Q&A Mandatory Disclosure to Clients of an Attorney's Lack of Professional Liability Insurance

See page 19 of this issue of the *Bar Bulletin* for Proposed Revisions to the Rules of Professional Conduct 16-104 NMRA.

1. **Is there a problem with lawyers' not carrying professional liability insurance?**
The Lawyers Professional Liability Committee (LPLC) believes there is a problem. The raw data for New Mexico shows that in 2005, 19.7 percent of lawyers in private practice were not insured. In 2006, the first year after mandatory disclosure to the State Bar was implemented, 20.3 percent of the lawyers were uninsured. Last year 17.1 percent were not insured.

   However, the data suggests that the number of uninsured lawyers may be higher. Some lawyers indicate they are "self-insured." Others did not provide adequate information to confirm that they are reporting professional liability insurance, as opposed to general liability, property and casualty, or workers' compensation insurance. If one adds the two reporting "self-insured" lawyers to the 356 unconfirmed "other" respondents, the total uninsured attorneys increases from 618 to 978, or 27 percent of those lawyers in private practice.

2. **Will the proposed rule reduce the number of uninsured lawyers?**
In every state in which a mandatory disclosure rule has been implemented, the percentage of insured lawyers has increased. After the adoption of similar rules in Alaska and South Dakota, the lawyers reacted in a predictable fashion. A significant number of lawyers who had previously been uninsured obtained malpractice insurance shortly before the effective date of the new rules. In other words, the new rules provided a positive incentive for uninsured lawyers to obtain insurance so that they would not be required to disclose to clients their lack of insurance. The LPLC believes the same thing will happen in New Mexico.

3. **What are the demographics of the lawyers who have reported they are not insured?**
The vast majority of lawyers who report that they are uninsured are in solo practice or small firms (two to four lawyers). The data from the 2008 dues forms indicate that the vast majority of uninsured lawyers (over three quarters) practice in the larger metropolitan cities and the county in which the city is located:

Bernalillo County (Albuquerque)	319	
Sandoval (Bernalillo, Rio Rancho)	31	
Chavez (Roswell)	5	
Dona Ana (Las Cruces)	40	
San Juan (Farmington)	11	
Santa Fe	75	
Total	**481**	**[78% of Total Uninsured]**

4. **Do clients believe that lawyers have liability insurance**?
In other states where polling of the public has been conducted, a majority of those polled indicated they thought lawyers had insurance. In Texas last year, 75 percent of the public responding to a poll said they thought lawyers should be required to have liability insurance.

5. **Is there documented proof that clients have been harmed by lawyers who have not had insurance**?
The LPLC has not conducted a study regarding this issue. Lawyers who represent clients in lawsuits against attorneys report anecdotally that there are cases that are not pursued because of a lack of insurance and clients who have been unable to be fully compensated when they have sued uninsured lawyers (see question 26).

6. **If there is no hard data that the public is being harmed by uninsured lawyers, why is this rule being proposed?**
A majority of the LPLC believes that as a matter of public policy (or at least the policy of the State Bar of New Mexico) lawyers, because of their higher calling and fiduciary duty to clients, should either be insured or should disclose their insured status. There is a populist element in the State Bar membership that believes that clients have a right to know—to make an informed decision regarding the purpose of legal services. Additionally:
   - Insurance is available to protect the public (not a lawyer who needs a defense).
   - Insurance is generally a cost of doing business for everyone in America.
   - Given the fiduciary relationship between the attorney and the client, disclosure at a minimum should be required.
   - Clients, who often rely on the ability to recover damages from insurance available to a tortfeasor, may presume that lawyers also have insurance and this presumption needs to be discussed with the client.
   - It does not matter how many claims there are when just one claim can be devastating and tarnish the reputation of the profession.

7. **Will all lawyers be required to comply with the proposed rule**?
No. As used in this rule, "lawyer" includes a lawyer provisionally admitted under Rule 24-106 and Rules 26-101 through 26-106; however, it does not include a lawyer who is a full-time judge, in-house corporate counsel for a single corporate entity, or a lawyer who practices exclusively as an employee of a governmental agency. Only lawyers who are in private practice and who do not have insurance in the amount of $100,000 per claim or $300,000 in the aggregate must make the disclosure. Lawyers who are insured at or above the limits in the proposed rule are **not** required to make any disclosure to the client.

