

**To: Members of the State Bar of California Malpractice Insurance Working Group**

**Date: February 20 2019**

**Subject: Comments on Draft Report to Board of Trustees**

Below is Jo-Anna Mendoza's February 19, 2019 memo, circulated to the Working Group by Chair Randy Miller on February 20, 2019, revised to add referenced paragraphs from the draft report in yellow, and to add Lisa Perrochet's supplemental comments in red.

**Page 4, Para. 2 and Footnote 2:**

Susan Saab Fortney, Associate Dean for Research and Faculty Development at Texas A&M University, School of Law, disputes this argument. Professor Fortney suggests that attorneys providing pro bono services should do so under the umbrella of legal services programs, which provide insurance coverage to volunteer lawyers. She also notes that premium costs can be absorbed by a relatively modest increase in hourly rates.<sup>2</sup>

<sup>2</sup> Susan Saab Fortney, *Mandatory Legal Malpractice Insurance: Exposing Lawyers' Blind Spots*. Unpublished manuscript of an article forthcoming in Volume 9, Issue II of *St. Mary's Journal on Legal Malpractice & Ethics*, p. 22- 24. Fortney notes that lawyers billing 1,750 hours per year would need to increase rates by \$2 per hour to cover an annual \$3,500 premium; assuming an annual premium of \$5,000 for California attorneys, rates would increase by less than \$3 per hour. An attorney who bills only 1,000 hours per year would need to increase rates by \$5 per hour to cover the cost of a \$5,000 annual premium.

This paragraph and footnote referencing the Fortney position should be deleted.

[I agree with Jo-Anna's points on this passage. I note also that this passage appears under the heading of Adequacy, Availability and Affordability, yet I don't remember our subcommittee discussing the Fortney article in our meetings, much less agreeing that it is authoritative, or representative of scholarly thinking on this topic. That concern alone, putting aside the more specific ones below, warrant taking out the reference to the article, to avoid unduly granting to it the imprimatur of the subcommittee.- LP]

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.

[An additional flaw in the article is the assumption that "umbrella" organizations providing insurance coverage exist for those offering pro bono and low bono services. Some may well exist for a few of the traditional areas of such work that may readily come to mind, but our committee discussed the fact that there are many ways that lawyers provide pro bono and low bono service that would not be provided through Public Counsel and similar organizations. This was confirmed by the anecdote of one member of the public who appeared in person to describe his work for the Electronic Frontier Foundation, which undertakes policy analysis and amicus briefing. That organization reportedly does not provide insurance for the volunteer lawyers who assist in various projects, and the same is almost certainly true for other public interest groups (religious organizations, animal rights groups, trade organizations, etc) who

benefit from the assistance of attorney volunteers. The Fortney article reveals a lack of understanding about the scope of pro bono and low bono services. -LP]

**Page 4, Para. 3:**

Although the issue of affordability is difficult to ascertain, as it is dependent on individual attorneys' perceptions of the necessity of coverage, the MIWG concluded nonetheless that legal malpractice insurance is readily available in California, and attorneys are able to obtain coverage at levels and with terms commensurate with their needs.

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."

[Agreed. The AAA subcommittee discussed the broad availability of coverage for those who want/need it in the context of agreeing there was no crisis such as that which precipitated Oregon's creation of a captive model scheme. The ready availability to those who find the price point commensurate with their anticipated liability exposure was not seen as a measure of what lawyers can afford to buy independent of their practice area and risks of exposure. The latest model luxury car is readily "available" to anyone who wants to buy such a car, but less expensive models are a rational choice for people who don't need the features offered by a luxury car—and a great many people rationally choose not to buy a car at all, because they can safely and efficiently conduct their daily business and meet their obligations to others without owning a car. The analogy is not perfect, but it merely highlights the general concept that ready "availability" does not support the conclusion that "therefore everyone should get one." The added notation that Jo-Anna suggests would head off any misleading implication from this paragraph of the report. - LP]

**Page 4: Section headed: "Proposed measures for encouraging attorneys licensed in California to obtain and maintain errors and omissions insurance."**

