

Comments on the draft MIWG report to BOT:

Page 4, Para. 2 and Footnote 2: This paragraph and footnote referencing the Fortney position should be deleted. First, it DOES NOT dispute the previous paragraph which shows that attorneys consider MI unaffordable. It also does not provide data to show that it would reduce the number of attorneys that provide pro bono or low bono services. That, however, was suggested by anecdotal evidence heard by the MIWG (for example, I believe it was Diane Minnich from Idaho who testified that 51% of lawyers over 50 gave up practice because of the insurance requirement, and we heard from several individual attorneys and legal services providers regarding the negative impact the mandatory MI would have on solo practitioners, part-time lawyers, pro bono and low bono work). Nevertheless, there is no hard data to support this either, just a serious concern by the MIWG which does not seem to be properly expressed anywhere in the report that was drafted.

The Fortney logic is severely flawed. It would be extraordinarily rare for a solo attorney to bill 1750 hours. Rather, a 2016 study by Clio found that solos billed only 2 hours a day. Assuming 5 days a week at 50 weeks (allowing for weekends off and 2 weeks vacation), that would be an average of 500 hours per year ($2 \times 5 = 10 \times 50 = 500$). That is WAY OFF of 1750 hours. Furthermore, it does not take into account those attorneys who provide low bono services and pro bono services which would not otherwise fall within the gambit of a qualified legal service provider, or attorneys who are already working part-time or winding down their practices. Thus, it is not simply an issue of reducing the number of attorneys, it is an issue of how much time solo attorneys can provide pro bono and low bono services if they are required to pay for MI insurance. By way of example, I billed about 7 hours total last year and spent much more of my time providing pro bono legal services to family. This means that my \$1200 year policy (already adjusted for part-time) reduced my billable rate by \$171/hour on an already low rate. It may be an extreme example, but there is a real difference between Fortney's flawed "guess" of \$3-\$5 an hour and the reality of solo practice. She also fails to acknowledge that many solo practitioners are making so little that they can barely afford the costs of doing business as well as their own personal expenses in a high cost of living state like CA. These types of attorneys are not flush with cash nor can they simply charge their clients more money when they already have difficulty paying their legal bills.

I consider this part of the analysis, therefore, deeply flawed. I cannot simply charge more when the rate I charge is already the market rate. Frankly, it is easier for me to stop paying for MI altogether at this point, and only do so because I am currently a law corporation. We should not even reference this article. I believe the MIWG made clear its concerns with it and the problems associated with it during our meetings.

Page 4, Para. 3: Something should be added that this availability of insurance in CA meant that it was agreed that a captive market was not necessary nor appropriate for consideration at this time. See the first recommendation of the subcommittee which stated that "There is no malpractice insurance crisis or other market condition that would support creation of a captive model."

Page 4, Para. 4: After hearing several of the MIWG members make it clear during several meetings that MI protected the insured (attorneys) more than it protects the third party (clients), I have a real problem

with the statement at the end of the paragraph which references “the protection afforded by hiring an insured attorney.” This is highly misleading and should be deleted.

Page 5, full Para. 3: The font size needs to be reduced.

Page 5, full Para. 5: As mentioned above, MI like all insurance is for the insured (not for the direct benefit of third parties). Therefore, the statement that a certain amount of coverage “is reasonably sufficient to protect members of the public who are served by attorneys who currently do not purchase insurance” contradicts what we learned during our MIWG meetings. Furthermore, we failed to establish any evidence/data that members of the public are, in fact, being harmed by any lack of MI insurance held by attorneys (we even heard testimony from Robert Hille of New Jersey that the bar there had done extensive studies of the market and found no evidence of a link between no coverage and victims of malpractice being harmed). I note that the report states nowhere within its text this often repeated concern raised by multiple members of the MIWG that we have no data that supports the existence of a current problem that needs to be fixed. One or two pieces of anecdotal evidence is the weakest form of evidence there is to establish the existence of a problem – one client upset about an outcome and one plaintiff’s attorney saying they don’t take cases where the attorney is not insured. A single incidence does not prove a general statement. Therefore, one simply cannot argue with any persuasiveness that the failure of some lawyers to carry MI is causing harm to the public. Perhaps we should have used the survey to try and get that data, but we did not do so – instead wasting the opportunity to find out if the public thinks lawyers already have MI or should have it.

