

**STATE OF MINNESOTA
IN SUPREME COURT
NO. C9-81-1206**

OFFICE OF
APPELLATE COURTS

JUL 29 2005

FILED

In re:

**Amendment to Minnesota Rules
for Registration of Attorneys**

PETITION OF MINNESOTA STATE BAR ASSOCIATION

July 27, 2005

MINNESOTA STATE BAR ASSOCIATION
Susan M. Holden (#189844)
Its President

MASLON EDELMAN BORMAN & BRAND, LLP
David F. Herr (#44441)
3300 Wells Fargo Center
90 South Seventh Street
Minneapolis, MN 55402-4140
(612) 672-8350

ATTORNEYS FOR PETITIONER
MINNESOTA STATE BAR ASSOCIATION

**STATE OF MINNESOTA
IN SUPREME COURT
NO. C9-81-1206**

In re:

Amendment to Minnesota Rules
for Registration of Attorneys

PETITION OF MINNESOTA STATE BAR ASSOCIATION

TO THE HONORABLE JUSTICES OF THE MINNESOTA SUPREME COURT:

Petitioner Minnesota State Bar Association (“MSBA”) respectfully asks this Court to adopt a new Rule 10 as part of its Rules of the Supreme Court for the Registration of Attorneys (“Registration Rules”). In support of this Petition, the MSBA would show the following:

1. Petitioner MSBA is a not-for-profit corporation of attorneys admitted to practice law before this Court and the lower courts throughout the State of Minnesota.
2. This Honorable Court has the exclusive and inherent power and duty to administer justice and to adopt rules of practice and procedure before the courts of this state and to establish the standards for regulating the legal profession and to establish mandatory ethical standards for the conduct of lawyers and judges. This power has been expressly recognized by the Minnesota Legislature. *See* MINN. STAT. § 480.05 (2004).
3. This Court adopted its Rules of the Supreme Court for the Registration of Attorneys on August 4, 1970, and has thereafter amended those rules from time to time.

4. In August 2004, the American Bar Association (“ABA”) adopted a Model Court Rule on Insurance Disclosure. The model rule was sponsored by the ABA Standing Committee on Client Protection. The ABA Committee’s report on the ABA model rule is attached hereto as Exhibit A. This report is also available at: http://www.abanet.org/cpr/clientpro/malprac_disc_report.pdf. The Court may also find informative a chart prepared by the ABA showing the status of adoption of the ABA model rule in the various states; that chart may be found at: http://www.abanet.org/cpr/clientpro/malprac_disc_chart.pdf.

5. A joint subcommittee comprising five members of the Minnesota Lawyers Professional Responsibility Board Rules Committee and four members of the MSBA Rules of Professional Conduct Committee met several times to discuss the ABA model rule and reported its conclusion that the MSBA Rules of Professional Conduct Committee should propose to the MSBA Assembly that Minnesota should adopt a similar rule. A copy of the MSBA’s report is attached to this petition as Exhibit B.

6. At its meeting on June 17, 2005, the MSBA Assembly, after first amending the report by adding the word “substantial” before the last word of proposed Rule 10(A), adopted the MSBA Committee’s report, and approved a formal petition to this Court to adopt a rule to address disclosure of professional liability insurance.

7. The MSBA believes that Minnesota should adopt a rule requiring lawyers who represent private clients to report annually whether they carry professional liability insurance. The rule provides that this information shall be made available to the public by the Supreme Court, preferably on its web site. This information will be useful to

consumers of legal services in selecting an attorney. The MSBA recognizes that there are limitations to the usefulness of the information and believes that the public should also be informed of these limitations.

8. The MSBA believes that the required disclosure should be part of the attorney registration renewal form and that it is desirable to have the reporting form track the language of the rule and to keep the form as simple as possible. The form will also ask each attorney to identify his or her primary professional liability carrier in order to assist any verification of the form's information that may become necessary.

9. The MSBA also recommends that the Supreme Court should make the professional liability insurance information available to the public on its website together with an explanation that will make the information meaningful to potential clients. The website would indicate the limitations of professional liability insurance, explain the reasons why an attorney might not carry such insurance, and encourage potential clients to ask an attorney about malpractice insurance before engaging the attorney. The MSBA also believes that Supreme Court may wish to include links to other sites useful to a potential client seeking representation, such as sites for attorney referral services, pro bono legal service programs, the Office of Lawyers Professional Responsibility, and the Attorney General's Office.

