



# The State Bar *of California*

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## **OPEN SESSION AGENDA ITEM 702 JULY 2019**

**Revised – Reposted July 12, 2019**

**DATE:** July 11, 2019

**TO:** Members, Board of Trustees

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

**SUBJECT:** Malpractice Insurance Working Group: Approval of Implementation Plan and Costs

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### **EXECUTIVE SUMMARY**

Pursuant to Section 6069.5 of the Business and Professions Code, the State Bar conducted a review and study regarding errors and omissions insurance, and reported its findings to the Supreme Court and the Legislature. The Board of Trustees directed staff to develop a plan and budget for the implementation of recommendations included in that report. This item requests that the Board of Trustees (Board): (1) review the proposed plan and budget; (2) direct staff to implement the recommendations; and (3) approve the budget for implementation of the recommendations.

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### **BACKGROUND**

The 2018 State Bar Fee Bill (Sen. Bill No. 36, Stats. 2017 (2017-2018 Reg. Sess.) ch. 422) 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 the Legislature by March 31, 2019. The Board authorized the formation of a Malpractice Insurance Working Group (MIWG) to undertake this study and report its findings to the Board.

At its March 2019 meeting, the Board accepted the report from the MIWG and directed staff to submit the report to the Supreme Court and the Legislature. The Board also directed staff to develop options for implementation and an analysis of the cost of implementation, of certain recommendations included in the MIWG Report.

## **DISCUSSION**

Pursuant to Business and Professions Code 6069.5, the topics studied by the MIWG included the following:

- 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.

At its March 2019 meeting, the Board reviewed findings of the MIWG and recommendations included in the MIWG Report, and directed staff to return in July 2019 with information about options and costs for implementation of the following recommendations included in the report:

1. Conduct additional research on the following topics:
  - The actual risk to the public posed by attorneys who do not carry malpractice insurance;
  - Whether attorneys who currently provide pro bono or low bono services would withdraw from practice and/or reduce the pro bono/low bono portion of their practices if mandatory insurance were imposed;
  - The availability of insurance through legal aid groups, and the limitations on obtaining insurance by working with such groups;
  - The rate of insurance coverage for California attorneys, by firm size; and
  - The potential availability of lower cost options to encourage attorneys who do not currently buy insurance to do so.
2. Implement Changes to Rule 1.4.2 of the Rules of Professional Conduct:
  - Provide improved model disclosure language provided in Rule 1.4.2 of the Rules of Professional Conduct;
  - Provide public information about an individual attorneys' lack of insurance on the State Bar's website; and
  - Require attorneys to report on their annual licensing statement whether they are insured, and to update this information on their State Bar profile.

## **RECOMMENDATIONS RELATED TO RESEARCH ON MANDATORY LEGAL MALPRACTICE INSURANCE**

Table 1 provides a summary of the research topics regarding mandatory legal malpractice insurance, and an estimate of the timeline and costs for conducting this research. Additional details are provided following Table 1.

**Table 1. Summary of recommendations of research topics**

Topic	Research Description	Research Timeline	Research Cost
Risk of uninsured attorneys to the public	Retain academic researcher to conduct a rigorous study of plaintiffs malpractice insurance attorneys to determine whether lack of insurance is an impediment to pursuing viable cases.	6 months–1 year	Dependent on whether research is conducted by graduate student or professor: \$25,000 to \$125,000
Whether attorneys who currently provide pro bono or low bono services would withdraw from practice and/or reduce the pro bono/low bono portion of their practices if mandatory insurance were imposed	This topic is difficult to research; a survey regarding potential responses to a hypothetical situation is likely to provide inaccurate information. Staff recommends not pursuing this option, see discussion below.	N/A	N/A
The availability of insurance through legal aid groups, and the limitations on obtaining insurance by working with such groups	National Legal Aid and Defender Association (NLADA) Insurance Program has indicated that a statewide insurance program, within specified parameters, may be possible. Legal services programs expressed reservations about the viability of such a program. Further research is required.	2–6 months	\$0
The rate of insurance coverage for California attorneys, by firm size	Analysis of attorney census data, based on My State Bar Profile survey, is provided below.	Complete	\$0
The potential availability of lower cost options to encourage attorneys who do not currently buy insurance to do so	Two California insurance providers have indicated that they plan to offer low cost insurance to attorneys with limited practice income.	Complete	\$0

### **The actual risk to the public posed by attorneys who do not carry malpractice insurance**

As discussed in the MIWG report, it is not possible to identify the number of malpractice cases that are not pursued due to a lack of insurance coverage on the part of the attorney accused of malpractice. Nor is it possible to determine the potential losses suffered by clients as a result of attorneys lacking insurance. The literature reviewed by the MIWG included an analysis based on the rate of successful claims against insured solo and small firm practitioners, and projected potential claims against uninsured attorneys if they had been insured. The MIWG questioned

this analysis, stating that it had not been established that uninsured attorneys commit malpractice at the same rate as insured attorneys.

An alternative approach for determining the risk to the public posed by uninsured attorneys was included in the literature reviewed by the MIWG. This approach included research based on interviews conducted with attorneys who handle legal malpractice cases. The research found that experienced practitioners generally do not pursue claims against uninsured attorneys, due to inability to collect on judgments. Staff proposes a rigorous academic study focusing on California attorneys, using the following methodology:

- Develop a systematic list of questions to be asked in an interview setting
- Conduct interviews with as many California attorneys who are experienced in representing plaintiffs in malpractice cases as can be identified, using the following methods:
  - Contact courts to determine if cases can be identified by filing type;
  - Contact certified specialists;
  - Contact Lawyer Referral and Information Services; and
  - Snowball sample, beginning with known attorneys and expanding outward.
- Provide analysis based on these interviews

Staff conducted initial exploratory conversations with academics familiar with this field, including Professor Calvin Morrill, Associate Dean at UC Berkeley Law School Jurisprudence and Social Policy Program, and Professor Shaubin Talesh at UC Irvine Law School. Both agreed that this methodology would provide a sound basis for analysis of this topic, and that the State Bar could engage either a professor or a Ph.D. student to conduct this research. The cost of the research would depend on a number of factors, including whether the research would be done by a professor or graduate student and the timeline for completion of the research. Minimum costs would include travel and transcription of interviews. Personnel costs would depend on who was engaged to do the research.

Staff recommends that the Board direct staff to develop and disseminate a request for proposals for the identified research, with a maximum cost of \$50,000. To minimize cost, staff would work to identify a Ph.D. student to conduct the research.

**Whether attorneys who currently provide pro bono or low bono services would withdraw from practice and/or reduce the pro bono/low bono portion of their practices if mandatory insurance were imposed**

Staff has found it challenging to assess whether mandatory insurance would negatively impact access to pro bono and low bono services. Legal aid organizations, including IOLTA-funded programs, provide malpractice insurance for legal representation provided through their programs. The question of whether attorneys who provide pro bono and low bono services outside the scope of those programs would cease to do so has proved to be difficult to answer.

During the course of the MIWG study period, staff sent a survey to 21 programs that work with attorneys that provide reduced cost and pro bono legal services, including legal aid programs and

incubators, and requested that they distribute this survey to attorneys who were currently or formerly associated with their programs. Only 19 survey responses were received. Nine of the 10 attorneys who responded to a question about whether they have insurance indicated that they do. Only one attorney responded to the question, “If you were required to carry malpractice insurance as a condition of licensing, would you be able to continue to provide low cost legal services?” That response was “no.”

The benefit of efforts to obtain responses from a larger sample of attorneys is questionable. Inquiring about how someone would respond to a hypothetical situation, absent key information such as the cost of mandatory insurance, is unlikely to produce reliable information. Staff recommends that, rather than pursue this course of inquiry, resources should be focused on ensuring that, if mandatory legal malpractice insurance is required, low cost coverage is available for attorneys of limited means.

### **The availability of insurance through legal aid groups, and the limitations on obtaining insurance by working with such groups**

As discussed above, legal aid organizations carry malpractice insurance that provides coverage for legal representation provided through their programs. Staff has conducted preliminary research regarding whether this coverage could be extended to attorneys who provide pro bono and low bono services outside the scope of those programs, through an informal nexus between this independent pro bono/low bono work and existing legal aid programs.

