

Malpractice Insurance Working Group
Subcommittee on Mandatory Malpractice Insurance
Report and Recommendations to the Malpractice Insurance Working Group

The Subcommittee on Mandatory Malpractice Insurance makes the following recommendations:

1. A mandatory captive fund for malpractice insurance should not be established;
 - a. California is a far more complex insurance market than those in which a captive fund has been established, as evidenced by the following factors:
 - i. Number of licensed attorneys;
 - ii. Areas of practice; and
 - iii. Number of large firms, including national and international firms, headquartered in the state.
 - b. Insurance is readily available on the private market;
 - i. The private insurance market provides insurance tailored to the specific needs of attorneys and firms;
 - ii. A mandatory captive fund would disrupt the private market, which might negatively impact attorneys;
 - While a mandatory captive fund might provide reduced premiums for solo attorneys and small firms, total premiums for large firms would likely increase, potentially driving large firms out of California.
 - iii. Mandatory captive funds were founded during “hard” insurance markets, to fill a need that does not currently exist in California.
 - c. It would be difficult to fund a mandatory captive fund in California;
 - A significant reserve, potentially as high as \$200 million, would be required.
2. Malpractice insurance should be required as a condition of licensing, but further study is necessary prior to implementation of this requirement;
 - a. Malpractice insurance helps to protect victims of attorney negligence;
 - i. Many clients, especially less sophisticated clients who are likely to hire solo practitioners, believe that malpractice insurance is currently required;
 - ii. Plaintiff’s malpractice attorneys rarely pursue action against uninsured attorneys;
 - Even when there is a viable cause of action, barriers to collecting judgments discourage attorneys from filing cases.
 - b. Further study is required, and should include the following elements:
 - i. Annual licensing fee statement to require attorneys to report the following information:
 - a) Firm size;
 - b) Areas of practice;
 - c) Whether they are insured;
 - If not, reason for lack of insurance; and
 - d) Additional information, to be determined.
 - ii. A professional survey firm to be retained to survey both attorneys and the public regarding legal malpractice insurance;

- Survey data to be analyzed in conjunction with data obtained from required reporting on annual fee statement.
- iii. Malpractice Insurance Working Group to reconvene to consider the research results and make final recommendations regarding malpractice insurance.
- 3. Interim measures to be implemented pending implementation of mandatory insurance:
 - a. Increased consequences for uninsured attorneys who commit malpractice:
 - i. Statutory amendment to require attorneys to report all malpractice verdicts against them; and
 - ii. Disciplinary sanctions for attorneys' failure to satisfy a final, non-appealable malpractice judgment.
 - b. Strengthen disclosure requirements regarding attorneys' lack of insurance:
 - i. State Bar to develop mandatory disclosure language, to be provided in a separate notice to client;
 - ii. Require written client acknowledgement of notice;
 - iii. Notice to be required if attorney is insured at time of retention but becomes uninsured during the course of representation.
 - c. Require all attorneys to complete programs that provide educational tools and self-assessment for practice management and risk reduction;
 - i. Protecting the public is best served by preventing harm in the first place;
 - ii. Insurers might promote a program that includes the mandatory loss prevention activities with coverage, thereby expanding the reach of coverage if not mandated.

One member of this subcommittee submits a dissenting recommendation with regard to Item 2, above.

1. Malpractice insurance to be required as a condition of licensing for all attorneys that represent private clients;
 - a. Further study, including a survey, would cause an unnecessary delay in instituting this requirement;
 - b. Insurance to be obtained in the private market;
 - c. Provide funding to subsidize the cost of insurance for attorneys who provide pro bono and very low costs services.