

February 27, 2004

Via Email

John Holtaway
Client Protection Counsel
Center for Professional Responsibility
American Bar Association
541 North Fairbanks Court
Chicago, IL 60611-3314

Re: Standing Committee on Client Protection proposal for Model Rule on Financial Responsibility

Dear Mr. Holtaway:

I am writing as Chair of the Minnesota State Bar Association Rules of Professional Conduct Committee. The Minnesota State Bar Association is a voluntary bar association representing over 16,000 Minnesota lawyers. Our committee regularly reviews proposals for changes in the rules governing lawyer conduct and makes recommendations to the Minnesota Supreme Court. The Chair of the Minnesota Delegation to the ABA House of Delegates asked us to review and comment on the proposed Rule on Financial Responsibility to assist the delegation when the proposal comes before the House of Delegates in Atlanta.

Our committee reviewed the proposed rule. We surveyed other states with rules requiring disclosure of malpractice insurance. We interviewed Minnesota lawyers who have handled plaintiff's attorney malpractice litigation, and we interviewed claims officers of Minnesota Lawyers Mutual Insurance Company, a bar-related professional liability insurance carrier which insures a substantial number of solo practice and small firm lawyers in Minnesota. As a result of that review, we offer the following comments and suggestions regarding the proposed rule.

These comments and suggestions are the product of our committee only and do not represent an official position of the Minnesota State Bar Association or any other component thereof.

1. Our Committee supports the concept underlying the rule and believes that while the rule is not a panacea, it is a step in the right direction for client protection. We believe that the attorney registration system is an appropriate mechanism for requiring lawyers to provide information about their financial responsibility.
2. The Committee recommends that the name of the rule be changed to Financial Responsibility Reporting Requirement. The rule does not require financial responsibility,

but rather requires reporting of certain information from which a client or potential client can determine whether the lawyer is likely to be financially responsible in the event of a malpractice claim.

3. The Committee supports the premise that whether an attorney carries malpractice insurance or has dedicated resources with which to pay for damages caused by his/her malpractice is a fact that clients and potential clients have the right to know if they inquire.

4. The Committee supports the concept of a reporting requirement so that the public, including potential clients, has a place to check regarding an attorney's financial responsibility. Therefore the rule should incorporate a provision requiring the lawyer registration agency to make the reported information available to the public by telephone, or preferably by Internet access. The rule should also require the lawyer registration agency to publicize the availability of this information. The lawyer registration agency should inform the public of limits on the usefulness of the information, e.g., that most policies are "claims made" policies and that policies generally do not cover dishonesty or other intentional acts.

5. A simplified model reporting form should be attached to the rule. A proposed simple reporting form appears at the end of this letter.

6. The requirement that attorneys be required to report unsatisfied judgments arising out of the practice of law should be eliminated. Our Committee believes that in this respect the rule is overbroad and could not be reasonably redrafted to include only those judgments that would reflect or potentially reflect financial irresponsibility. For example, this provision appears to require reporting even under the following circumstances: (a) attorney does not know about a firm judgment because he has left the firm but the firm has an unpaid judgment relating to malpractice at a time attorney was a member of the firm entered against it since his departure; (b) the unsatisfied judgment is on appeal; (c) the unpaid judgment is in process of being paid but not yet satisfied. Attorneys may also be concerned that this reporting requirement could be used as a tool by disciplinary agencies because willful failure to pay a law-related judgment has been found in our jurisdiction and others to be serious misconduct warranting discipline. The Committee recognizes that certain attorneys have made themselves judgment-proof against malpractice judgments by transferring assets to a spouse or sheltering them in some other way. Other attorneys have discharged malpractice judgments in bankruptcy. The Committee concluded that the problems associated with this provision outweighed the possible benefits of retaining it. Because judgments are public records, it is possible for clients to get this information from other sources.

7. The minimum limits of liability coverage should be left to each jurisdiction and each jurisdiction should be urged to review the limits regularly. If this rule were before us for a recommendation to our Supreme Court, the Committee would urge minimum limits of liability of \$200,000/600,000. This is the smallest policy limit now offered by Minnesota Lawyers Mutual, the largest legal malpractice insurer in Minnesota.

8. The rule should clarify whether policies that have critical exclusions or very high deductibles constitute "coverage by professional liability insurance." Lawyer malpractice policies often limit coverage in "high-risk" areas of practice. Arguably coverage is

illusory for a client seeking legal services in an excluded area of practice. For example, a potential client seeking immigration law services would be ill-served by a disclosure that an attorney advertising immigration law services had certified having malpractice insurance if the policy excluded immigration law from coverage. The Committee is concerned that the public could be misled by the illusion of coverage in this situation.

9. The rule should clarify whether the \$100,000 required in paragraph E of the proposal is the required amount for a single attorney or whether it is also applicable to a firm of any size. The amount may be too small if for a firm and too large if per attorney in the firm. It might be helpful to indicate how the threshold amount is determined.

10. In garnering support for this proposal, at the ABA level and for subsequent proposals to the states, it would be very helpful if the ABA committee could provide additional evidence to support the need for this rule and to show that the public is successfully accessing this information in the states which have adopted reporting rules. Other than Virginia, we do not have information that the program has been successful in the states that have adopted it. Attached to this comment is a copy of a letter we received from an attorney who handles lawyer malpractice cases and states that he will not take cases against uninsured lawyers.

Proposed modified language:

- A. Every lawyer, except a lawyer exempt under paragraph B below, shall certify to the [appropriate court or agency] on the annual attorney registration form whether the lawyer or the lawyer's law firm maintains professional liability insurance in the areas in which the lawyer practices with limits of not less than [\$200,000] per claim and [\$600,000] policy aggregate covering generally insurable acts, errors, and omissions occurring in the practice of law, other than an extended reporting endorsement. The lawyer shall immediately report in writing to the [appropriate court or agency] any change that makes this certification inaccurate or misleading.
- B. A lawyer is exempt from the requirements of paragraph A if the lawyer certifies to the [appropriate court or agency] that (1) the lawyer's income from the practice of law comes from full-time employment as a government attorney or as in-house counsel for a corporation; (2) the lawyer serves as a full-time judge; (3) the lawyer or the lawyer's law firm maintains independent security for payment of any liability of the lawyer arising from acts or omissions by the lawyer or other person employed or otherwise retained by the lawyer. Independent security must be in an amount not less than \$100,000 for a single lawyer or [\$] for a firm of [# to #] lawyers or [\$] for a firm of [more than #] lawyers, deposited in a trust designated solely for payment of claims enumerated in paragraph A of this Rule, in a [jurisdiction] trust company in the form of cash, certificate of deposit or United States Treasury obligation, a bank letter of credit or a surety or insurance company bond.
- C. The foregoing certifications shall be made available to the public by telephone or by accessing the website of the [appropriate court or agency].
- D. The license of any active lawyer who fails to so certify shall be administratively suspended until such time as the lawyer complies. Supplying false information in

response to this Rule or failing to report in writing any change that makes the certification inaccurate or misleading shall subject the lawyer to appropriate disciplinary action.

Model Registration Form Statement: I/my firm do(es) ___ do(es) not___ maintain malpractice insurance pursuant to Rule [appropriate rule of jurisdiction]. [Or] I am exempt pursuant to Rule [appropriate rule of jurisdiction]. _____

Thank you for your hard work in preparing and offering the proposed rule.

Yours truly,

Kenneth Kirwin

Chair, Rules of Professional Conduct Committee

Minnesota State Bar Association