

Scott Garner Comments to March 15, 2019 draft report (for March 4, 2019 MIWG Call)

Although this draft is far better than the previous one, I continue to be concerned that it is written as a persuasion piece *for* mandatory malpractice insurance. Here are some more specific comments:

Page 3, Para. 3 (i.e., fourth full paragraph, excluding heading): It is misleading to speak of 39 percent and 12 percent of solo and small firm attorneys being uninsured, when the number for *all* California attorneys is only 7 percent. Although that point is made later in the report, it should be made in this paragraph, so the 39 percent and 12 percent figures are in proper context.

Page 5, Para 3: The reference to “Canada and other common-law and European countries” should include a qualifier like “some” before “common-law” so it is less misleading.

Page 8, Para. 1: The statement “because plaintiffs’ malpractice lawyers are reluctant to pursue claims against uninsured lawyers” should be deleted. So too should the comment, “The one MIWG member who is a plaintiffs’ legal malpractice petitioner confirmed that this was his experience.” The only “evidence” we heard about this is a comment from Mark Abelson. And while I do not dispute that Mr. Abelson may turn away matters against an uninsured attorney, his reputation is such that he is in a position to do that. As a defendant malpractice lawyer, I received numerous calls from lawyers who have been sued despite having no insurance. Thus, while *some* lawyers may not want to sue defendant lawyers without insurance, others obviously are perfectly willing. To the extent you want to cite Mr. Abelson’s specific experience in this regard, then you should cite to my specific experience as well.

Page 10, Para 3: The first sentence does not make sense and/or is a *non-sequitur*. It says that “[o]ne of the principal arguments against mandatory malpractice insurance is that [it] would impose an unnecessary financial burden. . . .” While that is a true statement, the rest of the sentence refers to “a lack of evidence of harm caused by uninsured attorneys.” Those two statements are two separate arguments against mandatory insurance, and they should not be forcibly combined into one argument.

Page 10, Para 3: In my opinion, the biggest problem with the report (and one I pointed out before the last call) is that it grossly mischaracterizes the biggest argument against mandatory insurance. In line 4, it cites that reason as “lawyers would have to increase their fees to cover the cost of insurance.” While that could happen, the biggest problem identified is that some or many lawyers who practice in the pro bono or low bono space will stop practicing in that space altogether. That is far worse than an increase in fees, which the current draft suggests would be no big deal.

Page 11, Last Para: We should add a bullet point to the bottom of the page that says something along the lines of, “How many attorneys would reduce the pro bono and/or low bono portion of their practice.”