New Jersey Law Journal

VOL. CXCIX – NO. 2 - INDEX 58 JANUARY 14, 2010 ESTABLISHED 1878

Professional Malpractice

Mandatory Legal Malpractice Insurance: The Time Has Come

The state should enact legislation that supplements the court's rule

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In order to drive a car in New Jersey, you need a license and insurance. If your negligent driving injures someone, you have insurance not only to protect yourself, but to protect the person you injure.

In order to practice law in New Jersey, you also need a license, but not insurance. If your negligence damages a client and you have no insurance, then it's too bad for the client.

Is there something wrong with this picture? We think so. We lawyers are fiduciaries to our clients. That means that first and foremost we have to put our clients' interests ahead of our own. Even at our own cost.

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For many years, Oregon has been the only state that requires all practicing lawyers to carry professional liability insurance that protects clients who are damaged by their lawyer's errors. The experience in Oregon has been a good one. Premiums are relatively low and affordable. Clients are protected. Lawyers are protected. Malpractice insurers are happy because, in Oregon, all lawyers have to share in the cost of insurance and thus insurance companies make more money and premiums are thus lower for all.

In New Jersey, we have a modified form of mandatory malpractice insurance coverage. Under Court Rule 1:21-1A, B and C, lawyers who practice as an entity — a professional corporation, limited liability company or limited liability partnership — must have at least $100,000 for each of its attorneys. Each year, the entity must file a certificate of insurance with the Clerk of the Supreme Court to that effect. This mandatory coverage, however, covers only a fraction of the attorneys and law firms practicing in New Jersey. Although many solos and small firms who are not covered by these Court Rules voluntarily choose to carry malpractice insurance, many don't. That leaves a lot of lawyers who are uninsured and even more clients unprotected from even the simplest professional error that most of us can make.

Even with this partial form of mandatory malpractice insurance coverage, New Jersey's legal malpractice insurance rates are eminently affordable. In fact, the head of the State Bar Association's legal malpractice insurance committee recently declared that premiums have remained level even in the face of our six-year legal malpractice statute of limitations and the Supreme Court's decision in *Saffer v. Willoughby.* Insurance industry professionals agree and also believe that we can expect our malpractice insurance premiums to go down even more.

One way to assure that our malpractice insurance premiums stay low is by extending the mandatory insurance rules that apply to law practice entities under Rule 1:21-1A through C to lawyers who practice as individuals or general partnerships. With increased competition in the insurance marketplace (there are currently more than 20 professional liability insurers in New Jersey vying for our premium dollars), the resulting revenue infusion to carriers by mandating insurance coverage would not only lower premiums, but it would extend protection to all clients — not just those who, by some happenstance, hire a lawyer who has decided to conduct his practice as an entity covered by Rule 1:21-1A-C.

The courts in New Jersey may be headed in this direction. In *Nagle v. Natural Energy Works, Inc.*, Judge Victor Ashrafi, sitting in the Law Division of the Superior Court, Somerset County, recently recognized the paradox of allowing a defendant attorney on the legal malpractice claim to defend himself pro se

and to refuse to notify his professional malpractice carrier of the claim, thus depriving the former client of the very coverage that the rule mandated. In support of his ruling — that Court Rule 1:21-1A-C requires all attorneys practicing under the umbrella of a professional corporation to notify their professional liability carrier of the claim — the judge noted:

> [T]here's a reason we have a rule that says we have to carry insurance, and that's to make sure that there is coverage for clients who have claims. [It may be that] the claim is frivolous…but you got to be insured.

The court thus ordered the malpractice defendant to put his carrier on notice of the claim and to cooperate with the carrier in defending it. In that way, coverage for the benefit of an allegedly wronged client — and thus the very reason for the rule — would be vindicated.

The result in suits where attorneys are not required to have malpractice insurance coverage is especially disturbing in those cases where municipalities are represented by uninsured lawyers and the cost of their professional negligence must be borne by innocent taxpayers. In *Township of Manalapan v. Moskowitz*, MON-L-2893-07, the defendant attorney, a solo practitioner, not covered by Rule 1:21-1A-C, appeared pro se in a suit brought by the township alleging malpractice for his failure to secure a contingency clause that would have allowed the Township of Manalapan to back out of a contract to purchase and develop land for recreation, in the event the land was contaminated. The attorney argued that no matter what he did or did not do, the township had been required to buy the property by court order. Eventually, the township dropped the malpractice suit because it appeared that the defendant attorney may not have had malpractice insurance coverage and the township did not want to pursue him to satisfy any judgment from his personal assets.

The effect of such a dismissal, in the event the attorney was in fact found to be negligent, is that the municipality would be left holding the proverbial bag, with no recourse for the malpractice that allegedly cost $100,000 to remedy. Assuming the case had not been voluntarily dismissed by the township, and the court or jury hearing the malpractice case had found that the defendant attorney should have included a contingency clause to protect the municipality against contamination clean-up costs on the subject property, the township's inability to compel a solo attorney to file a notice of claim with his carrier, given the current structure of Rule 1:21-1A-C, would mean but one thing: the $100,000 expenditure for remediation would be unjustly borne by Manalapan taxpayers.

There is simply no way to reconcile the results of these two cases. In the event the client alleging malpractice can prove that the lawyer was negligent in his representation and that negligence caused the client damage, the client ought to be able to collect on a resulting judgment or settlement, whether the attorney practices as a solo, a general partner or one of the three covered entities. The rationale behind the Supreme Court's Rule 1:21-1A-C, that lawyers are fiduciaries who cannot hide behind an entity form of practice and are bound by a higher duty to ensure that their former clients have the ability to vindicate their rights even against them for professional negligence, is frustrated by a limited application of that principle to professional corporations, limited liability companies, and limited liability partnerships alone. It must apply to all practicing lawyers who represent clients regardless of the business form by which the lawyer chooses to practice.

If for some reason our Supreme Court would choose not to extend the rule, then the Legislature should proceed to enact legislation that supplements the Court's rule and extends the coverage of Rule 1:21-1A to C to all practicing lawyers — not so much to affect the practice of law — an area constitutionally reserved to the Supreme Court, but in order to afford all New Jersey citizens the same protection that they would get if they choose to retain lawyers who practice under the statutory entity form. The legislature would be entirely within its constitutional right to do so because it augments the Court's efforts. Moreover, more lawyers covered by insurance would mean more premium dollars to the insurance industry and thus lower premiums overall. If ever there were a "win-win" situation, this is it. The legislature should enact mandatory insurance coverage for all those practicing lawyers that the court's rule does not cover. ■