10. Accordingly, the MSBA requests that this Court adopt a new Rule 10 as set forth below (because the rule is entirely new, no redlining is included):

1 **RULE 10. REPORTING PROFESSIONAL**
2 **LIABILITY INSURANCE COVERAGE**
3

4 A. Each lawyer admitted to the active practice of law shall certify to
5 the Minnesota Supreme Court on the annual attorney registration form (1)
6 whether the lawyer represents private clients; (2) if the lawyer represents
7 private clients, whether the lawyer is currently covered by professional
8 liability insurance; and (3) whether the lawyer intends to maintain
9 insurance during the next twelve months. Each lawyer admitted to the
10 active practice of law in this jurisdiction who reports being covered by
11 professional liability insurance shall identify the primary carrier and shall
12 notify the Minnesota Supreme Court Attorney Registration clerk in writing
13 within 30 days if the insurance policy providing coverage lapses, is no
14 longer in effect, or terminates for any reason, unless the policy is renewed
15 or replaced without substantial interruption.

16 B. The Minnesota Supreme Court shall prescribe the form of
17 certification. Notwithstanding anything to the contrary in Rule 9 of these
18 rules, the information submitted pursuant to this rule will be made
19 available to the public by such means as may be designated by the
20 Minnesota Supreme Court.

21 C. Any lawyer admitted to the active practice of law who fails to
22 comply with this rule by the date that the lawyer's registration fee is due
23 may be suspended from the practice of law until such time as the lawyer
24 complies. Supplying false information in response to this rule shall subject
25 the lawyer to appropriate disciplinary action.

11. The MSBA further requests that the court confirm compliance with the rule by
requiring registering lawyers to provide information in the following form:

26 **Do you represent private clients?*** ___yes; ___no.

27 If so, are you covered by professional liability insurance? ___yes
28 (Carrier_____); ___no.

29 If so, do you intend to maintain professional liability insurance during the
30 next twelve months? ___yes; ___no.

31 * For the purpose of this question, the clients of government lawyers and in-house
32 counsel are not private clients.

12. Petitioner MSBA recommends that Supreme Court make available, as a part of its information about licensed attorneys, the information reported on the reporting form, together with explanatory language such as the following or other appropriate language:

Does Your Lawyer Have Insurance?

Many lawyers have malpractice insurance. It covers claims that a client was harmed by the lawyer's mistake. Lawyers are not required to have this insurance. Each year, lawyers in private practice must tell the Supreme Court if they have this insurance. Even if a lawyer buys this insurance, some claims are not covered. You should know these facts about lawyers' insurance:

1. Most malpractice policies cover only claims made during the policy term. You probably have car insurance. It covers you for accidents when the policy is in effect, even if the claim is made years later. Malpractice policies are different. If a client makes a claim after the policy ends, the claim is not covered. This is true even if the policy was in force when the claim arose or the loss happened.

2. Malpractice policies have limits and exclusions that may be important to you. Malpractice policies limit the amount paid on a single claim and on all claims made during the policy term. They may not cover some kinds of legal work. A lawyer who has insurance covering tax law may not be covered handling a divorce case.

3. Malpractice policies do not cover criminal acts. These policies cover only negligence. Negligence means failure to use ordinary care. This kind of insurance will not cover theft of money or property. Losses caused by dishonest lawyers may be covered by the Minnesota Client Security Board. Find out more at <http://www.courts.state.mn.us/csb/csb.html>.

4. The Court does not check on insurance policies. Lawyers report on their own policies. The Court does not check these reports. But a lawyer who makes a false report can be disciplined.

5. A lawyer may have a good reason for not having this insurance. If you have questions about a lawyer's insurance, ask the lawyer directly. The lawyer may be able to tell you why he or she does not carry insurance.

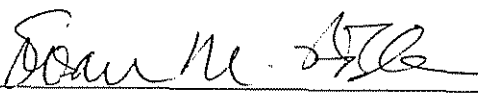
63 If the lawyer has insurance, ask if it covers the kind of work the lawyer will
64 be doing for you.

For the foregoing reasons, Petitioner respectfully requests that the Court amend
the Minnesota Rules of Professional Conduct by adopting proposed Rule 10.

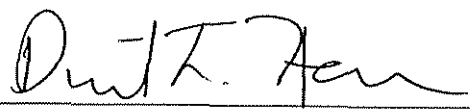
Dated: July 27, 2005.