The Idaho Law Foundation began offering such coverage through its Volunteer Lawyers Program (VLP) when Idaho implemented mandatory legal malpractice insurance beginning in 2018. An attorney seeking malpractice insurance coverage for a pro bono or reduced fee case that was not referred through the VLP can call the program, which records information about the case, including the attorney’s name, the client’s name, and the area of law and type of case. For each of these cases a letter is sent to the attorney confirming their pro bono representation and the program also follows up on the case. These cases do not need to meet the Legal Services Corporation income requirements, but the representation must be for low-income individuals or entities that have some focus on helping needy individuals or groups. The case is then covered under the VLP’s legal malpractice insurance policy, which was secured through the National Legal Aid and Defender Association (NLADA). Certain types of legal work are excluded from this program.

The NLADA Insurance Program confirmed that it would be able to sponsor a California program similar to the program offered in Idaho. Since California does not have a statewide legal services program, insurance coverage may need to be secured through legal services programs that serve regional areas.

Staff contacted representatives of legal services programs, who expressed reservations about participation in such a program. They explained that the vetting, training, supervision and support they provide for their volunteer attorneys helps to minimize the risk of malpractice. Extending coverage to attorneys that did not receive this support would increase their risk,

leading to increased insurance premiums. Further, a high level of attorney participation in such a program might require additional administrative resources to track the cases. A representative of one of the legal services programs suggested that participation in such a program might be viable if the State Bar were to subsidize these increased costs. In addition to concerns about cost, legal services programs expressed concerns about the dilution of pro bono services, by potentially supporting those who do pro bono work for friends and family, rather than serving the areas of greatest need.

Staff recommends that the Board direct staff to conduct additional research, including working with NLADA to identify insurance carriers that might offer coverage and to explore options for providing legal malpractice insurance to attorneys who provide pro bono services outside the scope of a legal services program through the State Bar, and with legal services programs, to conduct a more detailed analysis of options for providing legal malpractice insurance through legal services programs.

### **The rate of insurance coverage for California attorneys, by firm size**

When attorneys logged into My State Bar Profile to pay their annual license fees during the most recent billing cycle, they were presented with a set of questions related to their demographics and employment type as well as questions regarding malpractice insurance coverage and the number of hours of pro bono and reduced fee services they provide. Over 95,000 active attorneys provided information on the sector of the economy in which they work; nearly 70 percent indicated that they work in private practice. Of these, approximately 34,000 respondents reported working in solo practice or in firms with up to 10 attorneys. Tables 2 and 3 provide data for these solo and small firm attorneys.

**Table 2. Insurance coverage by firm size**

Firm Size	Insured	Uninsured	Not Sure	Total
Solo	11,565 64%	5,558 31%	891 5%	18,014 100%
2-5	8,126 88%	616 7%	463 5%	9,205 100%
6-10	3,756 92%	84 2%	225 6%	4,065 100%

Table 2 shows that there are significant differences across firms in rates of insurance coverage depending on the size of the firm. Over 30 percent of solo practitioners report being uninsured. For firms with between 2 and 5 attorneys, the uninsured rate drops to 7 percent, and declines still further, to 2 percent, for firms with between 6 and 10 attorneys. Thus, a mandatory legal malpractice insurance requirement would have the greatest impact on solo practitioners and their clients.

**Table 3. Pro bono and low bono hours by firm size and insurance coverage**

Firm Size		0 hours per month	1-5 hours per month	6+ hours per month		
Pro bono	Solo*	Insured	2,798 24%	4,949 43%	3,818 33%	
		Uninsured	1,440 26%	2,360 42%	1,758 32%	
	2-5	Insured	2,447 30%	3,266 40%	2,413 30%	
		Uninsured	184 30%	257 42%	175 28%	
	6-10	Insured	1,477 39%	1,337 36%	942 25%	
		Uninsured	33 39%	37 44%	14 17%	
	Low Bono	Solo**	Insured	2,502 22%	4,300 37%	4,763 41%
			Uninsured	1,392 25%	2,012 36%	2,154 39%
2-5		Insured	2,406 30%	2,902 36%	2,818 35%	
		Uninsured	177 29%	221 36%	218 35%	
6-10		Insured	1,556 41%	1,177 31%	1,023 27%	
		Uninsured	36 43%	28 33%	20 24%	
* Differences significant at .034 probability						
** Differences significant at .000 probability						

Table 3 shows that the provision of pro bono services and low bono services does not appear to be affected by whether the attorney is insured or not. Estimates by attorneys of the number of hours of pro bono and low bono services they provide each month are shown for firms of different sizes, distinguishing between those attorneys who indicated that they carried malpractice insurance and those who indicated they do not.

None of the differences shown in Table 3 between insured and uninsured attorneys is statistically significant *except* the difference shown in the provision of pro bono and low-cost services by solo practitioners. This lone, statistically significant finding, however, runs contrary to the assumed relationship between insurance coverage and the provision of services. It was suggested that insured attorneys would provide *fewer* low cost services than uninsured attorneys. Instead, a slightly higher percentage of insured solo practitioners estimated that they provide between 1-5 hours a month and greater than 6 hours a month of both pro bono and low-cost services than uninsured solo practitioners. And lower percentages of insured solo

practitioners indicated that they do not provide any pro bono or low-cost services than uninsured solo practitioners.

Combined, the numbers shown in Table 3 suggest that a malpractice insurance requirement would have little or no effect on the rate at which attorneys provide pro bono and low bono services. It is likely that some of these services reported by attorneys were provided through a legal services program, in which case the work would have been covered by the program's legal malpractice insurance, even if the attorney did not otherwise have coverage. Options for insurance coverage of pro bono and low bono work undertaken independently are discussed above, as well as in the next section.

### **The potential availability of lower cost options to encourage attorneys who do not currently buy insurance to do so**

During the course of the MIWG study period, insurance company representatives discussed the possibility of offering reduced cost legal malpractice insurance for attorneys who practice part-time, or have limited income from their legal practices. Staff followed up with representatives of those insurance companies to learn details about this coverage.

Lawyers Mutual Insurance Company (LMIC) provides a policy for an annual premium of \$500, which covers cases attorneys receive through State Bar certified Lawyer Referral Services (LRS); many LRS programs provide reduced fee referrals to income-qualified clients. LMIC also offers a premium discount of up to 50 percent for attorneys whose practice is 20 hours or less per week; this discount excludes certain higher risk practice areas. LMIC confirms that, beginning next year, it will offer a limited income policy for attorneys whose income from their legal practice is less than ~~\$7065~~,000 per year; the expected annual premium for this policy is \$750.

A similar policy may be available from CNA Insurance Company. The agency that represents CNA stated that CNA has offered a limited income policy in the past, and is amenable to offering it again if a mandatory legal malpractice requirement were to be imposed in California.

Staff recommends that no further action be taken to study lower cost options unless mandatory malpractice insurance is implemented.

### **RECOMMENDATIONS RE RULE 1.4.2 OF THE RULES OF PROFESSIONAL CONDUCT**

Rule 1.4.2 of the Rules of Professional Conduct, Disclosure of Professional Liability Insurance, requires attorneys to disclose to clients if they do not have professional liability insurance. The MIWG made several recommendations regarding modifications to this rule. Table 5 provides a summary of the required actions and timeline to implement changes to the rule. Additional details are provided following Table 5.



**Table 4. Summary of rule change recommendations**

Topic	Required Actions	Timeline	Resources
Provide improved model disclosure language in Rule 1.4.2 of the Rules of Professional Conduct	Rule amendment to be developed by Committee on Professional Responsibility and Conduct (COPRAC) for adoption by Board of Trustees and approval by Supreme Court.	6 months–1 year	Office of Professional Competence: .05 FTE Attorney .05 FTE Sr. Program Analyst .05 FTE Admin. Assistant COPRAC mtg. expenses
Require attorneys to report whether they are insured as part of the annual licensing process, and to update this information on their State Bar profile	State Bar Rule amendment, and possible amendment to California Rules of Court, to be developed by Office of General Counsel for adoption by Board of Trustees and approval by Supreme Court.	6 months–1 year	Office of General Counsel: .05 FTE Attorney .02 FTE Legal Secretary .02 FTE General Counsel/ Deputy General Counsel Travel expenses to BOT mtg.
Provide public information about an individual attorneys' lack of insurance on the State Bar's website	IT to develop system for attorneys to report whether they have malpractice insurance and to make information available on attorneys' public profile, based on specifications included in new rule.	1–2 months	Information Technology: .33 FTE IT Analyst

