

# **OPEN SESSION AGENDA ITEM**

## **702 SEPTEMBER 2018**

**DATE:** September 14, 2018

**TO:** **Members, Board of Trustees**

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

**SUBJECT:** **Malpractice Insurance Working Group: (1) Request to Circulate for Public Comment Options Under Consideration; (2) Authorization for Public Survey**

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### **EXECUTIVE SUMMARY**

The Board of Trustees authorized the formation of the Malpractice Insurance Working Group (MIWG) to undertake a study of legal malpractice insurance, pursuant to the 2018 State Bar fee bill (SB36, Stats. 2017, ch. 422). The MIWG has held four meetings so far, and has determined that additional information would be useful in formulating recommendations to be included in its report to the Board. This item requests that the Board: 1) request public comment on options being considered by the MIWG ; and, 2) authorize the expenditure of 2018 General Fund savings to conduct a poll of members of the public regarding legal malpractice insurance.

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### **BACKGROUND**

Senate Bill 36 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 Legislature by March 31, 2019. The full text of Section 6069.5 is provided as Attachment 1.

Issues that Business and Professions Code 6069.5 direct the Bar to evaluate include:

- 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.

The State Bar is required to report its findings to the Supreme Court and the Legislature by March 31, 2019.

At its November 2017 meeting, the Board of Trustees authorized the formation of the Malpractice Insurance Working Group (MIWG) to undertake the mandated review and study, and appointed Randall Miller as its Chair. The MIWG has held four meetings to date, with two more scheduled to take place before the MIWG issues a report to the Board early next year.

## DISCUSSION

At its first meeting, in March of this year, the MIWG formed four subcommittee, each of which has undertaken the study of one or more of the specific issues identified in the Fee Bill, and has presented information, as well as speakers with experience and expertise on that topic, to a meeting of the full MIWG. To date, the MIWG has studied the following topics:

- March 12: The history and current status of legal malpractice insurance requirements California and other states
- June 4: The advisability of mandating insurance, implementing an open market model.
- July 9: The availability and affordability of legal malpractice insurance, and recommended ranges of coverage
- August 27: Measure to encourage insurance coverage, and the adequacy of the current insurance disclosure rule

At its November 13 meeting, the MIWG will study the advisability of mandating insurance, implementing a captive fund model.

In studying each of these topics, the MIWG has been presented with a variety of information and perspectives on many of the above issues. Members of the MIWG, as well as staff, have made efforts to publicize the work of the MIWG, and to solicit input from both attorneys and members of the public that may be impacted by any recommendations that are made regarding legal malpractice insurance. Research has also been conducted to determine the extent of any harm caused by uninsured attorneys. Following are examples of this outreach:

- Members of the MIWG have discussed the work of the MIWG with local bar leaders;
- Notice was sent to local bar leaders with information about the MIWG and an invitation to comment;
- Legal Incubator programs, as well as other providers of reduced cost legal services, were asked to forward a survey to attorneys with whom they work, to determine the potential impact of mandatory legal malpractice insurance on access to legal services; and
- Lawyer Referral Service and Fee Arbitration programs were asked to forward their clients a survey, to determine the potential impact of uninsured attorneys on legal consumers.

To date, the MIWG has received very little input from either attorneys or legal consumers. Responses to surveys have been minimal. The MIWG requests the Board's assistance in its efforts to solicit input on the issues it is studying, and authorization to engage a reputable research agency to conduct a survey of members of the public on these topics.

### *Request for Public Comment*

The Malpractice Insurance Working Group (MIWG) is continuing its study. Before issuing any preliminary recommendations, the MIWG wants to ensure that all interested parties have the opportunity to share their perspectives on these important topics, particularly legal consumers and attorneys providing reduced cost services. Consequently, the MIWG requests the Board issue an informal request for public comment on some of the options that have emerged during the MIWG's preliminary discussions. Following is the proposed request for public comment:

The Malpractice Insurance Working Group has researched, collected data, and taken live testimony on numerous topics related to lawyers professional liability (malpractice) insurance. It is now considering several options that may become part of the recommendations it will make to the Board of Trustees early next year. These options include:

1. Amending rules requiring attorneys to disclose to clients that they do not carry legal malpractice insurance. Options being considered:

- a. Requiring attorneys to disclose to the State Bar whether they have legal malpractice insurance, potentially including the amount of coverage and the type of policy (i.e., claims-made or occurrence-based) and;
    - i. Making this information available to the public; or
    - ii. Limiting this information to aggregate analysis by the State Bar;
  - b. Requiring written client acknowledgment of an attorney's disclosure that they do not have legal malpractice insurance;
  - c. Requiring attorneys to disclose on all written communication with clients, on their websites, and on all advertising, that they do not have malpractice insurance; or.
  - d. No change to current disclosure rule.
2. Mandating legal malpractice insurance for attorneys as a condition of licensing, except for in-house counsel and government attorneys. Options being considered:
    - a. Insurance to be obtained in the private insurance market ("Open Market Model");
    - b. Insurance fund, established by statute, would provide minimum insurance coverage for all attorneys ("Captive Insurance Fund Model"); additional coverage could be purchased on the private market;
      - i. A Captive Fund could be run by the State Bar, a private insurance company, or an entity created expressly for this purpose.
    - c. No mandatory insurance requirement (except for limited liability partnerships or law corporations, as presently required by statute).
  3. Developing a Continuing Legal Education or Practice Management program that provides an interactive self-assessment of law practice operations in an effort to examine legal malpractice liability. Options being considered:
    - a. Require all attorneys to complete the self-assessment;
    - b. Require uninsured attorneys to complete the self-assessment; or
    - c. Provide the self-assessment as an optional tool, but not require it.
  4. Promoting the voluntary purchase of insurance by:
    - a. Educating lawyers about the benefits of insurance (including risk assessment and claims handling functions; CLE provided; etc.); and/or
    - b. Educating the public about the significance of an attorney not having effective coverage (including claims-made "tail" policies).

The requested public comment period is 45 days.

#### *Public Survey*

The MIWG has had little success in obtaining input from members of the public regarding the issues under consideration. The survey sent to Lawyer Referral Service and Fee Arbitration programs mentioned above was targeted to members of the public who believed that the lawyers they hired had committed malpractice; the goal was to determine whether those legal consumers were harmed by their lawyers' lack of malpractice insurance.

The MIWG would like to conduct a broader public survey, not limited to people who contacted a bar-related program for assistance. The purpose of this survey would be to determine the general public's opinions on issues related to legal malpractice insurance, including whether there is a broad sentiment in favor of requiring malpractice insurance, and whether, short of such a mandate, there is a preference for more robust disclosure rules.

Staff contacted several research firms to discuss survey options and capabilities, and recommends the selection of the National Opinion Research Center (NORC) AmeriSpeak panel. The AmeriSpeak panel was developed to be scientifically rigorous, and has conducted highly-regarded legal services research, including research used by the Legal Services Corporation for its *2017 Justice Gap Report*.

Other research firms stated that they would conduct a survey by telephone, using purchased call lists. This method presents many challenges; since most of the phone numbers are for mobile devices, it is difficult to ensure that all respondents are current California residents. It is

also hard to ensure that the surveyed group accurately reflects the broader population. Estimates for telephone-based surveys range from \$25,000 to \$40,000.

AmeriSpeak is a pre-screened panel of households that accurately reflect a cross-section of the United States; participants have agreed to complete surveys on a wide variety of topics, including government policies and programs. If selected to conduct this research, NORC would limit the survey to California residents. The cost for using NORC's AmeriSpeak panel for this survey would range between \$46,800 and \$49,000, depending on the specific services provided by NORC in development of the survey and analysis of the data.

## **FISCAL/PERSONNEL IMPACT**

If approved by the Board, the cost of the survey would be between \$46,800 and \$49,000, funded by 2018 General Fund savings.

## **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: (c): 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.

## **RECOMMENDATION**

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

**RESOLVED**, that Board of Trustees request public comment regarding options under consideration by the Malpractice Insurance Working Group, as detailed above; and it is

**FURTHER RESOLVED**, that the Board of Trustees authorize staff to enter into a contract with NORC to conduct a public survey, as described above.

## **ATTACHMENT(S) LIST**

- A.** Tentative Survey Questions for Malpractice Insurance Working Group Public Survey

# Attachment A

## Tentative Public Survey Questions re Legal Malpractice Insurance

Introductory language: Legal malpractice insurance can compensate people when their attorney makes some types of mistakes (a negligent error) when handling their case, which causes them monetary harm. An example is when an attorney misses a filing deadline. It does not compensate a client for any intentional wrongdoing on the part of their attorney nor does it compensate a client for all types of mistakes.

1. Do you believe that all lawyers are now required to have malpractice insurance as a condition of practicing law?

(After getting the response, the interviewer would inform the respondent that attorneys are not required to have insurance.)

2. If a lawyer does not have malpractice insurance, should he or she be required to disclose this fact to potential clients?
  - a. Is it sufficient if the attorney discloses that they don't have malpractice insurance at the time when the client decides to hire them?
  - b. Is it sufficient if the attorney discloses that they don't have malpractice insurance only when it appears that he or she will do more than 4 hours of work on a particular project for a client?
  - c. Should information that an attorney does not have malpractice insurance be available on the State Bar's website, which currently provides information about an attorney's status and disciplinary history?
3. Have you ever hired an attorney?
  - a. If yes, how did you decide what attorney to hire?
  - b. Did you look on the State Bar's website to find information about one or more attorneys that you were considering hiring?
    - i. If yes, did the information you found on the State Bar's website have any influence on your decision about which attorney to hire?
4. Should all lawyers be required to have malpractice in order to be able to practice law?
  - a. If yes to question 3, Should all lawyers be required to have malpractice insurance, even if it means that they would charge clients more for their services?