8. **Will the proposed rule apply to out-of-state lawyers?**
Yes. The proposed rule will apply to any lawyer in private practice who represents clients in New Mexico. It will apply to lawyers in private practice who are admitted pro hac vice before any court over which the New Mexico Supreme Court has superintending control.

9. **Does a lawyer have to include a statement on the lawyer's letterhead or in advertisements that complies with the proposed rule**?
No. The proposed rule does not require this. It requires that the client sign an acknowledgement at the time the lawyer is hired. The acknowledgement can be a separate document or it can be contained within a written contingent fee agreement or engagement letter that the client signs at the beginning of the representation.

10. **What must the uninsured lawyer tell a client**?
The proposed rule contains the wording required for the notice and acknowledgment signed by the client. Thus, every lawyer will use the same explanation. This does not mean, however, that the lawyer cannot explain to the client why the lawyer does not have insurance. Any additional verbal or written explanation may not be misleading.

11. **Won't this proposed rule harm the new lawyer starting a practice**?
The LPLC believes that new lawyers will not be harmed. New lawyers do not have what is known as retroactive exposure or an experience tail. The premium for new lawyers is normally less than the premium for experienced lawyers. However, new lawyers may have a tendency to represent on insurance applications that they handle many types of work, including work that is viewed as higher risk work, and for this reason, a new lawyer may be charged a higher premium or be declined coverage altogether. The State Bar has resources available to assist any lawyer in obtaining coverage.

12. **Won't the fact that a lawyer has insurance make it more likely that a lawyer will get sued?**
There are lawyers who believe that if they have no insurance, they will not get sued. There are lawyers whose practice is in a substantive area in which they believe they will not be sued. Criminal law and insurance defense are examples. In fact, lawyers who practice in all areas are being sued.

    There is no data to support or refute the position that having insurance increases the likelihood of being sued. Often, a lawyer's insured status (or the amount of coverage) is unknown until after the lawsuit is filed. Lawyers who sue lawyers indicate it is often the size of the claim that makes a difference. If the damage to the client is large, plaintiff's counsel may still pursue the uninsured lawyer and his assets. If the claim is small, the lack of insurance may be a factor in making the decision to take cases. A concern has been expressed that jurors may award larger damages against a lawyer who is insured. Normally, whether a defendant is insured or uninsured is not admissible.

13. **Doesn't the State Bar's Client Protection Fund protect clients from uninsured lawyers?**
The Client Protection Fund protects clients in a limited manner regardless of the lawyer's insured status. The fund compensates clients for what amounts to dishonest conduct, criminal acts, or fraud related to client funds. Often these acts are excluded from coverage under a professional liability policy. The LPLC does not consider the Client Protection Fund to be a form of insurance.

14. **Won't requiring insurance drive up the cost of legal services and deprive low income or poor people of access to legal services?**
There is no data to support this concern. A lawyer is not required by this rule to have insurance, and any client who knowingly signs the acknowledgement may engage an uninsured lawyer.

15. **What will happen to a lawyer who violates the proposed rule?**
The LPLC considered this issue and discussed two forms of special sanctions but in the proposed rule being presented to the Board of Bar Commissioners, there are no special sanctions. The State Bar will not initially have a way to monitor compliance with the rule. In time, lawyers who report on the dues forms that they are not insured may be subject to random auditing to determine if they are complying with the proposed rule. Any lawyer who does not comply with the proposed rule may be subject to a disciplinary proceeding.

16. **What type of policy will comply with the rule, and what about policies that erode the amount of coverage (Pac-man policies)?**
The proposed rule requires a professional liability policy that covers the errors and omissions of a lawyer and those employees the lawyer supervises. New Mexico insurance regulations currently do not permit the carrier to issue a claims expense policy with limits under $500,000 per claim or in the aggregate. Thus, a policy that complies with the proposed rule cannot have a Pac-man provision.

    A policy that provides $500,000 or more in coverage can have a claims expense provision, but the claims expense provision cannot consume more than 50 percent of the amount of the coverage. Thus, no policy currently available in New Mexico can erode coverage to limits below those in the proposed rule.

However, there is one exception in the insurance regulations that could be used to allow a 100 percent claims expense deductible to be included in the policy.

17. **What about lawyers who cannot obtain the minimum liability insurance because of their prior claims experience?**
Lawyers who cannot get insurance because they have a bad claims record may nevertheless continue to practice law. They will, however, be required to comply with the proposed rule and obtain a signed client acknowledgement. There still may be coverage available within the limits required by the proposed rule, but the carrier may charge a higher premium.