#### **Provide improved model disclosure language provided in Rule 1.4.2 of the Rules of Professional Conduct**

Rule 1.4.2 of the Rules of Professional Conduct provides model language that attorneys may use to advise clients of their lack of malpractice insurance. The MIWG recommended that the State Bar improve this model disclosure language to provide additional information to allow clients to make better-informed decisions.

Amendments to the California Rules of Professional Conduct are typically assigned to the Committee on Professional Responsibility and Conduct (COPRAC), which is supported by staff from the Office of Professional Competence (OPC). The rule study, which includes research, drafting, public comment analysis and a final report, would be included in COPRAC's normal course of business. Supreme Court approval of the rule amendment would be required. There would be no unbudgeted costs unless a public hearing is held, as this would require the costs of a court reporter and a transcript.

~~Staff requests the Board to direct OPC to work with COPRAC to develop improved model disclosure language for inclusion in Rule 1.4.2 of the Rules of Professional Conduct.~~

#### **Require attorneys to report on their annual licensing statement whether they are insured, and to update this information on their State Bar profile**

The MIWG recommended that attorneys be required to report on their annual licensing statement whether they are insured. Implementing this requirement likely would require

amendment to the State Bar Rules, as well as possible amendment of the California Rules of Court. Amendment of State Bar Rules and Rules of Court may be assigned to the Office of General Counsel, which would draft the proposed rule amendments, request that they be issued for public comment, provide analysis of public comment, prepare the report to the Board for adoption of the rule amendment, and file the petition in the Supreme Court for approval of the rule amendments. There would be no unbudgeted costs unless a public hearing is held, as this would require the costs of a court reporter and a transcript.

### **Provide public information about an individual attorneys' lack of insurance on the State Bar's website**

The MIWG recommended that information about an attorney's lack of insurance be included as publicly available information on the State Bar's website. If State Bar Rules are amended to require this information, the Office of Information Technology (IT) will develop a solution to require attorneys to report whether they have insurance, and to provide the reported information on the attorneys' public profile.

## **FISCAL/PERSONNEL IMPACT**

This information is provided in Table 1 and Table 4.

## **RULE AMENDMENTS**

None

## **BOARD BOOK AMENDMENTS**

None

## **STRATEGIC PLAN GOALS & OBJECTIVES**

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: b. 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.

Goal: 5. Proactively inform and educate all stakeholders, but particularly the public, about the State Bar's responsibilities, initiatives, and resources.

Objective: d. Improve transparency, accountability, accessibility, and governance by increasing the availability of meeting materials and public access to meetings and records and reporting these efforts to stakeholders and the general public.

## RECOMMENDATIONS

It is recommended that the Board of Trustees approve the following resolution:

**RESOLVED**, that the Board of Trustees direct staff to develop and disseminate a request for proposals for research regarding the risk to the public posed by attorneys who do not carry malpractice insurance, as described above; and it is

**FURTHER RESOLVED** that the Board of Trustees direct staff to conduct additional research regarding options for providing legal malpractice insurance through ~~the State Bar and/or~~ legal services programs to attorneys who provide pro bono and low bono services outside the scope of a legal services program; and it is,

~~**FURTHER RESOLVED** that the Board of Trustees direct staff to develop improved model disclosure language for inclusion in Rule 1.4.2 of the Rules of Professional Conduct; and it is~~

~~**FURTHER RESOLVED** that the Board of Trustees direct staff to develop amendments to the State Bar Rules and California Rules of Court to require attorneys to report to the State Bar whether they have legal malpractice insurance; and it is~~

~~**FURTHER RESOLVED** that the Board of Trustees direct staff to make information regarding attorneys' malpractice insurance available on attorneys' public profiles, subsequent to approval by the Supreme Court of amendments to State Bar Rules and California Rules of Court requiring attorneys to report this information to the State Bar.~~

## ATTACHMENT(S) LIST

None