Respectfully submitted,

MINNESOTA STATE BAR ASSOCIATION

By 
Susan M. Holden (#189844)
Its President

MASLON EDELMAN BORMAN & BRAND, LLP

By 
David F. Herr (#44441)
3300 Wells Fargo Center
90 South Seventh Street
Minneapolis, MN 55402-4140
(612) 672-8350

ATTORNEYS FOR PETITIONER
MINNESOTA STATE BAR ASSOCIATION

REPORT

Continuity of judicial regulation of the legal profession depends on action taken by the profession itself.
Robert B. McKay, 1990

The ABA Standing Committee on Client Protection (“the Committee”) recommends that the American Bar Association adopt the *Model Court Rule on Insurance Disclosure* (“the Model Court Rule”).

OVERVIEW

The ABA *Model Court Rule on Insurance Disclosure* requires lawyers to disclose on their annual registration statements whether they maintain professional liability insurance. The purpose of the Rule is to provide a potential client with access to relevant information related to a lawyer’s representation in order to make an informed decision about whether to retain a particular lawyer. The intended benefit of the Model Court Rule is to facilitate the client’s ability to determine whether a lawyer is insured. While the Model Court Rule does not require a lawyer to disclose directly to clients whether insurance is maintained or to maintain professional liability insurance, it does impose a modest annual reporting requirement on the lawyer. The information reported by lawyers will be made available by such means as designated by the highest court in the jurisdiction. While this information could be sought during the initial retention process, many clients are unsophisticated and may be reluctant to raise such issues.

Paragraph A of the Model Court Rule requires a lawyer to disclose on the annual registration statement whether professional liability insurance is maintained. Excluded from the Rule’s reporting requirement are those lawyers who are not engaged in the active practice of law and those who are engaged in the practice of law as full-time government lawyers or as counsel employed by an organizational client and do not represent clients outside that capacity. A lawyer who is employed to represent an organization on an ongoing basis generally represents a knowledgeable and sophisticated client. Additionally, organizational or governmental clients may have their own professional liability insurance policies.

Finally, Paragraph A places an affirmative duty upon lawyers to notify the highest court whenever the insurance policy covering the lawyer’s conduct lapses or is terminated. This ensures that the information reported to the highest court is accurate during the entire reporting period.

Paragraph B of the Model Court Rule requires lawyers to certify to the accuracy of the information reported. Paragraph B also requires that the information submitted by lawyers will be made available by such means as designated by the highest court. For example, in Nebraska and Virginia, information regarding a lawyer’s professional liability insurance is made available to a potential client if the client telephones the bar association and requests it. The information can also be accessed on the bars’ websites. (See, www.vsb.org, under the headings Public Information, Attorney Records Search, Attorneys without Malpractice Insurance). It was reported to the Committee that this Virginia Bar website receives 1250 visits per month.

Paragraph C of the Model Court Rule clarifies that failure or refusal to provide the required information would result in a lawyer's administrative suspension from the practice of law until such time as the lawyer complies with the Model Court Rule. The Committee is not recommending that a court amend its current Rules of Professional Conduct. Failure or refusal to make the required disclosure would, therefore, not be considered a disciplinary offense. Nevertheless, providing *false* information in response to the Model Court Rule would subject the lawyer to appropriate disciplinary action, pursuant to ABA *Model Rules of Professional Conduct*, Rule 8.4(c), that prohibits, "conduct involving dishonesty, fraud, deceit or misrepresentation."

INSURANCE REPORTING REQUIREMENTS IN UNITED STATES JURISDICTIONS

To date, ten jurisdictions have addressed the issue of reporting the maintenance of professional liability insurance. The highest courts in five jurisdictions, Delaware, Nebraska, North Carolina, Michigan and Virginia, require lawyers to disclose on their annual registration statements whether they maintain professional liability insurance. The Committee's proposed Model Court Rule is patterned after the reporting requirements in these jurisdictions.

The highest courts in four other jurisdictions, Alaska, New Hampshire, Ohio and South Dakota, have amended their Rules of Professional Conduct to require lawyers to disclose directly to their clients whether they maintain professional liability insurance. The Rule in South Dakota, effective January 1, 1999, is the most comprehensive.¹

In addition, the Oregon Supreme Court, while not having a disclosure rule *per se*, mandates professional liability insurance as a condition precedent to practicing law.