18. **Won't the proposed rules result in "insurability" becoming a *de facto* determination of "competency"?**
Some lawyers have expressed the concern that insurance underwriters may be in a position to determine who can practice law. However, the proposed rule does not require that a lawyer have insurance, only that a lawyer makes a disclosure that he or she does not. Underwriting, therefore, plays no role in determining competency or one's right to practice law.

19. **Isn't the LPLC made up of lawyers who represent insurance companies, and isn't the proposed rule a gimmick to help their clients get more business?**
The LPLC membership includes lawyers who represent uninsured lawyers before the Disciplinary Board and the courts, lawyers who represent lawyers who are insured, lawyers who sue lawyers, lawyers who represent government agencies, and lawyers in private practice.

20. **Isn't the proposed rule the next step on the road to requiring all New Mexico lawyers to have professional liability insurance as a condition to practicing law?**
Oregon is the only state that requires all lawyers to be insured, and Oregon had to create a captive insurance company to do it. The State Bar of Virginia is considering a rule requiring all lawyers in private practice to have insurance issued by a commercial carrier. The LPLC has rejected this idea because doing so may exclude a very small number of lawyers from being able to practice law. The LPLC notes, however, that requiring certain lawyers to have insurance is not new. The State Bar of New Mexico and the New Mexico Supreme Court already require lawyers who want to be certified as "specialists" to carry a minimum of $250,000 under a legal malpractice policy, unless the attorney practices exclusively as an employee of a governmental agency or exclusively as in-house corporate counsel for a single corporate entity (see Rule 19-203(B)).

21. **Many lawyers get calls seeking simple advice or small pro bono matters. Many lawyers give "cocktail party advice." If they are not insured, can they give this advice, or must they get the person to come in and sign the disclosure first? Is it possible to allow an incidental level or value of services to be provided?**
Aside from the fact that it is unwise to give "incidental advice" because a lawyer often is not aware of all the facts or of the context in which the question is asked, incidental responses normally do not result in a formal contingent fee agreement or an engagement letter.

    If those asking a question believe they are retaining a lawyer to represent them, or the lawyer understands that he or she is being retained, the disclosure would be required by any uninsured lawyer.

    The proposed rule is not intended to cover this type of situation. It envisions a situation in which the lawyer is formally retained to handle a matter.

22. **Is a firm with a deductible in excess of $100,000 required to comply with the rule? Is the firm insured, self-insured, or not insured as the rule is written? How does the rule impact larger firms with self-insured reserves and a layer of excess coverage, or smaller firms who elect large deductibles?**
This problem is not limited to large firms. A solo practitioner or a firm of any size could acquire a policy with a deductible or self-insured retention in excess of $100,000.

    When the need arises to pay a settlement or a judgment, the language of the specific policy will determine whether the carrier is required to pay the judgment and collect the deductible from the insured or whether the insured must first pay the deductible. Many policies state that the carrier will pay all amounts that the insured becomes legally obligated to pay **in excess** of the deductible shown on the declarations page.

    A number of the largest New Mexico firms belong to a special risk retention insuring group called Attorney's Liability Assurance Society (ALAS), and their members maintain a self-insured reserve (SIR) in excess of $100,000 with the carrier acting in the role of an excess carrier. In the ALAS 2007 Annual Report, The Modrall Firm, The Rodey Firm, and The Hinkle Cox Firm were listed as New Mexico members. Holland & Hart was listed in Colorado, and Lewis & Rocca was listed in Arizona. These firms have New Mexico offices. These firms are not totally self-insured.

    A law firm, whether it has a deductible or a SIR, is insured so technically the requirement of the proposed rule is met. The LPLC does not believe the State Bar should set standards for deductibles.

    The LPLC added the following provisions and a footnote in order to clarify the role of deductibles or SIRs:

    (5) The minimum limits of insurance specified by this Rule include any deductible or self-insured retention, [fn 4] which must be paid as a precondition to the payment of the coverage available under the professional liability insurance policy.

    (6) A lawyer is in violation of this Rule if the lawyer or the firm employing the lawyer maintain a professional liability policy with a deductible or self-insured retention that the lawyer knows or has reason to know cannot be paid by the lawyer or the lawyer's firm in the event of a loss.

[fn 4] The use of the term "deductible" includes a claims expense deductible. The professional liability insurance carrier must agree to pay, subject to exclusions set forth in the policy, all amounts that an insured becomes legally obligated to pay *in excess of the deductible or self-insured retention* shown on the declarations page of the policy.