When we voted on things at our meetings, we were not parsing every word presented since there was not the time to do so. At the end of our last meeting we were running out of time and having a very hard time coming to agreement on the exact language of the recommendations. The \$100k/\$300k was a no-brainer and folks were ready to move on and leave, but it also failed to include the subcommittees recommendation that MI be offered without consuming/burning limits. I don’t think anyone even paid attention to the misleading implication that a minimum amount may be determined to be a public protection issue. The statement is misleading because it suggests that MI is necessary in a minimum amount to protect the public, which would otherwise suggest that the MIWG supported mandatory minimum MI. That is NOT what the MIWG concluded. Thus, we should remove the public protection reference in the recommended minimum amounts which were identified solely for the purpose of having them set in the event the MIWG thought that MI should be mandatory, and we should include the consuming/burning limits part of the recommendation.

Page 6, Para. 2: The beginning of the paragraph can be misleading, especially if the rest of the paragraph is not read closely. It states that the MIWG “considered two principal benefits of the rule” (re disclosure). However, the two identified benefits that follow have not been established as being beneficial at all. They are merely assumptions or beliefs. We need to add the term “assumed” or “believed” between the terms “two” and “principal” since that is all they are at this time.

Page 6, Para. 3: While it is not incorrect to reference South Dakota, it is not an apples to apples comparison to California given the significantly higher premiums charged to California lawyers. More

importantly, the numbers in our own survey show that **only 7% of active California lawyers are not insured** (see p. 8 of the report – 13,208 out of 189,509 = 7%). That is a 93% insured rate for attorneys who would possibly need insurance in California, compared to 94% of South Dakota after its rule implementation. We are not talking about a real difference here except the volume of attorneys in both states (SD was roughly 2600 active attorneys and CA with nearly 190,000) and the breadth of practices in CA vs South Dakota, but these are never pointed out in the report. Given that CA has already put a disclosure rule in place and, presumably, any increase in covered attorneys has already occurred because of that, citing to South Dakota seems to be completely unhelpful on its face. This is especially true since we don't have a proper before and after measurement for our own disclosure rule and its impact upon how many more attorneys acquired MI after it went into effect.

Page 6, Para. 4 and Para. 5: Again, the reference to the “benefit” should have the word “assumed” before it so as not to be misinterpreted. The sentences in the two paragraphs do not logically follow each other. The reference to “claims made” concerns should follow the sentence about concerns regarding sufficiency of the notice. Providing the disclosure on a separate page should follow the sentence about the disclosure being found in the body of the retainer agreement. The discussion about drafting improved model disclosure language at the end of 5 should instead follow the discussion about the sufficiency of the current notice language. In other words, these should either be combined into a single paragraph in logical order or separated into a paragraph on sufficiency and a paragraph on location of the disclosure.

Page 7, Para. 1: Referencing the ABA Model Court Rule, the report fails to mention any of the testimony on this subject (Saul Berkovitch, Alice Mine, Mary Andreoni or Andrew Fergel) or an important part of the MIWG discussion: namely, the State Bar raised concerns as to how such a requirement could be implemented and the cost in State Bar resources associated with reporting. These concerns are important, especially in light of there being no data to support whether such a rule change has any impact one way or the other or that the lack of MI is a problem has any data to support the claim that it negatively impacts public protection. The only data we have merely suggests that the public thinks the info should be on the State Bar website, but not that it would fix any problem that has been identified. We are talking about a likely very expensive measure to address the 7% of attorneys who are not insured (and may remain uninsured even AFTER such a rule is put into place given the high costs of premiums in California and the other reasons attorneys do not acquire MI).

I would also note the failure to discuss any of the problems related to website disclosure that Alice Mine of North Carolina discussed. North Carolina had a disclosure rule in place from 2004-2010, where attorneys also had to report to the bar if they were in private practice and whether they had MI. This info was made available on the website. There was a compliance procedure like annual dues and CLE requirements with administrative suspension. However, there was no way to enforce the update requirement and updating MI status was rare. It cost N.C. (a much smaller attorney population) \$25k to implement in addition to personnel expenses for recordkeeping and phone calls. It was determined after 6 years it was not performing any useful function. The information was not sufficiently useful or reliable

for public use. It was only good for the day it was reported. They had to include a disclaimer re: the accuracy, especially in light of claims made policies, limits differentials, high deductibles, declining limits, etc. It slowed down the processing of dues payments and they saw no increase in the number of lawyers purchasing insurance. Therefore, it was deemed to be not a good use of limited resources.