EXISTING ABA POLICIES

On three previous occasions, the American Bar Association has adopted policies requiring lawyers in some circumstances to maintain professional liability insurance. In August 1989, the ABA House of Delegates adopted *Minimum Quality Standards* for lawyer referral services. The minimum standards were adopted as client protection measures. One of the standards is that participating lawyers maintain malpractice insurance coverage.

In August 1992, the ABA House of Delegates adopted *Model Supreme Court Rules Governing Lawyer Referral And Information Services*. Rule 4 of the *Model Rules* requires that in order for a lawyer to participate in the service, the lawyer shall maintain in force a policy of errors and

¹ Rule 1.4 of the South Dakota Rules of Professional Conduct requires South Dakota lawyers to promptly disclose to their clients if they do not maintain professional liability insurance with limits of at least \$100,000, or if during the course of the representation, the insurance policy lapses or is terminated, lawyers shall disclose to their clients by including a component of the lawyers' letterhead, using the following specific language, either that: (1) "This lawyer is not covered by professional liability insurance;" or (2) "This firm is not covered by professional liability insurance." The required disclosure is to be included in every written communication with clients. Rule 7.5 (Firm Names and Letterheads) of the South Dakota Rules of Professional Conduct provides that the disclosure *shall be in black ink with type no smaller than the type used for showing the individual lawyer's names*.

omissions insurance, or provide proof of financial responsibility, in an amount at least equal to the minimum established by the Committee that oversees the service. The Comment to Model Rule 4 states that the intent of the insurance requirement is to ensure that, in the event errors are made by the participating lawyer, the client has redress through the lawyer's policy of insurance. The requirement is contained in the ABA *Minimum Quality Standards* for lawyer referral services (*See* above.). The Comment notes, that only by requiring such insurance, or a showing of financial responsibility, can a client best be protected. In states where lawyer referral services are not immune from lawsuits for negligent referral, this requirement will help protect the lawyer referral service from such suits; in states where such immunity exists, it ensures that a client may find redress against the principal negligent party, the lawyer.

In August 1993, the ABA House of Delegates adopted the ABA *Model Rule for the Licensing of Legal Consultants*. The Model Rule sets forth the requirements for a foreign lawyer to practice law as a foreign legal consultant in the United States on a permanent basis. The Model Rule requires that foreign legal consultants maintain professional liability insurance.

THE PROPOSED MODEL COURT RULE ON INSURANCE DISCLOSURE

The Model Court Rule properly places the burden for reporting the maintenance of insurance on the lawyer. Potential clients should not be required to inquire of a lawyer if professional liability insurance is maintained. Many unsophisticated clients either assume that a lawyer is required to provide malpractice insurance or do not even think to inquire if they lawyer is covered.² The proposed Model Court Rule would provide potential clients with the ability to independently determine whether a lawyer maintains professional liability insurance. The Model Court Rule is a balanced standard that allows potential clients to obtain relevant information about a lawyer if they initiate an inquiry, while placing a modest annual reporting requirement on lawyers.

Lawyers in the United States, except in Oregon, are not required to maintain professional liability insurance. While clients have the right to hire lawyers who do not maintain professional liability insurance, those who do so will likely have no avenue of financial redress if the lawyer commits an act of negligence. Lawyer disciplinary proceedings primarily offer prospective protection to the public. They either remove lawyers from practice or seek to change the lawyers' future conduct. Protection of clients already harmed is minimal. While lawyer-respondents are sometimes ordered to pay restitution in disciplinary cases, in many jurisdictions the failure of lawyers to make restitution ordered in disciplinary proceedings will not bar subsequent readmission to practice. Clients can also seek restitution from client protection funds when dishonest conduct is involved. Client protection funds are an innovation of the legal profession unmatched by any other profession. Unfortunately, the ability of client protection funds to compensate clients is limited. Restitution is generally available only when a lawyer has misappropriated client funds. Legal malpractice claims are the only manner by which clients can seek redress for acts of negligence. Prospective clients should have the right to decide

² A Minnesota lawyer reported to the Committee that based upon his experience in handling legal malpractice actions since 1996, it is a foregone conclusion that every consumer of legal services in the State of Minnesota presumes that the lawyer they hire is insured. He further stated that it is also a given that virtually none of the consumers of legal services ever ask or receive any confirmation as to the insurance status of their lawyer at the time of retention.

whether they want to hire lawyers who do not maintain liability insurance. The Model Court Rule offers the prospective client the ability to make an informed decision.

Lawyers who lack insurance are not immune from malpractice liability. Claims against uninsured lawyers are often abandoned, precisely because there is no available insurance. Plaintiff's counsel know that in evaluating whether to file such a claim, a threshold issue is whether the lawyer is insured. If the claim for damages is modest, many plaintiff's legal malpractice lawyers will elect not to file suit because the risk that any judgment will prove to be uncollectible, in light of how difficult these claims are in other respects, simply makes such claims not worth pursuing. The data on malpractice claims reported by the ABA Standing Committee on Lawyers' Professional Liability is incomplete since potential claims not pursued due to a lack of insurance are not factored.³

Malpractice insurance is not a panacea for injuries caused by lawyer negligence. Nevertheless, whether a lawyer maintains professional liability insurance is a material fact that potential clients should have a right to know in retaining counsel. Professional liability insurance does ensure that a client *may* find financial redress against the principal negligent party, their lawyer. The proposed Model Court Rule provides the public with access to relevant information; it does not mandate that lawyers maintain malpractice insurance. The Model Court Rule incorporates a provision requiring an entity designated by the highest court to make the reported information available to the public. The information would presumably be available by telephone, or preferably, by Internet access.

The bar or the lawyer regulatory agency should also inform the public of the limits on the usefulness of this information, e.g., that most policies are "claims made" policies and that policies generally do not cover dishonesty or other intentional acts. Given the nature of claims-made coverage, it is possible that the insurance policy a lawyer has in place at the time when a prospective client is likely to inquire about it, may have lapsed at the time a claim for legal malpractice is made. Most lawyers will probably purchase "tail" coverage to protect themselves from this situation but the public should be made aware of the unique nature of professional liability insurance. The Committee was advised that the experience in Alaska has been that most lawyers who have malpractice insurance today will most likely have it in the future and that, therefore, the value of making the information available to the public outweighed its potential to be misleading by the fact that the policy had lapsed by the time a claim was made.

The Committee recommends that each jurisdiction adopting the Model Court Rule decide if it wants to include, in its version of the Rule, minimum limits of professional liability coverage. Alaska, New Hampshire and Ohio require lawyers to disclose to their clients if the lawyer does not maintain a policy with limits of at least \$100,000 per claim and \$300,000 annual aggregate.⁴

³ Data has been collected on legal malpractice claims from the National Association of Bar-Related Insurance Companies and commercial insurers for the period January 1, 1996 through December 31, 1999. During that period, there were reported to be 36,844 legal malpractice claims nationally. This data did not cover the entire lawyer population: a significant percentage of practicing lawyers have no malpractice coverage and not all U.S. malpractice insurers provided data. *Profile of Legal Malpractice Claims, 1996-1999*, American Bar Association, Standing Committee on Lawyers' Professional Liability.

⁴ Alaska Court Rules, Rule 1.4 (c), Alaska Rules of Professional Conduct; Rule 1.17, New Hampshire Rules of Professional Conduct; and Ohio Rules of Court, Code of Professional Responsibility, DR 1-104.

South Dakota requires its lawyers to disclose to their clients if the lawyer does not maintain a policy with limits of at least \$100,000.⁵ The Committee was also advised that a professional liability insurance policy with limits of liability of \$200,000/600,000 is the smallest policy limit now offered by Minnesota Lawyers Mutual, the largest legal malpractice insurer in Minnesota.⁶

CONCLUSION

The *Model Court Rule on Insurance Disclosure* would reduce potential public harm by giving consumers of legal services an opportunity to decline to hire a lawyer who does not maintain professional liability insurance. Under this Model Court Rule, a lawyer would inform the highest court in the jurisdiction, or designated entity, whether insurance is maintained. The court would make this information available to the public. During the reporting year, if the policy is terminated or modified, the lawyer would be required to inform the court. The ultimate decision whether or not to maintain professional liability insurance remains with lawyers.

Robert D. Welden, Chair
Standing Committee on Client Protection
August 2004

⁵ South Dakota Rules of Professional Conduct, Rule 1.4.

⁶ Letter dated February 27, 2004, to the Committee from the Minnesota State Bar Association Rules of Professional Conduct Committee.

"No resolution presented herein reflects the policy of the Minnesota State Bar Association until approved by the Assembly. Informational reports, comments, and supporting data are not approved by their acceptance for filing and do not become part of the policy of the Minnesota State Bar Association unless specifically approved by the Assembly."

