

OPEN SESSION AGENDA ITEM

703 DECEMBER 2017

DATE: November 13, 2017

TO: Members, Board of Trustees

FROM: Leah Wilson, Executive Director

SUBJECT: Establishment of Malpractice Working Group Pursuant to B & P Code § 6069.5 (a)

EXECUTIVE SUMMARY

Business and Professions Code section 6069.5, enacted as part of the 2018 State Bar fee bill (SB 36, Stats. 2017, ch. 422) directs the State Bar to conduct a review and study regarding errors and omissions insurance for attorneys licensed in California. Areas of study include the availability of insurance; measures for encouraging attorneys to obtain insurance; recommended ranges of insurance limits; the adequacy of the disclosure rule regarding insurance, and; the advisability of mandating insurance for licensed attorneys. The State Bar is required to report its findings to the Supreme Court and the Legislature by March 31, 2019. The most effective means to conduct this review and develop recommendations is to convene a working group composed of members with wide ranging expertise. This item requests that the Board: 1) authorize the working group; 2) appoint Randall Miller, current Chair of the Bar's Professional Liability Committee, to chair this working group; and 3) and direct staff to work with Mr. Miller and the Chair and Vice-Chair of the Regulation and Discipline Committee to develop the working group charter and recommendations for working group membership to be presented to the President of the Board of Trustees.

BACKGROUND

Senate Bill 36 added Section 6069.5 to the Business and Professions Code, directing the State Bar to conduct a review and study regarding errors and omissions insurance, and to report its findings to the Supreme Court and Legislature by March 31, 2019. Specifically, Section 6069.5 provides as follows:

6069.5. (a) In recognition of the importance of protecting the public from attorney errors through errors and omissions insurance, the State Bar shall conduct a review and study regarding errors and omissions insurance for attorneys licensed in this state. The State Bar shall conduct this review and study, which shall specifically include determinations of all of the following:

(1) The adequacy, availability, and affordability of errors and omissions insurance for attorneys licensed in this state.

- (2) Proposed measures for encouraging attorneys licensed in this state to obtain and maintain errors and omissions insurance.
 - (3) The ranges of errors and omissions insurance limits for attorneys licensed in this state recommended to protect the public.
 - (4) The adequacy and efficacy of the disclosure rule regarding errors and omissions insurance, currently embodied in Rule 3-410 of the Rules of Professional Conduct.
 - (5) The advisability of mandating errors and omissions insurance for attorneys licensed in this state and attendant considerations.
 - (6) Other proposed measures relating to errors and omissions insurance for attorneys in this state that will further the goal of public protection.
- (b) The State Bar shall report its findings under this section to the Supreme Court and the Legislature no later than March 31, 2019.
- (c) The State Bar may consider any past studies, including, but not limited to, any relevant actuarial studies, and any current information that is available to the State Bar from other entities, such as the American Bar Association, regarding errors and omissions insurance.

DISCUSSION

The most effective approach to conduct a thorough study of the type envisioned by Section 6069.5 is to convene a working group composed of members of wide ranging expertise and perspectives. Staff recommends the Board of Trustees authorize the formation of the Malpractice Insurance Working Group, charged with undertaking the mandated review and study. Staff further recommends the appointment of Randall Miller to chair the working group. Mr. Miller is the current chair of the State Bar's Professional Liability Insurance Committee. The dissolution of that committee is addressed in a separate item before the Board today. Mr. Miller and staff, subject to the approval of the Chair and Vice-Chair of the Regulation and Discipline Committee, will develop the working group's charter, the criteria for categories of expertise required of members of the working group to ensure a broad range of interests are represented, and, in consultation with the Supreme Court, the Legislature, and other relevant stakeholders, develop recommendations for members of the working group to present to the President of the Board of Trustees. The Board President will make final recommendations for working group composition to the Board at its January 2018 meeting.

FISCAL/PERSONNEL IMPACT

Staff will be assigned to coordinate and support the work of the working group, and to compile the findings of the review and study in preparation for submission to the Supreme Court and the Legislature. Staff time and working group costs, including meetings and travel, will be included in budget revisions being made for final budget submission in February 2018.

RULE AMENDMENTS

None.

BOARD BOOK IMPACT

None.

STRATEGIC PLAN GOALS & OBJECTIVES 2017-2022

Goal: 1. Successfully transition to the “new State Bar”— an agency focused on public protection, regulating the legal profession, and promoting access to justice.

Objective: (c): Implement and pursue governance, composition, and operations reforms needed to ensure that the Board’s structure and processes optimally align with the State Bar’s public protection mission.

RECOMMENDATION

Staff recommends that the Board of Trustees approve the following resolution:

RESOLVED, that the Board of Trustees authorizes the formation of a Malpractice Insurance Working Group to undertake the review and study mandated by Section 6069.5 of the Business and Professions Code; and it is

FURTHER RESOLVED, that the Board of Trustees appoints Randall Miller to chair the Malpractice Insurance Working Group; and it is

FURTHER RESOLVED, that the Board of Trustees directs staff to work with Mr. Miller to develop, subject to the approval of the Chair and Vice-Chair of the Regulation and Discipline Committee, the working group’s charter, the criteria for categories of expertise required of members of the working group to ensure a broad range of interests are represented, and, in consultation with the Supreme Court, the Legislature, and other relevant stakeholders, recommendations for members of the working group by the Board of Trustees at its January 2018 meeting.

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Randall A. Miller has 33 years' experience as a litigator focusing on defending and counseling professionals, financial institutions, corporations, directors and officers and insurers. He has extensive litigation and trial experience in state and federal courts in a broad variety of matters. His legal malpractice cases have included a range of underlying litigated matters arising out of intellectual property/patent, bankruptcy, class action, family law, personal injury, products liability, and trusts and estates, and virtually every form of commercial transaction. Mr. Miller has 11 published State and Federal appellate decisions and numerous non-published opinions. He has been retained by law firms ranging from sole practitioners to multi-office/multi-national firms. He regularly handles private and industry arbitrations, as well as attorney ethics counseling,

fee disputes and arbitrations, risk management/loss prevention, insurance coverage and underwriting, and claim monitoring.

Additionally, Mr. Miller has significant experience representing financial and insurance agents and brokers in claims ranging from failure to procure insurance to IRC 412i, 419, defined benefit plans, deferred compensation claims, to suitability, selling away, churning, trade secret and employment claims. Much of that practice involves claims administered by FINRA. He has also handled MPL matters involving architects, engineers, design professionals, actuaries, appraisers, and landscape engineers, among other professionals, as well as public/private D/O claims and not-for-profits.

Mr. Miller has an exceptional perspective on the business needs and goals for insurer clientele, and is keenly aware of insurer operations, organization, and practice, including underwriting, claims adjustment and reporting, policy terms and coverage, bad faith exposure, insurer v. insurer disputes, insurance finances and reserving, and actuarial operations.

AFFILIATIONS, ACTIVITIES AND ACCOMPLISHMENTS

Since 2010, Mr. Miller has served as the Chair of the California State Bar Committee on Professional Liability Insurance, which oversees the State Bar-sponsored lawyers E&O insurance program, administered by Marsh and underwritten through Arch; he has been a member since 2004. He is one of a handful of lawyers chosen to represent California superior and appellate court Judges and Justices before the Commission on Judicial Performance, the entity charged with enforcing California's Code of Judicial Ethics. In addition, Mr. Miller is a member of the Board of Directors for Special Needs Network, Inc.

Mr. Miller regularly authors articles on professional malpractice, risk management and loss prevention, malicious prosecution and ethics, and is a frequent speaker at bar associations, practice related groups, and client-sponsored events focusing on professional liability.

Mr. Miller has been named to the list of *Southern California Super Lawyers* every year since 2004.