I. Welcome & Introductions

II. Approval of Minutes from April 22, 2019 meeting

III. Schedule of Meetings

A. September 2019
   a. Town Hall Meeting for Savannah Bar at the DeSoto Savannah on October 18, 2019 from 3:30 p.m.--5 p.m.

B. Other meetings

IV. Discussion Items

A. Current Proposal
   a. Proposed Rule 1-210
   b. Rule 1-204

B. Background Discussion with Power Point presentation

C. Update on other jurisdictions
   a. California Malpractice Insurance Working Group Report (attachments omitted)
   b. California Rule 3-410
c. Washington Mandatory Malpractice Insurance Task Force Report (sent electronically)
   i. https://www.wsba.org/docs/default-source/legal-community/committees/mandatory-malpractice-insurance-task-force/mandatory-malpractice-insurance-task-force-report815766f2f6d9634cb471ff1f00003f4f.pdf?sfvrsn=728c03f1_0
d. Washington State Bar Decides Against Malpractice Insurance Mandate Article 36-37

D. ABA Model Court Rule on Insurance Disclosure 38-39

E. Next Steps
   a. Surveys—Bar members and/or public
   b. Public input
   c. Insurance industry input
   d. Timeline
   e. Outreach to Bar
   f. Alternate proposals

V. Adjourn
2019 - 2020
Professional Liability Insurance

This special committee will study and make recommendations to the Executive Committee and Board of Governors on issues concerning lawyers professional liability insurance.

Chairperson
Christopher Paul Twyman, Rome 2020

Member
Sarah Brown Akins, Savannah 2020
Kimberly Cofer Butler, Savannah 2020
Christy Crowe Childers, Macon 2020
Stephanie Kirjian Cooper, Birmingham 2020
J. Hamilton Garner, Moultrie 2020
Brandon Cory Goldberg, College Park 2020
Warren Raymond Hinds, Roswell 2020
Kenneth Bryant Hodges III, Atlanta 2020
Linley Jones, Atlanta 2020
Herman Maddox Kilgore, Marietta 2020
David Neal Lefkowitz, Athens 2020
Daniel James O'Connor, Vidalia 2020
Dennis C. Sanders, Thomson 2020
Toronda Michelle Silas, Atlanta 2020
R. Gary Spencer, Atlanta 2020
Shannon McKenzie Sprinkle, Atlanta 2020
Meredith Wilson Sutton, Marietta 2020

Executive Committee Liaison
David S. Lipscomb, Lawrenceville 2020

Staff Liaison
Paula J. Frederick, Atlanta 2020
Call to Order

At approximately 12:12 p.m. Chair Linley Jones called the meeting to order.

Roll Call & Introductions

The following committee members were present: Linley Jones; Peter Werdesheim; Warren Hinds; Shannon Sprinkle; Emerson Carey, Jr.; Kenneth B. Hodges, III, and Executive Committee Liaison, David S. Lipscomb.

Committee members Sarah Brown Akins; William T. Davis; Michael G. Frick; Christine L. Mast; Christopher Balch; and Kimberly C. Butler participated via teleconference.

Committee members William Thomas Mitchell; William T. Clark; David Neal Lefkowitz; and R. Gary Spencer were not in attendance.

Also present were the following State Bar of Georgia staff members: General Counsel Paula J. Frederick; Executive Director Jeff R. Davis; Deputy General Jenny Mittelman, Deputy General Counsel and staff liaison William D. NeSmith, III; and Paralegal Betty Ross Derrickson.

Approval of the Meeting Minutes

Hearing no objections, the February 19, 2019 Professional Liability Insurance Committee meeting minutes were unanimously approved as presented.

Agenda Amendment

With the Committee's approval the meeting's agenda was amended to add an update of the Supreme Court meeting as item 2. under Unfinished Business; and the proposed disclosure rule as item 6. under New Business.
Unfinished Business

1. Report on PLI Presentation and Feedback at BOG

Board Chair Linley Jones informed the Committee that the presentation regarding proposed mandatory professional liability insurance at the March 29, 2019 Board of Governors meeting went very well. Board members were divided as to whether they oppose or support mandatory liability coverage. However, there were many members who were undecided. A major concern was who would/should be excluded from the rule. The presentation lasted approximately 2 hours.

Board member Ken Hodges added that most of the concerns he encountered regarded whether this matter had been adequately/properly vetted and disseminated to Bar members. Mr. Hodges indicated that he has dedicated his next Georgia Bar Journal article to this matter, and will send out one or two more email blasts to Bar members regarding this matter. Mr. Hodges would like the Committee to meet at least one more time with the goal of having a proposed rule ready for presentation at the 2019 State Bar of Georgia Annual meeting, or in the interim, presentation of a proposed disclosure rule.

