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ALI Restatement Should Not Reflect Aspirational Proposals

By **Laura Foggan** (May 17, 2018, 3:03 PM EDT)

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The American Law Institute's Restatement of the Law on Liability Insurance has been criticized for overreaching by proposing innovations in the law that should reside with legislators, not a private organization publishing restatements of the law. It contains many provisions that conflict with the common law or statutory law, or that establish new rules where no law exists. One of the most dramatic changes proposed for insurance law is Section 12(1), which sets out a new rule imposing liability on an insurer for defense counsel's "negligent act or omission" where the insurer "fails to take reasonable care" in selecting defense counsel and defense counsel's negligence "is within the scope of the risk that made the selection of counsel unreasonable."

This proposal would make insurers gatekeepers over attorney competence and the adequacy of attorneys' malpractice coverage. It has no support in existing case law and suggests assigning to insurers responsibilities that the legal system already places elsewhere. Section 12(1) is an innovation that would draw the ALI deeply into an ongoing public policy debate. It is an example of why this restatement is so controversial.

The official comments to Section 12(1) state that: "[w]hat constitutes negligence in the selection of defense counsel is a fact-specific question that turns on the insurer's efforts to assure that the lawyer has adequate skill and experience in relation to the claim in question, as well as adequate professional liability insurance."[1] The proposed draft restatement offers an illustration of liability under this new rule, where an insurer retained defense counsel later shown to have a substance abuse problem contributing to mishandling of the case. But this experimental approach would alter the law and public policy on who determines attorney competency and the adequacy of malpractice coverage.

Throughout the legal profession, there are well-established avenues for oversight of attorneys through the bar licensing process, which is equipped to address issues presented by impaired attorneys and others who should not be practicing law. Similarly, existing professional responsibility rules require attorneys to accept only those assignments for which they are competent.[2]

With respect to the adequacy of attorney malpractice coverage, there is no standard that has been agreed upon by attorney licensing boards or state legislatures. Several states have considered proposals for mandatory attorney malpractice insurance and rejected them, citing concerns about the affordability of insurance and whether such mandatory insurance requirements may invite frivolous lawsuits. Only

Oregon and Idaho require attorneys to carry liability insurance. About half of the states have elected to adopt disclosure requirements, under which lawyers in private practice must certify to the licensing agency whether they carry and will maintain malpractice insurance, information which may be made publicly available. But nearly half do not have any regulation in place, and a number of those states have expressly considered and rejected any regulation of attorney malpractice insurance. Certainly, there is no consensus or clear guidance on what would constitute adequate attorney liability coverage, with respect to amounts or policy terms.

Whether and to what extent attorneys must have malpractice insurance is a matter of public policy, best addressed by legislatures, not the ALI or — as the restatement proposes — insurers under the guise of a new rule imposing liability on them for retaining defense counsel without "adequate professional liability insurance." The ALI should not adopt a restatement provision that lacks any support in existing law and gets ahead of an important, ongoing policy debate.

A lot is at stake. ALI Restatement Section 12(1) would expressly transform insurers into gatekeepers, requiring them to second-guess licensing board decisions about attorney competence and public policy questions about adequate malpractice insurance. It would change the rules about determining when an attorney is competent for the task and what liability insurance is "adequate" for attorneys' professional activities. The restatement would be setting policy that legislators have declined to make, and overriding practices that state licensing boards have developed to address competency issues arising in sensitive settings such as attorney impairment.

When the American Law Institute meets next week to consider whether to give final approval to the proposed Restatement of the Law on Liability Insurance, ALI members should take note of provisions such as Section 12(1), which would embroil the ALI in policy questions that are far afield from its mission in publishing restatements of the law. This restatement should not be approved in its present form, because it continues to reflect aspirational proposals in addition to, or in place of, settled insurance law.

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Disclosure: The author serves as the insurance industry liaison to the ALI Restatement of the Law on Liability Insurance project.

[1] See ALI Restatement of the Law, Liability Insurance: Proposed Final Draft No 2, Section 12, cmt. b.

[2] See Model R. Prof'l Conduct, Rule 1.1 (lawyer must provide "competent representation to a client," requiring "the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation").