

OPEN SESSION AGENDA ITEM

703 FEBRUARY 2018

DATE: February 16, 2018

TO: Members, Regulation and Discipline Committee
Members, Board of Trustees

FROM: Linda Katz, Principal Program Analyst
Office of Research and Institutional Accountability

SUBJECT: Adoption of Charter and Appointment of Members to Malpractice Insurance Working Group

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. At its November 2017 meeting, the Board of Trustees authorized the formation of the Malpractice Insurance Working Group to undertake this review and study, and appointed a chair to the working group. This item requests that the Board: 1) approve the working group charter; and, 2) appoint members to the working group.

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. The full text of Section 6069.5 is provided as Attachment 1.

Issues that Business and Professions Code 6069.5 direct the Bar to evaluate 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.

At its November 2017 meeting, the Board of Trustees authorized the formation of the Malpractice Insurance Working Group to undertake the mandated review and study. At that time, the Board also appointed Randall Miller to chair the working group and directed 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 Chair of the Board of Trustees.

DISCUSSION

The attached charter for the Malpractice Insurance Working Group (Attachment 2) has been developed in accordance with the Board's directive from November 2017. The charter seeks to ensure that a broad range of interests is represented, and outlines the work to be undertaken by the working group, as well as the makeup of the working group and the source for each nomination and appointment.

The makeup of the working group was developed with input from the Supreme Court, the Legislature, the Board Chair, and the Chair and Co-Chair of the Regulation and Discipline Committee. Great care was taken to ensure that the concerns of the Legislature and legal consumers, as well as practitioners and insurance industry representatives, would be considered. The proposed list of working group members, provided as Attachment 3 for consideration by the Board of Trustees, reflects nominations and appointments from the groups identified in the charter, and will help to ensure that the voices of all interested parties are represented in the discussion of these important issues.

Six meetings have been scheduled over the course of the next year, alternating between the State Bar's San Francisco and Los Angeles offices. During these meetings, the working group will review and consider past studies that have been undertaken; hear from representatives of other jurisdictions that have implemented regulations regarding legal malpractice; consider input from experts in the areas of ethics, legal malpractice, and insurance; consider input from other interested parties, including legal consumers; and, undertake additional study of these issues. Staff will coordinate the preparation of a report for the Board to present to the Supreme Court and Legislature by the statutory deadline.

FISCAL/PERSONNEL IMPACT

One staff person from the Office of Research & Institutional Accountability has been assigned to coordinate 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. Working group costs will depend in part upon the selection of members, the distance from which they need to travel, and other factors that cannot be precisely calculated at this point. However, considering the number of meetings and estimating a mix of members traveling from around the state yields an approximate cost of \$25,000. This amount, as well as staff time, will be addressed via budget amendment.

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

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

RESOLVED, that the Board of Trustees approve the attached charter for the Malpractice Insurance Working Group; and it is

FURTHER RESOLVED, that the Board of Trustees appoint the members to serve on the Malpractice Insurance Working Group; the list will be provided for discussion at the meeting.

ATTACHMENT(S) LIST

- A.** Business and Professions Code Section 6069.5
- B.** Draft Charter of the Malpractice Insurance Working Group



STATE OF CALIFORNIA
AUTHENTICATED
ELECTRONIC LEGAL MATERIAL

State of California

BUSINESS AND PROFESSIONS CODE

Section 6069.5

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.

(Added by Stats. 2017, Ch. 422, Sec. 26. (SB 36) Effective January 1, 2018.)

MALPRACTICE INSURANCE WORKING GROUP

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, and to report its findings to the Supreme Court and the Legislature by March 31, 2019. The Board of Trustees authorized the formation of the Malpractice Insurance Working Group, to conduct this review and develop recommendations for consideration by the Board.

The Malpractice Insurance Working Group shall:

- Conduct a review and study regarding errors and omissions insurance, as specified in Section 6069.5 of the Business and Professions Code, in order to determine each 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.
- Consider any past studies, including, but not limited to, any relevant actuarial studies, and any current information available from other states, public entities, and bar associations, such as the American Bar Association, regarding errors and omissions insurance.
- Convene meetings at which information from experienced attorneys, insurance industry representatives, experts and members of the public with knowledge of relevant issues, representatives from other jurisdictions that have implemented, or considered implementation of, regulations regarding malpractice insurance, and other interested parties, will be considered.
- Report its findings to the Board of Trustees
 - The report to the Board of Trustees may include recommendations that the Board may consider in its report of its findings that is due to the Supreme Court and Legislature no later than March 31, 2019.

The Malpractice Insurance Working Group shall be appointed by the Board, and shall include the following representatives (in addition to the Chair):

Attachment B – Draft Charter

Interest Group/Stakeholder	No. of Members	Nomination/Appointment Source
Board of Trustees	Up to 4	Board of Trustees
Assembly Judiciary Committee	1	Assembly Judiciary Committee
Senate Judiciary Committee	1	Senate Judiciary Committee
California admitted malpractice litigators (one defense, one plaintiffs)	2	California Lawyers Association
Solo/Small Firm practitioner	1	Local Bars
Sections Representative	1	California Lawyers Association
Ethics Attorney	1	Committee on Professional Responsibility and Conduct
Consumer Advocate (not licensed attorney)	2	Public Citizen (1) To be determined (1)
CA admitted insurance carrier	1	ABA Standing Committee on Lawyers Professional Liability
CA admitted insurance broker (who places policies with solo/small firms)	1	ABA Standing Committee on Lawyers Professional Liability
Affinity Bar	1	Minority Bar Coalition
Judge	1	California Judges Association
Total	14-17	