In addition, Mary Andreoni of Illinois testified that their website disclosure requirement had failed to produce any indication of impact – there was no identifiable increase in the number of attorneys purchasing MI since the rule went into effect in 2005.

While the MIWG may have agreed that an attorneys insurance status should be posted on the State Bar website, there remain many questions unanswered including the cost in resources and consequences for non-compliance. These additional questions should at least be identified in the report.

Page 7, last Paragraph and Footnotes 10 and 11: Again, the reference to public protection at the end of line 2 and beginning of line 3 needs to be qualified – “believed public protection” or “assumed public protection.” There is a belief, not supported by any data, in support of the remainder of the paragraph and its claims. These include statements presented as fact related to lack of recourse by clients, plaintiffs attorneys, and likelihood of recovery. We cannot credibly put such statements as if they are fact in a report that is supposed to be unbiased. Anecdotal evidence is the weakest evidence that one can have. As Senator Lockyer was often quoted as saying, the plural of anecdote is not evidence. We quite simply have no evidence.

The footnotes must be omitted for this same reason. I am particularly concerned with the bias presented by citing to articles that are not supported by any meaningful data, and definitely not California data. For example, on page 3 of the Kritzer/Vidmar document it states that “a significant proportion of legal practitioners serving private clients are uninsured.” As we know, our own data does not bear this out, as only 7% of the active attorneys in California report themselves as being uninsured. There is not even a citation to this statement by Kritzer/Vidmar. There is a reference to the 2001 survey of California attorneys showing 18% as uninsured. This number has clearly dropped. I would also point out that the Kritzer/Vidmar article admits that there is limited literature of empirical research on the issue of legal malpractice. The limited literature was itself leaning toward the anecdotal given its very limited survey scope.

None of these concerns about the Kritzer/Vidmar article is mentioned in the MIWG report. Rather, this source is cited for the conclusion that clients who are harmed by attorneys’ malpractice generally have little recourse if their lawyers are uninsured because plaintiffs’ malpractice lawyers are reluctant to pursue claims against uninsured lawyers. Page 5 of the article is referenced for this conclusion. I have thoroughly read page 5. The only reference even close to this is found in footnote 20, which merely states without reference to any authority “In many instances it may be that the nature of the consequences of medical negligence is temporary and so limited ... that it is uneconomical to pursue a claim.” This clearly does not even relate to legal malpractice claims, and is merely an opinion asserted by the others without supporting data. The following footnote references legal malpractice, but not for the

position asserted as citation in footnote 10. It merely discusses how a problem can be remedied in such cases.

With respect to the Levin article, it is asserted for the authority that, even if a client is successful with a claim against a lawyer for malpractice, the likelihood of recovering a substantial settlement or judgment is low. Page 32 is referenced for this statement. Reviewing page 32, however, it first simply makes an assumption that tens of millions more dollars would be paid annually to compensate clients. This is supported only by footnote 174, which provides, without any reference to authority or supporting data, that “[o]f course, in some cases uninsured lawyers pay out-of-pocket to settle malpractice disputes. But for lawyers who cannot afford to purchase insurance, it seems unlikely that if they make a payment, it will fully compensate the client for the loss.” I am not even going to address the flawed logic to this statement based on testimony heard by the MIWG and discussions we had. The point I need only make that citing to this mere opinion in a manner that suggests it is authority for the proposition asserted is improper and misleading. It should be deleted.

The failure to identify any other authority that contradicts this position is also of great concern. If we are going to reference authority that has no data supporting it, we should also reference the New Jersey State Bar doing extensive studies that show no evidence of a link between no coverage and victims of malpractice being harmed and that economically stressed lawyers and clients would be disproportionately impacted negatively by mandatory MI, as testified to by Robert Hille. The full analysis performed by the bar of New Jersey (not a unified bar and therefore more in line with California’s bar) is not even mentioned in this report.