Report and Recommendation to the MSBA
Regarding the Reporting of Professional Liability Insurance Coverage
MSBA Rules of Professional Conduct Committee
April 20, 2005

RECOMMENDATIONS

RESOLVED that the Minnesota State Bar Association petition the Minnesota Supreme Court to adopt proposed Rule 10 of the Minnesota Rules on Registration of Attorneys in the form attached hereto and recommend to the Court that it adopt the proposed reporting form that follows the proposed rule and that it make the information available to the public with explanatory language such as that described below or other appropriate language.

REPORT

In August 2004, the ABA adopted a Model Court Rule on Insurance Disclosure. The model rule was sponsored by the ABA Standing Committee on Client Protection.

A joint subcommittee consisting of the five members of the Lawyers Professional Responsibility Board Rules Committee and four members of the MSBA Rules of Professional Conduct Committee met several times to discuss the ABA model rule and reported its conclusion that the MSBA Rules of Professional Conduct Committee should propose to the Assembly that Minnesota should adopt a similar rule.

Proposed Rule 10. The committee believes that Minnesota should adopt a rule requiring lawyers who represent private clients to report annually whether they carry professional liability insurance. The rule provides that this information shall be made available to the public by the Supreme Court, preferably on its web site. The committee believes that this information will be useful to consumers of legal services in selecting an attorney. The committee recognizes that there are limitations to the usefulness of the information and believes that the public should be informed of these limitations.

Reporting Form. The committee believes that the required disclosure should be part of the attorney registration renewal form. The Committee believes it is desirable to have the reporting form track the language of the rule and to keep the form as simple as possible. The form will also ask each attorney to identify his or her primary

professional liability carrier in order to assist any verification of the form's information that may become necessary.

Making Information Available to the Public. The committee recommends that the Supreme Court should make the professional liability insurance information available to the public on its website together with an explanation that will make the information meaningful to potential clients. The website would indicate the limitations of professional liability insurance, explain the reasons why an attorney might not carry such insurance, and encourage potential clients to ask an attorney about malpractice insurance before engaging the attorney. The Supreme Court might wish to include links to other sites useful to a potential client seeking representation, such as sites for attorney referral services, pro bono legal service programs, the Office of Lawyers Professional Responsibility, and the Attorney General's Office.

PROPOSED RULE

RULE 10. REPORTING PROFESSIONAL LIABILITY INSURANCE COVERAGE

- A. Each lawyer admitted to the active practice of law shall certify to the Minnesota Supreme Court on the annual attorney registration form (1) whether the lawyer represents private clients; (2) if the lawyer represents private clients, whether the lawyer is currently covered by professional liability insurance; and (3) whether the lawyer intends to maintain insurance during the next twelve months. Each lawyer admitted to the active practice of law in this jurisdiction who reports being covered by professional liability insurance shall identify the primary carrier and shall notify the Minnesota Supreme Court Attorney Registration clerk in writing within 30 days if the insurance policy providing coverage lapses, is no longer in effect, or terminates for any reason, unless the policy is renewed or replaced without substantial interruption.

B. The Minnesota Supreme Court shall prescribe the form of certification.

Notwithstanding anything to the contrary in Rule 9 of these rules, the information submitted pursuant to this rule will be made available to the public by such means as may be designated by the Minnesota Supreme Court.

C. Any lawyer admitted to the active practice of law who fails to comply with this rule by the date that the lawyer's registration fee is due may be suspended from the practice of law until such time as the lawyer complies. Supplying false information in response to this rule shall subject the lawyer to appropriate disciplinary action.

Reporting Form. The MSBA further recommends to the Supreme Court the following language as a form that might be used to establish compliance with the proposed rule:

Do you represent private clients?* ☐ yes; ☐ no.

If so, are you covered by professional liability insurance? ☐ yes (Carrier _____); ☐ no.

If so, do you intend to maintain professional liability insurance during the next twelve months? ☐ yes; ☐ no.

* For the purpose of this question, the clients of government lawyers and in-house counsel are not private clients.

Proposed Means for Making Information Available to the Public. The MSBA recommends that Supreme Court make available, as a part of its information about licensed attorneys, the information reported on the reporting form, together with explanatory language such as the following or other appropriate language:

Does Your Lawyer Have Insurance?

