

THE VITTAL LAW FIRM

J. ANTHONY VITTAL

WRITER'S DIRECT-DIAL TELEPHONE
(310) 339-2520

WRITER'S E-MAIL ADDRESS
tony.vittal@abanet.org

EAST-WEST BANK PLAZA
1900 AVENUE OF THE STARS, SUITE 2500
LOS ANGELES, CALIFORNIA 90067-4506

eFAX – (603) 484-5374

REFER TO FILE NO.

Office / CDCBA 2006

September 22, 2006

The Board of Directors
Conference of Delegates of California Bar Associations
ATTN: Laura Goldin, Executive Director
3450 Sacramento Street, Suite 521
San Francisco, California 94118

Re: Request for Leave to Present Emergency Late-Filed Resolution

Ladies and Gentlemen:

I write on behalf of the Beverly Hills Bar Association, which requests leave to file the attached resolution as an emergency late-filed resolution for consideration by the 2006 Conference. This resolution addresses the mandatory malpractice insurance disclosure rules circulated for public comment by the State Bar of California – a matter of substantial importance to the bar and the public.¹

The proposed rules were circulated for public comment on or about June 22, 2006, following authorization by the Board of Governors at its June 17 meeting. The proposed rules were first brought to the attention of the Beverly Hills Bar Association delegation at its initial pre-Conference caucus on September 7, 2006. As a consequence, the Beverly Hills Bar Association effectively was precluded from filing the attached resolution in the ordinary course as a late-filed resolution in accordance with Sections 5(D)(2)(a) and 5(D)(2)(b) of the Rules of the Conference. The public

1. This is a matter of substantial importance for the additional reason that the proposed rules are diametrically opposed to the position adopted by the Conference of Delegates in 1993 on the same subject.

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comment period, which initially was scheduled to end on September 15, 2006, has been extended to permit the Conference to express its views on the proposed rules.

The attached resolution is being presented for filing as soon as reasonably possible after the occurrence of the aforementioned events. Presentation of this resolution has been duly authorized by the Beverly Hills Bar Association.

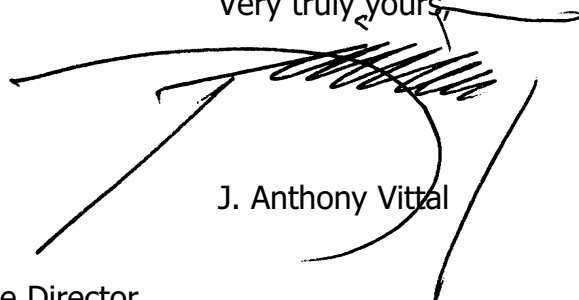
The subject matter of the resolution will not be before the Conference at its 2006 meeting unless the resolution is filed.

The business of the Conference previously scheduled for the meeting will allow time for consideration of the resolution without unduly restricting the time for consideration of other matters deemed by the Board to be of equal or greater importance to the Conference, the bar and the public.

The resolution is accompanied by the Report of the Insurance Disclosure Task Force of the State Bar of California, which has recommended the proposed rules, in lieu of counter-arguments of a responsible spokesperson for the opposite viewpoint. We also have solicited a counter-argument from Jim Towery, the Chair of the Insurance Disclosure Task Force, as a responsible spokesperson for the opposite viewpoint. As of the time I write this letter, we have not had a response from Mr. Towery. We believe that the Task Force Report provides both the rationale for the opposing viewpoint and a discussion of the reasons the Task Force rejected the views expressed by the proponent of this resolution.

For the foregoing reasons, the Beverly Hills Bar Association urges you to grant this request and to place the attached resolution on the agenda of the 2006 Conference as a special setting for full debate.

Very truly yours,

A handwritten signature in black ink, appearing to read "J. Anthony Vittal". The signature is stylized with a large, sweeping initial "J" and "V".

J. Anthony Vittal

JAV:t
CDCBA 001.wpd
Enclosures as stated
cc: Marc Staenberg, Executive Director

RESOLUTION ELF-02-2006

Opposition to Proposed Mandatory Insurance Disclosure Rules

RESOLVED, that the Conference of Delegates of California Bar Associations urges the Board of Governors of the State Bar of California not to adopt proposed Rule 3-410 of the Rules of Professional Conduct, which would mandate the disclosure, by a lawyer to the lawyer's client, the fact that the lawyer is not covered by lawyers' professional liability insurance.¹

FURTHER RESOLVED, that the Conference of Delegates of California Bar Associations urges the Board of Governors of the State Bar of California not to recommend to the California Judicial Council that it adopt proposed Rule 950.6 of the California Rules of Court, which would mandate that an active member of the State Bar of California certify to the State Bar whether the member represents clients and, unless the member is employed as a government lawyer or as in-house counsel to the exclusion of all other clients, whether or not the member is covered by lawyers' professional liability insurance.²

FURTHER RESOLVED, that the Conference of Delegates of California Bar Associations urges the Board of Governors of the State Bar of California not to recommend to the California Judicial Council that it adopt the proposed amendment to Rule 950.5 of the California Rules of Court, which would mandate public disclosure of the information certified under proposed Rules 950.6.³

FURTHER RESOLVED, that the Conference of Delegates of California Bar Associations urges the California Judicial Council not to adopt the proposed amendment to Rule 950.5 and proposed Rule 950.6, of the California Rules of Court.

FURTHER RESOLVED, that the Conference of Delegates of California Bar Associations urges the State Bar of California to determine why over 18% of the active members of the State Bar in private practice do not maintain lawyers' professional liability insurance coverage; to evaluate whether the establishment of a captive lawyers' professional liability insurance carrier would achieve coverage of all active members in private practice; and, if so, to propose the enactment of appropriate legislation.

Proponent: Beverly Hills Bar Association

STATEMENT OF REASONS:

Existing Law: There currently is no requirement that an active member of the State Bar maintain lawyer's professional liability insurance ("LPL") coverage or that he or she disclose to anyone whether or not he or she maintains LPL coverage.

1. The language of the proposed rule is included as an attachment to the Report of the Insurance Disclosure Task Force (June 2, 2006), a link to which is posted on the CDCBA web site, and which can be downloaded from the State Bar web site at the URL http://calbar.ca.gov/calbar/pdfs/public-comment/2006/Insurance-Disclosure_Agenda.pdf.

2. *Ibid.*

3. *Ibid.*

This Resolution: Consistent with the position taken by the Conference of Delegates of the State Bar in 1993, this resolution urges the State Bar and the Judicial Council not to adopt the proposed rules. Instead of the proposed rules, this resolution urges the State Bar to determine why active members of the State Bar in private practice do not maintain LPL coverage; to evaluate whether the establishment of a captive LPL carrier would achieve coverage of all active members in private practice; and, if so, to propose the enactment of appropriate legislation.

The Problem: Setting a precedent for the regulated professions, the proposed rules will require a lawyer in private practice to publicly disclose to the State Bar, and to disclose to every client, whether or not he or she is covered by malpractice insurance – and to keep those disclosures current. While offered as a “consumer information” proposal, the indirect effect of the proposed rules will be to force uncovered lawyers to obtain and maintain malpractice insurance, while directly imposing a substantial notification burden – both immediate and ongoing – on all lawyers in private practice.⁴

The most important obligation lawyers owe their clients is honesty. The proposed mandatory disclosure of the mere existence or non-existence of malpractice coverage is antithetical to the fundamental fiduciary duty of honesty. The proposed mandatory disclosures fail to explain the intricacies of insurance coverage, and “public education” groups will not solve the problems created by the current proposal. Further, the proposed mandatory disclosures may create a false sense of security that will engender a host of unintended consequences.⁵

Disciplinary rules should not be imposed on us as “chicken soup.” With no showing of compelling need for regulation, the proposal should be rejected.

IMPACT STATEMENT:

This resolution will not affect any other law, statute, or rule.

AUTHOR AND/OR PERMANENT CONTACT: J. Anthony Vittal, The Vittal Law Firm, 1900 Avenue of the Stars, Suite 2500, Los Angeles, California 90067-4506. Telephone: (310) 339-2520; eFax: (603) 484-5374; tony.vittal@abanet.org. Diane L. Karpman, Karpman & Associates, 9200 Sunset Boulevard, Penthouse 7, Los Angeles, California 90069-3502. Telephone: (310) 887-3900; Fax: (310) 887-3901; karpethics@aol.com.

4. In addition, the proposal applies without exception to every member who is representing clients, wherever the member may be located, without regard to where the client may be located. Thus, the proposal applies to the 18.3% of the State Bar membership who practice outside California and may be subject to different and/or inconsistent obligations in their “home” jurisdictions.

5. Given the principle in fiduciary duty law that any disclosure, if made, must be sufficiently complete as not to be misleading, a requirement that a lawyer disclose to a prospective or continuing client the “absence” of LPL insurance, if there is no coverage for any part of the lawyer’s engagement, despite the existence of an LPL policy otherwise covering the lawyer, arguably requires the lawyer to disclose that fact as well, with a discussion of the reasons for the exclusion (which may be beyond the particular lawyer’s competence, thus arguably necessitating the engagement of coverage counsel for the purpose of making the disclosure). Those are unnecessary and unwarranted burdens to impose on any lawyer.

RESPONSIBLE FLOOR DELEGATES: J. Anthony Vittal and Diane L. Karpman