[I'm disappointed that this section does not include any reference to the concept of the State Bar sponsoring legislative changes that would provide "carrots and sticks" in tort law to encourage attorneys to purchase malpractice insurance. As has been discussed in the subcommittee, and as referenced in the Availability etc sub-subcommittee report, this is something that has been adopted in other contexts (auto liability/Prop 213, workers compensation insurance, contractor licensing). I suggest including some reference to undertaking further study of such ways to increase the purchase of malpractice insurance through lawyers' rational self-interest, as one part of the solution to undocumented by hypothesized problem of a significant number of attorneys causing harm to clients and being

unable to respond financially to cover amounts presented in legitimate claims. Lawyers have a greater understanding than the State Bar can have regarding their individual practice and the potential exposure for harming clients and facing liability, so rules that enhance an individual lawyers' evaluation of the risk they pose are arguably better than across-the-board, categorical mandates. – LP]

**Page 4, Para. 4:**

The MIWG agreed that attorneys should be encouraged to purchase legal malpractice insurance. The MIWG recommends that a professional communications firm be retained by the Bar to develop a strategy focused on currently uninsured lawyers, to educate them about the benefits of insurance and the risks of remaining uninsured. A communications strategy such as this should provide information about specialized policies offered by insurance carriers, including for newly licensed attorneys, those practicing part-time, and those with limited income from their law practice. A campaign focused on providing legal consumers with clear information about legal malpractice insurance, and about the protection afforded by hiring an insured attorney, would also serve to encourage attorneys to purchase insurance.

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.

[While I agree that professional liability insurance is designed to protect the lawyers who buy the insurance, and clients should not be viewed as “third party beneficiaries” of the contracts, I’m comfortable with the State Bar educating clients about the benefits of hiring an insured attorney so that the marketplace—and not State Bar mandates—provides an incentive for lawyers to buy insurance. I believe this is similar to having informed consumers who include liability insurance among the considerations they take into account when hiring a contractor for home remodeling, for example. – LP]

**Page 5: Section headed “The ranges of errors and omissions insurance limits for attorneys licensed in this state recommended to protect the public”**

[This section discusses the range of coverage recommended to protect “the public,” but that heading needs clarification. I recommend that the report add, “**consisting of clients who receive negligently provided legal services.**” The State Bar’s charge is to protect “the public,” but throughout the report “the public” implicitly refers to clients. In fact “the public” also would include lawyers, and all those who depend on a functioning legal system to protect the rule of law. The discussion of insurance limits needed “to protect the public” is really a discussion about limits needed “to protect clients who incur a loss due to legal malpractice.”

This is an important distinction, because measures could be proposed—mandating that all attorneys in all practice areas purchase \$5 million in coverage—that would incrementally ensure that each *client* whose lawyer falls below the standard of care would have excellent protection, but that would incidentally harm other members of the public, such as through the departure of some lawyers from the profession, and through the increased cost of legal services. In addition, without clarification, mandates might be imposed on the assumption that insurance protects clients more than it does—it does not protect against intentional acts and ethical lapses that cause harm but that are not within the insuring clause of any standard policy. – LP]

**Page 5, full Par 2.**

The MIWG reviewed information about minimum coverage requirements in jurisdictions that mandate insurance coverage. While Canada and other common-law and European countries mandate \$1 million or more of minimum coverage for attorneys, minimum coverage in the two U.S. states where insurance is required are significantly lower. Attorneys in Oregon are required to carry a minimum of \$300,000 per claim/\$300,000 annual aggregate coverage, and attorneys in Idaho are required to carry minimum coverage in the amount of \$100,000 per claim/\$300,000 annual aggregate.

[]This paragraph references limits required in Europe and in the two U.S. states that have mandatory insurance requirements. The unstated assumption is that *some* coverage is “required” to protect the public. To be transparent and not misleading, the subcommittee should consider an additional sentence at the end of this paragraph saying, “Many states, including California in the many prior studies it has undertaken, and including most recently New Jersey, have found that no minimum required coverage is needed to protect the public. The MIWG was presented with no data indicating that the public is not adequately protected in the states that do not have any mandatory insurance requirement.” – LP]

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

**Page 5, full Para. 5:**

The MIWG determined that, if legal malpractice insurance were required in California, minimum coverage of \$100,000 per claim/\$300,000 aggregate per year is reasonably sufficient to protect members of the public who are served by attorneys who currently do not purchase insurance. It is assumed that currently insured attorneys who work in higher risk practices or who represent clients with potentially greater losses are likely to maintain adequate insurance coverage, regardless of any mandated minimum imposed.