Many lawyers have malpractice insurance. It covers claims that a client was harmed by the lawyer's mistake. Lawyers are not required to have this insurance. Each year, lawyers in private practice must tell the Supreme Court if they have this insurance. Even if a lawyer buys this

insurance, some claims are not covered. You should know these facts about lawyers' insurance:

1. **Most malpractice policies cover only claims made during the policy term.** You probably have car insurance. It covers you for accidents when the policy is in effect, even if the claim is made years later. Malpractice policies are different. If a client makes a claim after the policy ends, the claim is not covered. This is true even if the policy was in force when the claim arose or the loss happened.

2. **Malpractice policies have limits and exclusions that may be important to you.** Malpractice policies limit the amount paid on a single claim and on all claims made during the policy term. They may not cover some kinds of legal work. A lawyer who has insurance covering tax law may not be covered handling a divorce case.

3. **Malpractice policies do not cover criminal acts.** These policies cover only negligence. Negligence means failure to use ordinary care. This kind of insurance will not cover theft of money or property. Losses caused by dishonest lawyers may be covered by the Minnesota Client Security Board. Find out more at <http://www.courts.state.mn.us/csb/csb.html>.

4. **The Court does not check on insurance policies.** Lawyers report on their own policies. The Court does not check these reports. But a lawyer who makes a false report can be disciplined.

5. **A lawyer may have a good reason for not having this insurance.** If you have questions about a lawyer's insurance, ask the lawyer directly. The lawyer may be able to tell you why he or she does not carry insurance. If the lawyer has insurance, ask if it covers the kind of work the lawyer will be doing for you.

ANALYSIS

The proposed rule generally follows the ABA Model Court Rule on Insurance Disclosure. The following shows how the proposed Minnesota rule 10 varies from the ABA model rule:

A. Each lawyer admitted to the active practice of law shall certify to the ~~[highest court of the jurisdiction] on or before [December 31 of each year];~~ Minnesota Supreme Court on the annual attorney registration form (1) whether the lawyer is engaged in the private practice of law represents private clients; (2) ~~if engaged in the private practice of law~~ if the lawyer represents private clients, whether the lawyer is currently covered by professional liability insurance; and (3) whether the lawyer intends to maintain insurance during the next twelve months ~~period of time the lawyer is engaged in the private practice of law~~; and 4) ~~whether the lawyer is exempt from the provisions of this Rule because the lawyer is engaged in the practice of law as a full-time government lawyer or is counsel employed by an organizational client and does not represent clients outside that capacity.~~ Each lawyer admitted to the active practice of law in this jurisdiction who reports being covered by professional liability insurance shall identify the primary carrier and shall notify the ~~[highest court of the jurisdiction]~~ Minnesota Supreme Court Attorney Registration clerk in writing within 30 days if the insurance policy providing coverage lapses, is no longer in effect, or terminates for any reason, unless the policy is renewed or replaced without interruption.

B. ~~The foregoing shall be certified by each lawyer admitted to the active practice of law in this jurisdiction in such form as may be prescribed by the [highest court of the jurisdiction].~~ The Minnesota Supreme Court shall prescribe the form of certification. Notwithstanding anything to the contrary in Rule 9 of these rules, the information submitted pursuant to this rule will be made available to the public by such means as may be designated by the ~~[highest court of the jurisdiction]~~ Minnesota Supreme Court.

C. Any lawyer admitted to the active practice of law who fails to comply with this rule by the date that the lawyer's registration fee is due ~~in a timely fashion, as defined by the [highest court of the jurisdiction]~~ may be suspended from the practice of law until such time as the lawyer complies. Supplying false information in response to this rule shall subject the lawyer to appropriate disciplinary action.

The proposed explanatory language that the Court may wish to include on its website has a Flesch-Kincaid Readability Grade Level of 7.8, which means that a person with 7.8 years of education should be able to read and comprehend it. The Flesch test measures readability by creating a score that factors in word length, words per sentence, sentences per paragraph, and percentage of sentences using the passive voice. Minnesota law requires that materials prepared for public distribution by the Department of Health and the Department of Human Services be written at the seventh

grade level as measured by the Flesch test. *See* Minn. Stat. §§ 144.056, 256.016 (2004). The committee concluded that the proposed explanatory language should meet that standard, although the substance is similar to that in language proposed by the ABA Client Protection Committee (which scores 9.3 on the Flesch scale) and the North Carolina Bar Association (which scores 12.0 on the Flesch scale).

Respectfully submitted,

MSBA Rules of Professional Conduct Committee
Kenneth F. Kirwin, Chair