2. Supreme Court Meeting Update

Board member Ken Hodges indicated that he believes the Supreme Court of Georgia is generally in favor of mandatory professional liability insurance; however, they too think that more in depth consideration should be given to the matter.

New Business

1. Consideration of Additional Practice Exceptions to the Proposed Mandatory Professional Liability Insurance Rule

The committee initially discussed attaching exemptions to the same criteria used in determining whether an IOLTA account of required; however, this idea was not agreed upon. The Committee considered whether the following groups should be exempt from the proposed rule:

a. Juvenile court lawyers/child advocates/guardian ad litem for juveniles – the Committee indicated this group should not be excluded; however, additional information is needed. Inquiry should be made to Nikki Vaughan, Chair of the Child Protection and Advocacy Law Section and someone from the Family Law Section.

b. Criminal defense lawyers – the Committee determined that this group should not be exempt.

c. Lobbyists – the Committee determined that section (b)(3) of proposed Rule 1-210 covers this group. This group will be added to that section of the rule.

d. Out-of-state lawyers – the Committee determined that this group should not be exempt.
e. Lawyers admitted pro hac vice – the Committee determined that the State Bar of Georgia has no jurisdiction over this group. Pro hac vice is governed by the Uniform Superior Court rules.

f. Lawyers whose practices do not require IOLTA accounts – the Committee determined that this group already falls under section (b)(3) of proposed Rule 1-210.

g. Senior judges and other retired lawyers who do occasional pro bono work or part-time work (1-2 clients per year) - the Committee determined that senior judges already fall under section (b)(3) of proposed Rule 1-210. The remaining group listed should not be exempt.

The committee determined that Comments should be added to proposed Rule 1-210 to provide explanations of and clarity to the rule.

2. Appeal panel/exemption process

The Committee voted to add language to the proposed rule that establishes an appeal panel/exemption process. The language will be reviewed at the next meeting.

3. Consideration of exception to diminishing limits prohibition for larger policies

By majority vote the committee approved, as an interim measure, an amendment to section (a) to add an exclusion to the eroding policy portion of the rule that allows eroding policy limits if the policy is over $1,000,000. Chair Linley Jones will reach out to the insurance commissioner for additional information.

4. Create study subcommittee to study other jurisdictions

Board members Ken Hodges and Pete Werdesheim will work together to track what other jurisdictions are doing regarding mandatory professional liability insurance.

5. Plan outreach efforts

Chair Linley Jones and Committee Member Ken Hodges informed the Committee of current plans they have to speak with various groups about this issue. Mr. Hodges also plans to contact every member of the Board of Governors before the 2019 Annual Meeting to discuss this issue. Committee members were encouraged to make opportunities to talk about this initiative with various groups, i.e., volunteer bar organizations, sections, CLE’s, and committees to inform, discuss, and address the issues and concerns.

6. Disclosure Rule

Board Member Ken Hodges indicated that if proposed Rule 1-210 is not ready for an affirmative vote at the 2019 State Bar of Georgia Annual Meeting, an interim step should available. The interim step is to recommend the adoption of a proposed rule for meaningful disclosure that will include the provision of the Illinois
registration rule (PMBR-Proactive Management Based Regulation). General Counsel Paula Frederick was asked to revise the previously drafted disclosure rule as discussed. The proposed disclosure rules will be circulated to the Committee members before the next meeting and discussed and voted on at the next meet.

Next Meeting Date

The Committee determined that the next meeting will be Tuesday, May 7, 2019, at 12:00 noon. The meeting will be held at State Bar of Georgia Headquarters in Atlanta, Georgia.

Comments

The Committee discussed the issue of the impact the insurance industry may have if professional liability insurance is mandated, i.e. inequality of providing coverage, rate setting, etc. Linley Jones indicated that the insurance commission has previously stated to her that he saw no reason a mandatory insurance provision would cause rate increases. Linley Jones was asked to speak with the insurance commissioner again and other underwriters to weigh in on how a mandatory professional liability insurance rule will impact rates in the insurance industry.

Adjournment

There being no further business, the meeting was adjourned at approximately 2:05 p.m.
Rule 1-210. Professional Liability Insurance

(a) All active members of the State Bar of Georgia engaged in the private practice of law in Georgia must be covered by a policy of professional liability insurance, in an amount no less than $100,000 per occurrence and $300,000 in the aggregate, the limits of which are not reduced by payment of attorney's fees or claims expenses incurred by the insurer for the investigation, adjustment, defense, or appeal of a claim.