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:**

In evaluating the adequacy and efficacy of this rule, the MIWG considered two principal benefits of the rule: (1) increasing the number of insured attorneys, and (2) increasing information for consumers to make informed decisions when engaging a lawyer. Regarding the first benefit, it is difficult to determine whether mandatory disclosure has a significant impact on attorneys’ decisions to purchase insurance.<sup>7</sup> As in most states, California does not require attorneys to report to the State Bar whether or not they are insured; absent this information, the impact of mandatory disclosure rule cannot be measured, even if California attorneys were required in the future to report whether they are insured.

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:**

There is some evidence that a more stringent disclosure requirement may encourage attorneys to obtain malpractice insurance. South Dakota attorneys who do not carry insurance with at least \$100,000 of coverage are required to disclose their lack of insurance on their letterhead, and in every communication with their clients. South Dakota attorneys are also required to report to their state bar whether they are insured. Although rates of insurance coverage were not known before the disclosure rule was implemented, South Dakota now reports that 94 percent of attorneys in private practice are insured.<sup>8</sup>

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.

[Agreed. The comment above highlights, additionally, that there are practicing lawyers—and not just those in government or in-house practice—who do not realistically pose a threat of causing a loss to a client, or causing a loss that the lawyer will not be financially responsible for covering without insurance. – LP]

**Page 6, Para. 4 and Para. 5:**

With regard to the second benefit, the MIWG questioned whether the current rule is effective in providing information to legal consumers. In considering this question, the MIWG discussed the nature and timing of the disclosure. Concerns were raised about the sufficiency of the notice, and whether clients have enough information to make fully informed decisions. The

required disclosure of lack of insurance is often included within the body of a retainer agreement, and specific acknowledgment of this disclosure is not required.

Further, due to the “claims made” nature of malpractice insurance policies, although an attorney may honestly state that he is insured at the time of engagement, coverage might not be in place at the time a claim is made. The MIWG discussed requiring that the disclosure be provided on a separate page, and that explicit client acknowledgment be obtained. Drafting improved model disclosure language, to provide clear notice to clients, was also discussed.

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:**

The timing of disclosure was also a concern. Disclosure is not required until the time of engagement, after the client has decided to retain the attorney. Clients may be less likely to change their mind about hiring the lawyer after the decision has been made, when signing the retainer agreement may be considered a formality. Publicly available information on the State Bar’s website would provide this information to clients while they are “shopping” for legal services. The American Bar Association (ABA) Model Court Rule on insurance disclosure includes the publication of information by state regulators about attorneys’ insurance coverage status.<sup>9</sup> Following is a summary of the Model Court Rule: [text of rule omitted].

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:**

The MIWG reviewed information and testimony both in favor of and against requiring attorneys to carry legal malpractice insurance. The principal argument in favor of such a requirement is that of public protection. 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.<sup>10</sup> Even if they are successful, the likelihood of recovering a substantial settlement or judgment is low.<sup>11</sup> The one MIWG member who is a plaintiffs' legal malpractice practitioner confirmed that this was his experience. ([https://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/clientpro\\_migrated/Model\\_Rule\\_InsuranceDisclosure.pdf](https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/clientpro_migrated/Model_Rule_InsuranceDisclosure.pdf))

<sup>10</sup> Herbert M. Kritzer and Neil Vidmar, *When Lawyers Screw Up: Improving Access to Justice for Legal Malpractice Victims*. Lawrence: University Press of Kansas, 2018. p. 5.

<sup>11</sup> Leslie C. Levin, *Lawyers Going Bare and Clients Going Blind*, 68 Fla.L.Rev.1281(2016), p. 32. <https://scholarship.law.ufl.edu/flr/vol68/iss5/2/>

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.

[I strongly agree with this. There is simply no data on the extent to which it may be true 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.” **First**, clients who are harmed by malpractice do not always need a lawyer to obtain regress—lawyers may voluntarily make amends without any law suit being filed. **Second**, clients who are harmed by malpractice committed by an uninsured lawyer may well have damages that are so small that few lawyers who operate on an hourly or contingency basis would take the case, *even if there were insurance to cover it*. **Third**, it falls to low bono/low-rate and pro bono attorneys to assist clients with small claims—the very lawyers who may become more scarce if mandatory insurance were required. *And those clients with the small claims might never have found a lawyer at all if pro bono and low bono lawyers depart the practice*. Thus, for every anecdote about a client who is unable to obtain compensation from a negligent lawyer, one might counter with an anecdote about a would-be client who is unable to obtain any lawyer in the first place. One cannot implement policy by looking exclusively to the plight of any hypothesized clients with legitimate, significant claims who can’t get compensation solely because their lawyers are uninsured.-- LP]

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 United States is unusual in not mandating that attorneys carry legal malpractice insurance; most European and common-law countries require lawyers in private practice to carry insurance.<sup>12</sup> In the United States, only Oregon and Idaho currently have such a requirement, although the state of Washington is considering implementing such a requirement. The task force appointed by the Washington State Bar Association Board of Governors to study the topic concluded in 2018 that malpractice insurance should be mandated for Washington lawyers.<sup>13</sup>

The Board of Governors will to consider the task force's final report and recommendations later this year.

