

# AGENDA ITEM

**MARCH 134**

Malpractice Insurance  
Affordability and Availability  
Survey

**DATE:** February 17, 2009

**TO:** Members of the Board of Governors  
Members of the Member Oversight Committee

**FROM:** Saul Bercovitch, Legislative Counsel

**SUBJECT:** Malpractice Insurance Affordability and Availability Survey

## **EXECUTIVE SUMMARY**

In May 2008, the Board of Governors voted to recommend the adoption of a new insurance disclosure rule. In November 2008, the Board's recommendation was transmitted to the California Supreme Court, and the matter is currently under consideration. In May 2008, the Board also (1) voted to study (a) methods of making professional liability insurance more affordable and widely available to attorneys, and (b) additional means of compensating clients who are harmed by uninsured attorneys; and (2) voted to assess the effect of any new insurance disclosure rule, after the effective date of any such rule.

A working group has been created pursuant to the Board's resolution to study methods of making professional liability insurance more affordable and widely available to attorneys. On January 27, 2009, the working group met. Although anecdotal evidence was presented on the issues of affordability and availability, the working group noted the absence of solid current data to assist in evaluating the extent and precise nature of any current issues or problems. The working group determined that a member survey would be necessary, in order to gather more meaningful and detailed data. A survey will also assist the State Bar in assessing the effect of any new insurance disclosure rule, because it will provide baseline data before the approval of any such rule.

Questions regarding this agenda item should be directed to Saul Bercovitch at (415) 538-2306.

## **BACKGROUND**

In May 2008, the Board of Governors voted to recommend the adoption of a new rule of professional conduct that would require members who do not have professional liability insurance to disclose that fact in writing to a client, at the time the member is engaged, whenever it is reasonably foreseeable that the total amount of the member's legal representation of the client in the matter will exceed four hours. The rule would exempt government lawyers or in-house counsel when the lawyer is representing or advising the entity employer, members who render legal services in an emergency, and members who previously provided the disclosure to a returning client.

In November 2008, the Board's recommendation was transmitted to the California Supreme Court, requesting that the Supreme Court approve the new rule of professional conduct. The matter is currently under consideration, but it is too soon to determine what action the Supreme Court will take.

In May 2008, when the Board of Governors voted to recommend the adoption of the new insurance disclosure rule, the Board adopted two other related resolutions. The first was that the State Bar will study (a) methods of making professional liability insurance more affordable and widely available to attorneys, and (b) additional means of compensating clients who are harmed by uninsured attorneys. The second was that the State Bar will assess the effect of any new insurance disclosure rule, after the effective date of any such rule.

A working group has been created pursuant to the Board's resolution to study methods of making professional liability insurance more affordable and widely available to attorneys. The working group has sixteen members with a broad range expertise, and includes members of the State Bar's Committee on Professional Liability Insurance (COPLI), insurance brokers and underwriters, attorneys who represent policy holders and attorneys who defend malpractice actions, and representatives of various State Bar sections. On January 27, 2009, the working group, State Bar President Holly Fujie, Vice President John Peterson, and State Bar staff held a meeting.

During its January 27 meeting, the working group considered a number of issues, including potential State Bar strategies that will assist in making professional liability insurance more available and affordable to attorneys in the California market. Although anecdotal evidence was presented on the issues of affordability and availability, the working group noted the absence of solid current data to assist in evaluating the extent and precise nature of any current problem. The working group determined that a member survey would be necessary, in order to obtain more meaningful and detailed information on issues such as (a) the current percentage of uninsured attorneys, (b) the extent to which professional liability insurance is simply unavailable and the reasons therefore, such as particular practice areas or individual circumstances, and (c) specific information to assist in evaluating the question of "affordability." The survey will also

assist the State Bar in assessing the effect of any new insurance disclosure rule, because it will provide baseline data before the approval of any such rule.

### **FISCAL/STAFF IMPACT**

The anticipated cost of the survey is \$25,000 or less. The survey does not require additional personnel expenses, and will be conducted by an outside contractor.

### **BOARD BOOK IMPACT**

None.

### **PROPOSED BOARD COMMITTEE RESOLUTION**

If the Member Oversight Committee concurs with the recommendation to conduct an insurance affordability and availability survey, the following resolution would be appropriate:

**RESOLVED** that the Member Oversight Committee recommends that the Board of Governors approve conducting a member survey relating to the affordability and availability of professional liability insurance.

### **PROPOSED BOARD RESOLUTION**

If the Board of Governors concurs with Member Oversight Committee's recommendation, the following resolution would be appropriate:

**RESOLVED** that, upon recommendation of the Member Oversight Committee, the Board of Governors approves conducting a member survey relating to the affordability and availability of professional liability insurance.