure requirements. According to the ABA Standing Committee on Client Protection, approximately half of the states require disclosure (to either the client or a regulatory agency), if the attorney does not have insurance. Seven states require direct disclosure to the client, while 17, including Michigan, require disclosure on the registration form. Michigan, however, does not provide the information to the public. There are exemptions in each state, usually for government/municipal attorneys and in-house counsel. A few examples of the disclosure schemes to clients are provided below.

- Alaska and Ohio - Attorneys must notify clients in writing if they have no malpractice insurance, or if their coverage is less than \$100,000 per claim and \$300,000 aggregate. Clients must also be notified if insurance coverage is terminated or if coverage drops below the \$100,000/\$300,000 levels.
- South Dakota – Attorneys must specify on their letterhead if they have no malpractice insurance or if their coverage is less than \$100,000 per claim.

The Task Force considered and noted concerns about requiring all SBM members to have a certain level of malpractice insurance coverage, including but not limited to, interfering with the attorney/client relationship, giving insurance companies greater power to determine who practices law, and negatively impacting solo and small firm practitioners. The Task Force did not recommend mandatory malpractice insurance in light of these concerns.

Instead, the Task Force recommended that Michigan expand its existing disclosure program to include public disclosure of the malpractice coverage already reported by SBM members during the annual registration process. The program developed by the State Bar, for example, might include, based on information already provided to the State Bar, disclosure to the public on the online State Bar Member Directory for those members who currently have some level of malpractice insurance.

Opposition

The opposition may be concerned that the provision of malpractice information may negatively impact solo and small firm practitioners and their client relationships or their ability to attract new clients, or may provide insurance companies the opportunity to raise rates. While there is information to show that mandatory malpractice insurance programs have resulted in increased premiums, rate increases have not been attributable to public disclosure in jurisdictions adopting such requirements.

Prior Action by Representative Assembly

During its meeting on March 16, 1973, the Representative Assembly “Approved a recommendation to the Supreme Court that all attorneys actively engaged in private practice be required to maintain a minimum malpractice insurance policy.”

Fiscal and Staffing Impact on State Bar of Michigan

The fiscal and staffing impact is unknown and cannot be determined until a specific public disclosure process is developed. The malpractice disclosure information is automatically captured in the State Bar’s member management database when dues are paid online. Movement towards requiring dues to be paid online is advancing and can be utilized if needed to create an effective and efficient process to minimize the fiscal and staffing impact.

STATE BAR OF MICHIGAN POSITION

By vote of the Representative Assembly on September 22, 2016.

Should the Representative Assembly adopt the above resolution to direct the State Bar to develop a program to make attorney malpractice coverage information more readily available to the public?

The above Resolution should be adopted.

(a) Yes

or

(b) No