12 Kritzer and Vidmar, *supra.* p. 38.

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 number of uninsured lawyers in California is significant. In a 2017 State Bar survey of licensed attorneys, nearly 21 percent of respondents reported being solo practitioners, and about 30 percent of these attorneys indicated that they were uninsured. Another approximately 18 percent of respondents reported working in small firms (defined as firms of fewer than 30 attorneys), and over 3 percent of this group reported that they were uninsured.<sup>16</sup> Extrapolating these percentages to the number of active attorneys provides an estimate that over 13,000 California attorneys are uninsured, as shown in Table 1.

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.

[Agreed. In addition, it is essential to know *who* the uninsured lawyers are—especially whether the nature of their practice raises any meaningful risk of loss, or uncompensated loss, to clients—to know what significance the 7% figure might have. – LP]

**Page 9, Para. 2:**

Quantifying the financial harm suffered by victims of uninsured lawyers who commit malpractice is especially problematic because those claims are rarely pursued. However, Professor Leslie Levin, using data from an analysis of indemnity payments made to resolve claims against insured solo and two-to five-firm lawyers, projected that “tens of millions of dollars” would be paid annually to clients of uninsured lawyers, if only they were insured.<sup>20</sup>

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:**

The NORC survey, referenced in the above discussion of the disclosure rule, asked whether malpractice insurance should be required. Over three-quarters of respondents (78 percent) indicated that all lawyers should be required to have legal malpractice insurance. Of that 78 percent, 86 percent responded that insurance should be required, even if lawyers would charge higher fees to cover the cost of insurance. When asked if they would vote in favor of a proposed law requiring lawyers to have legal malpractice insurance, if it would result in a \$10 increase in hourly fees, 72 percent responded that they would do so. A law resulting in an hourly increase of \$30 would be supported by 60 percent of respondents. Overall, 57 percent of respondents would support such a law, despite an increase in costs.

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.”

[This observation highlights the problem of referencing resources that have not affirmatively been identified by the subcommittee as both authoritative and representative, i.e., not contrary to other authoritative sources. The State Bar will not be well-served by a presentation that appears to rely on cherry-picked or unvetted sources. It may be appropriate at the outset of the report to state that there is a consensus as to the referenced sources that they are reliable and support the statements for which they are provided as support—and then to omit any sources that don't meet that criteria.. – LP]

**Page 9, Para. 4:**

The principal argument against mandatory malpractice insurance is that it would negatively impact access to justice for the low income population that requires legal services, since lawyers would have to increase their fees to cover the cost of insurance. These claims were supported in a presentation made to the MIWG by San Joaquin School of Law Professor Andrew Kucera. Professor Kucera discussed his “Practice 99” course, which provides practice management guidance for law students who wish to serve clients with incomes that preclude them from eligibility for pro bono services, but who cannot afford to hire attorneys at prevailing hourly rates (the “99%”). Professor Kucera includes malpractice insurance among the expenses that may be unnecessary and can therefore be eliminated, thereby reducing practice costs. Cynthia Chandler, Director of the Bay Area Legal Incubator, also discussed the challenges faced by solo practitioners serving low income clients. Ms. Chandler stated that the requirement that incubator participants carry malpractice insurance presents a significant burden to some of those participants.

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.

[Other concerns not mentioned in the report include the cost to the State Bar of implementing, monitoring and enforcing mandatory insurance requirements; harm to the public from siphoning off funds that could go to other State Bar programs; reputational harm to the State Bar from imposing costs and regulations without meaningful data demonstrating the need for such costs and regulations; and the concern that a mandate to buy insurance side-steps other equally or more effective measures for protecting the public, to the extent one assumes that the small population of currently uninsured attorneys are practicing in a way that visits significant harm on the public at present. - LP]

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:**

The MIWG concluded that further study is required before a recommendation can be made with respect to mandatory legal malpractice insurance.

While it is true the MIWG concluded further study was necessary before any recommendation could be made, no where 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.