

# NYCLA Issues Opinion On Disclosure of Malpractice Coverage

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The Committee on Professional Ethics of the New York County Lawyers Association has issued Formal Opinion No. 734 dealing with the general issue of a lawyer's obligation to disclose whether or not he carries malpractice insurance. In the last several years, several other states have dealt with this issue in a number of different ways.

The most extreme approach has been taken by Oregon, which now requires that all lawyers licensed in the state maintain malpractice coverage. Coverage is provided through the Oregon State Bar. The other states which have considered the issue have all focused on the lawyer's obligation to disclose coverage rather than the obligation to secure and maintain coverage.

Thus, Alaska, Ohio, New Hampshire and South Dakota all require that a lawyer who has no malpractice insurance disclose that fact directly to his clients. Virginia requires that lack of coverage be disclosed to the State Bar, which posts the information on its website. Five states – Delaware, Illinois, Michigan, Nebraska and North Carolina – require that all lawyers reveal whether or not they are covered by insurance on their annual registration forms. This approach corresponds with the position adopted by the ABA in 2004.

In Formal Opinion 734, the NYCLA recognized that the New York Code of Professional Responsibility has no provision dealing directly with the issue of malpractice insurance, nor any Rule requiring a lawyer to disclose whether or not he has coverage. Nor does any statute require disclosure of coverage.

The NYCLE Committee divided its inquiry into the issue of coverage into three questions. The first two questions deal with prospective rather than current clients.

*Question #1. Does a lawyer have an affirmative obligation to disclose malpractice insurance information to a prospective client?*

In the absence of a specific Rule or statute dealing with the question, NYCLA Committee sought guidance in DR 5101:

- A. A lawyer shall not accept or continue employment if the exercise of professional judgment on behalf of the client will be or reasonably may be affected by the lawyer's own financial, business, property, or personal interests, unless a disinterested lawyer would believe that the representation of the client will not be adversely affected thereby and the client consents to the representation after full disclosure of the implications of the lawyer's interest.

After examining this Rule, The Committee concluded:

We do not believe that a lawyer's malpractice coverage is, as a general rule, an interest that is likely to affect the lawyer's professional judgment and therefore we do not believe that disclosure to and consent by the client are required under the Code.

*Question #2. Does a lawyer have an obligation to disclose insurance information to a prospective client who asks for it?*

Here again, the Committee's answer was "no."

For the same reasons that a lawyer is not obligated to affirmatively disclose coverage information to a prospective client, a lawyer is not obligated to provide such information if asked by a prospective client.

The Committee considered the impact of EC 78, which instructs a lawyer to use his best efforts to insure that decisions of the client (including, presumably, the decision whether or not to retain the lawyer) are made only after the client has been "informed of all relevant considerations."

The Committee did not believe that a client would consider the lawyer's lack of coverage to be relevant to the decision whether or not to hire the lawyer. The issues which the client would consider might relate, instead, to the lawyer's knowledge, experience and competence. The manner in which the lawyer conducts the initial interview will also influence the client whether to retain the lawyer. Insurance coverage becomes relevant only if and when the client is forced to consider a claim for professional negligence. At that point, DR 5101, *supra*, would require that the representation come to an end.

Obviously, some clients will consider the issue of insurance coverage important enough to inquire about it before agreeing to the representation, in much the same way they might inquire about the lawyer's personal life or the internal workings of his law firm.

The lawyer may conclude that this information would be important to the client's decision whether to retain him, and may decide to provide it. Or "...counsel will choose not to make disclosure, and explain to the client that he or she is free to seek alternative counsel. Our opinion is that the decision of whether to disclose or not is not an ethical one and therefore is at the lawyer's discretion."

An inquiry into malpractice coverage is like an inquiry into a lawyer's religious belief or into his liquidity or net worth. Although the client may consider these relevant, the lawyer is free to provide the information or to state that his policy is not to disclose it. But his answer must not be ambiguous or misleading. DR 1102 (A) (4) prohibits conduct involving dishonesty and DR 7102(A) directs a lawyer not to make a false statement of fact.

*Question #3. Does a lawyer have an obligation to disclose insurance information at the request of a current client?*

The Committee's answer: Only if the information about coverage becomes "relevant" to the representation. The assertion of a claim for malpractice is one circumstance which would make the information relevant. The Committee refused to speculate about other circumstances in which the

information would be relevant. If a current client asks about coverage, however, the lawyer should attempt to determine whether the information is relevant to the representation. If the lawyer concludes that the client considers it relevant and he does not want to make disclosure, the lawyer may offer to withdraw with the client's permission (DR 2110(C)(5)).

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