ASSOCIATION OF THE BAR
OF THE CITY OF NEW YORK
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Committee on Professional Responsibility

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Robert D. Welden
Washington State Bar Association
2101 Fourth Avenue, 4th Flr.
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Re: Model Rule on Insurance Disclosure
Report #108

Dear Mr. Welden:

The American Bar Association Report recommending a Model Rule regarding Disclosure of Legal Malpractice Insurance was forwarded to the Professional Responsibility Committee of the Association of the Bar of the City of New York for comment. The Committee formed a sub-committee to study the Proposed Model Rule ("Rule") and after a careful review the Committee has determined that it cannot support the adoption of the Rule, for the reasons briefly explained below.

The Rule mandates that all attorneys in private practice certify to the highest court in a jurisdiction that he or she is covered by professional liability insurance. If the insurance policy is terminated for any reason, the attorney is required to inform the Court

or a designated agency. The Rule directs that the information be made available to the public and failure to comply with the Rule is a basis to suspend the attorney from the practice of law.

An initial consideration for the enactment of any rule is whether there is a problem that the rule addresses. Research by our Sub-Committee has failed to identity any empirical evidence that a large number of clients are currently without remedies against lawyers who cannot pay malpractice judgments. Therefore, the Rule could create a burden to the Court system and lawyers to address an unsubstantiated problem.

With respect to the substance of the Rule, the Committee's primary concern is that the enactment of the Rule could provide a false sense of security to clients because legal malpractice insurance will typically not cover fraudulent acts. Consequently, one of the largest categories of misconduct will not be covered unbeknownst to clients. Similarly, the type of legal malpractice policy an attorney purchases could drastically affect the protection afforded a client about which the client will have no information. Therefore, an unintended result of such a rule could be to mislead clients.

While the Rule is framed in terms of "disclosure," the practical effect of the Rule, nevertheless, may make malpractice insurance all but mandatory because attorneys will have no choice but to purchase malpractice insurance or be branded as an attorney who is financially unable to afford coverage or who is uninsurable. Indeed, disclosure that an attorney has no insurance could be a practice-ending black mark against a practitioner.

Moreover, such a rule would have a disproportionate impact upon single or small firm principals whose practice may not support ever-growing insurance premiums. Consequently, a related concern is that the enactment of the Rule without a state-

sponsored fund to provide reasonably premium-priced malpractice insurance could create a financially untenable situation for these vulnerable practitioners.

Finally, the Committee is concerned that the Rule might drive up the cost of legal services and cause clients to select counsel on the basis of whether or not they have malpractice insurance coverage rather than whether the attorney has experience and expertise in the subject matter of the contemplated engagement. Moreover, it threatens to both encourage frivolous malpractice claims, on the one hand, while presenting the possibility of increased insurance industry regulation over the legal profession, on the other.

Based upon the foregoing, the Committee can not support the Proposed Model Rule for Insurance Disclosure.

Very truly yours,

Richard M. Maltz
Chair, Professional Responsibility Committee
Association of the Bar of the City of New York

Victor M. Metsch
Sub-Committee Chair

cc: John A. Holtway
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