Page 8, Para. 1: The very first sentence makes a claim unsupported by the authority noted in the footnote. I have no recollection of testimony or materials before the MIWG that indicated that “most European and common-law countries require lawyers in private practice to carry insurance.” When I review page 38 of the Kritzer and Vidmar article, it contains only a partial sentence and certainly does not support this factual assertion. The sentence should be deleted if we have no authority for the claim asserted as fact.

In addition, the inclusion of the reference to the Washington state report, while failing to include a discussion about or references to the other states that have looked at and rejected mandatory insurance is one-sided. In particular, the New Jersey report was much more detailed but there is no mention of its conclusions and recommendations. On the other hand, the Washington state report is fatally flawed by its complete failure to provide any supporting data for its underlying conclusion that uninsured lawyers pose a risk to clients and themselves, that clients of uninsured lawyers often have a difficult time obtaining compensation from those attorneys after a malpractice event, or that clients have a difficult time finding legal representation. Expressing concerns, opinions and recommendations for additional regulation based upon limited anecdotal evidence and unsupported by data is not how a state regulatory agency should be operating. We need to be held to a higher standard than this. Referencing a report that fails in this regard without explaining this and without referencing other states reports and conclusions appears biased and misleading.

Page 8, Para. 4: The first sentence is, quite simply, wrong. The table of uninsured attorneys (Table 1) shows that of 189,509 active lawyers in CA, 13,208 are uninsured. That is 7%. This is not “significant” by any measure I am aware of. The sentence should be deleted. It mischaracterizes the data and is not necessary. Let the data speak for itself.

Page 9, Para. 2: The first sentence once again makes a factual claim without any supporting data. Specifically, it states that claims are rarely pursued if an attorney is uninsured. The rest of the paragraph refers once again to the “opinion” of Prof. Levin previously cited and already explained to be significantly flawed as a basis to make a factual assertion. This entire paragraph is without support and should be deleted.

Page 9, Para. 3: While we can include the NORC study as an appendix, referring to it for any reason suggests it is helpful when it is not. It was flawed and failed to determine what the MIWG needed to learn – whether there existed a problem with public protection caused by uninsured lawyers. Those who are surveyed come into the survey with unknown biases and preconceptions about lawyers. They do not have the full understanding of the concerns associated with mandatory insurance that have presented to the MIWG, so an opinion whether MI should be required is of limited use to the MIWG. The same group may also state that every other licensed profession in California should be required to carry such insurance. I am deeply troubled with the reference to the study on this issue, especially when it is combined with what appears to be a very biased slant in the report that mandatory insurance is required to “protect the public.”

Page 9, Para. 4: The paragraph fails to address other concerns, such as the number of attorneys who would stop doing pro bono and low bono work (a number we do not have), attorneys who cannot raise their rates given their clientele, attorneys who are living on a very limited income in a high cost of living state and may have to give up practicing altogether, etc. There were a number of concerns raised, though there was only anecdotal evidence to support those concerns as well.

The fact that the report gives so little coverage to the concerns raised by the MIWG that prevented a majority from agreeing that mandatory insurance should be implemented in CA is highly disturbing. The report is written with a slant that one would clearly expect the MIWG could only reach one conclusion – a conclusion we did not reach. It suggests that the MIWG voted against mandatory insurance because a majority of attorneys took issue with it in public comments and testimony, which was hardly the reasoning of the MIWG who voted against it.

Page 10, full Para. 2: While it is true the MIWG concluded further study was necessary before any recommendation could be made, nowhere in the report does it identify those issues for which the MIWG repeatedly stated further study was needed. For example, it was repeatedly stated we needed data to establish there was a problem we would be fixing if we had mandatory MI, and that without that data and without identifying the actual problem it was impossible to fashion a remedy. Without this discussion of the data points needed and missing, this recommendation stands without any context whatsoever.

Page 10, Recommendations: These are all presented in a confusing fashion. If a recommendation was unanimously rejected by the MIWG, it should not even be included as a recommendation. To state a recommendation that was rejected by a majority of the MIWG is highly confusing. It is not a recommendation if it was rejected by a majority. Perhaps include the rejected recommendation in a footnote instead so it is not confused with actual recommendations. For example, re: mandatory MI, we should move 1 to a footnote, only list 2 and delete 3. With respect to Rule 1.4.2, we should delete 1.

The votes for all recommendations should be footnoted to clean it up and make it easier to read.