The proposed rule does not permit a lawyer or a firm to be totally "self-insured" and section (6) of the proposed rule does not allow a lawyer or a law firm to rely on a policy of insurance with a deductible with SIR or reserve that the lawyer knows or should have known the lawyer or the firm cannot pay. The LPLC recommends that when a claim is asserted against a lawyer that the lawyer establish or set aside a cash reserve large enough to cover the deductible or the SIR.

23. **Did the committee consider not mentioning any amount of insurance in the disclosure?**
The LPLC has considered this issue, and the committee believes that the amount of insurance should be mentioned.

If a lawyer, or the lawyer's staff, informs a client that the lawyer does not have the "coverage required by the State Bar," it is very likely that the client will ask what that amount is. The LPLC is concerned that in responding a lawyer or a lawyer's staff may make a negligent misrepresentation.

The purpose of the defined disclosure and acknowledgement is to make certain that all uninsured lawyers are initially providing the client with the same information.

24. **Does the committee have any information on the premium costs at different coverage levels (e.g., $100,000 vs. $500,000)?**
This information is not readily available. It is often proprietary. Because of the underwriting variables, costs vary but it may be possible to acquire basic rate information.

The LPLC selected the amounts referenced in the rule because they are generally available in the commercial market, they are in the lower band of coverage provided by most carriers, and they generally provide the most competitive rates. These rates, with but one possible exception, do not allow for "claims expense deductibles" (see question 16). Coverage of $500,000 or more would permit the use of a claims expense deductible.

The LPLC will endeavor to obtain this information and post it on the State Bar's Web site.

25. **What happens when the insurance company goes out of business and the attorney is left with no insurance? Does the attorney now have to provide notice to all clients until new coverage is secured?**
Yes, the lawyer must give notice; it is the same as not having insurance or allowing insurance to lapse. The lawyer will have to inform clients that coverage has lapsed.

Normally, an adequate amount of notice is given for a lawyer to secure a policy from another carrier. The LPLC believes that a firm would have a reasonable amount of time to secure new coverage with an adequate tail to cover any short "uninsured period," before it must give the notice to its clients.

26. **Are there any statistics that show how many attorneys in New Mexico are sued for legal malpractice?**
There are no statistics for New Mexico that are accurate. These records are not kept by the courts or the State Bar, and a docket search would be time consuming and less than accurate. There are many claims asserted in New Mexico that are settled without a lawsuit being filed. Nationally 21.32 percent of claims are settled with no suit being commenced (see *ABA Profile of Legal Malpractice Claims 2004-2007*).

We know that nationally from 2004 to 2007, 44,000 claims were asserted against **insured lawyers** (see the *ABA Profile of Legal Malpractice Claims 2004-2007*).

In an effort to answer this question, an informal survey of New Mexico defense counsel for legal malpractice liability carriers was conducted. Firms were asked to provide information regarding the number of **insured** claims filed against New Mexico lawyers in the last five years. Four lawyers reported a total of 151 claims. One lawyer stated that 20 percent of the claims he has defended were for uninsured lawyers.

The *ABA Profile of Legal Malpractice Claims 2004-2007* shows that 70 percent of all insured claims are brought against lawyers in firms with one to five lawyers. The highest rate of uninsured lawyers in New Mexico falls within the one-to-five lawyer group. It would appear that statistically the chances of an uninsured New Mexico lawyer being sued are rather high.

27. **Whose responsibility is it to report an attorney in non-compliance to the Disciplinary Board?**
Rule 16-803(A) requires that any "…lawyer who has knowledge that another lawyer has committed a violation of the *Rules of Professional Conduct* that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority." The proposed rule is part of the *Rules of Professional Conduct*. The comments to Rule 16-803 state that the "…term 'substantial' refers to the seriousness of the possible offense and not the quantum of evidence of which the lawyer is aware." Intentionally violating the rule in order to induce clients to retain a lawyer would be reportable. A clerical error with no other pattern of avoidance may not constitute a reportable violation.

The State Bar lacks the resources to police or enforce this rule, just as it lacks the resources to enforce every provision of the *Rules of Professional Conduct*. As is the case with most Disciplinary Board violations, the violations will be reported by clients who believe, correctly or incorrectly, that they have been harmed by lawyers and learn they were not given the disclosure; and by lawyers and judges who learn about violations.