

The Supreme Court of Ohio

BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE

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OFFICE OF SECRETARY

OPINION 2007-6

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SYLLABUS: A court appointed lawyer for an indigent criminal defendant is not required to provide notice to the defendant that the lawyer does not maintain professional liability insurance. A court appointed lawyer for an indigent criminal defendant falls within the Rule 1.4(c)(3)(i) governmental entity exception to the notice requirement of Rule 1.4(c).

OPINION: This opinion addresses whether the Ohio Rules of Professional Conduct require a court appointed lawyer for an indigent criminal defendant to notify a defendant if the lawyer does not maintain professional liability insurance.

Is a court appointed lawyer for an indigent criminal defendant required pursuant to Rule 1.4(c) to provide notice to the defendant that the lawyer does not maintain professional liability insurance?

Since July 1, 2001, Ohio lawyers who do not maintain professional liability insurance are required to notify their clients and obtain acknowledgment of the lawyer's lack of professional liability insurance. The notice must be signed by the lawyer and the acknowledgment of receipt of the notice must be signed by the client. This requirement is set forth in Rule 1.4(c) of the Ohio Rules of Professional Conduct which became effective February 1, 2007 and prior to that was set forth in now former DR 1-104 of the Ohio Code of Professional Responsibility.

Rule 1.4

(c) A lawyer shall inform a client at the time of the client's engagement of the lawyer or at any time subsequent to the engagement if the lawyer does not maintain professional liability insurance in the amounts of at least one hundred thousand dollars per occurrence and three hundred thousand dollars in the aggregate or if the lawyer's professional liability insurance is terminated. The notice shall be provided to the client on a separate form set forth following this rule and shall be signed by the client.

(1) A lawyer shall maintain a copy of the notice signed by the client for five years after termination of representation of the client.

(2) A lawyer who is involved in the division of fees pursuant to Rule 1.5(e) shall inform the client as required by division (c) of this rule before the client is asked to agree to the division of fees.

(3) The notice required by division (c) of this rule shall not apply to either of the following:

(i) A lawyer who is employed by a governmental entity and renders services pursuant to that employment;

(ii) A lawyer who renders legal services to an entity that employs the lawyer as in-house counsel.

NOTICE TO CLIENT

Pursuant to Rule 1.4 of the Ohio Rules of Professional Conduct, I am required to notify you that I do not maintain professional liability (malpractice) insurance of at least \$100,000 per occurrence and \$300,000 in the aggregate.

Attorney's Signature

CLIENT ACKNOWLEDGEMENT

I acknowledge receipt of the notice required by Rule 1.4 of the Ohio Rules of Professional Conduct that [insert attorney's name] does not maintain professional liability (malpractice) insurance of at least \$100,000 per occurrence and \$300,000 in the aggregate.

Client's Signature

Date

The underlying reason for requiring notice and acknowledgement of a lawyer's lack of professional liability insurance is client protection. Comment [9] to Rule 1.4 explains that "[t]he client may not be aware that maintaining professional liability insurance is not mandatory and may well assume that the practice of law requires that some minimum financial responsibility be carried in the event of

malpractice. Therefore, a lawyer who does not maintain certain minimum professional liability insurance shall promptly inform a prospective client or client.”

There are two exceptions to Rule 1.4(c). A lawyer employed by a governmental entity and who renders services pursuant to that employment is not required to provide notice of a lack of maintaining professional malpractice insurance. And, a lawyer employed as in-house counsel who renders legal services to the employing entity is not required to provide such notice. These exceptions are established in divisions (c)(3)(i) and (ii) of Rule 1.4.

Comment [8] to Rule 1.4 explains that “[a]lthough it is in the best interest of the lawyer and the client that the lawyer maintain professional liability insurance or another form of adequate financial responsibility, it is not required in any circumstance other than when the lawyer practices as part of a legal professional association, corporation, legal clinic, limited liability company, or registered partnership.

It is the Board’s view that a lawyer appointed by a court to represent an indigent criminal defendant falls within the governmental entity exception in Rule 1.4(c)(3)(i) and therefore is not required to provide notice of lack of professional liability insurance. No purpose would be served by requiring such disclosure. A court appointed criminal defense lawyer is providing legal representation for which indemnification for malpractice is provided by law. Ohio law provides that if a malpractice action is filed against a lawyer, who accepts court appointments to represent indigent criminal defendants, the lawyer shall be indemnified for any judgment awarded in the malpractice action or the amount negotiated in settlement of the malpractice claim, and for court costs or legal fees incurred in defense of the malpractice claim. Ohio Rev.Code Ann. §120.41 (West 2002).

In conclusion, the Board advises as follows. A court appointed lawyer for an indigent criminal defendant is not required to provide notice to the defendant that the lawyer does not maintain professional liability insurance. A court appointed lawyer for an indigent criminal defendant falls within the Rule 1.4(c)(3)(i) governmental entity exception to the notice requirement of Rule 1.4(c).

Advisory Opinions of the Board of Commissioners on Grievances and Discipline are informal, nonbinding opinions in response to prospective or hypothetical questions regarding the application of the Supreme Court Rules for the Government of the Bar of Ohio, the Supreme Court Rules for the Government of the Judiciary, the Ohio Rules of Professional Conduct, the Ohio Code of Judicial Conduct, and the Attorney’s Oath of Office.