(b) The following members shall be exempt from the requirements of this rule:

(1) Members who are employed by a governmental entity or other organization and whose practice is limited to matters concerning the entity or organization;

(2) Members whose practice consists solely of serving as an arbitrator or mediator; and

(3) Members who are not actively engaged in the practice of law or who do not represent clients.

(c) Each lawyer who is required by this rule to have professional liability insurance shall so certify by providing the name of the insurance company and the policy number on the annual license fee notice, and shall notify the Membership Department of the State Bar of Georgia in writing within 30 days if coverage lapses, is no longer in effect, or terminates for any reason. Each lawyer's insurance status shall appear in the State Bar Member Directory as either "yes," "no," or "exempt."

(d) No lawyer shall be deemed to be a member in good standing while in violation of this Rule. A lawyer deemed not to be in good standing under this Rule shall be returned
Proposed Rule 1-210. Professional Liability Insurance

to good standing upon providing the Executive Director of the State Bar of Georgia with
proof of professional liability insurance.
Rule 1-204. Good Standing.

No lawyer shall be deemed a member in good standing:

(a) while delinquent after September 1 of any year for nonpayment of the annual license fee and any costs or fees of any type as prescribed in Chapter 5, Rule 1-501 (a)-(c);

(b) while suspended for disciplinary reasons;

(c) while disbarred;

(d) while suspended for failure to comply with continuing legal education requirements; or

(e) while in violation of Rule 1-209 for failure to pay child support obligations.

(f) while in violation of Rule 1-210.
March 27, 2019

Supreme Court of California
350 McAllister Street
San Francisco, CA 94102-4797

RE: Malpractice Insurance Working Group Report to Board of Trustees, Submitted Pursuant to Business and Professions Code Section 6069.5

To the Honorable Tani Cantil-Sakauye and the Honorable Associate Justices of the California Supreme Court:

The enclosed report is submitted to the Supreme Court (Court) in accordance with Business and Professions Code Section 6069.5, which directs the State Bar to submit a report no later than March 31, 2019, to the Supreme Court and the Legislature reporting findings from its review and study regarding errors and omissions insurance for attorneys licensed in California. Following is a brief summary of the process undertaken to conduct this research and the findings of the report.

Shortly after Section 6069.5 was added to the Business and Professions Code, the State Bar Board of Trustees authorized the formation of a Malpractice Insurance Working Group (MIWG or Working Group) to undertake the mandated study. The makeup of the Working Group was developed with input from the Court and the Legislature, as well as the State Bar’s Board of Trustees to ensure that the concerns of legal consumers, legal practitioners, and insurance industry representatives would be considered.

The MIWG met throughout 2018 and into early 2019 to study the statutorily identified topics, reviewing historical materials from the State Bar, information from other jurisdictions, and scholarly writing on this topic. Testimony from academics, representatives from other state bars and regulatory agencies, and from California attorneys with an interest in this topic, was also considered. The State Bar also commissioned a survey to assess public understanding and sentiment on the topic of legal malpractice insurance, the results of which were analyzed by the MIWG.
The enclosed report reflects the lively debate that characterized the Working Group's discussions. Some members argued that mandatory malpractice insurance may be a solution in search of a problem, citing a lack of evidence showing harm to clients of uninsured attorneys. Others disagreed, arguing that experienced legal malpractice plaintiffs' attorneys generally decline to file cases against uninsured practitioners, even when they believe that they would be likely to prevail. They pointed out that the absence of filed cases presents a challenge to finding evidence of harm, but does not prove that this harm does not exist.

The MIWG also considered the potential impact of mandatory malpractice insurance on low income clients, with some members arguing that the cost of insurance would lead solo and small firm practitioners to stop providing pro bono and low bono services, or to close their practices altogether. Comments from the legal community, both in writing and in oral comment at MIWG meetings, supported this position. Consumer advocates and scholars conducting research on this topic disagreed, suggesting that pro bono services could be provided under the auspices of legal services programs whose insurance affords coverage to volunteer attorneys; they further suggested that the cost of insurance could be absorbed through a modest hourly increase for those providing low bono services.

The final report presented by the MIWG to the Board of Trustees on March 15, 2019 included detailed findings on each of the identified topics, as well as the following recommendations:

**Recommendation on Mandatory Legal Malpractice Insurance**
- More data, as identified above, is required prior to making a recommendation regarding whether mandatory malpractice insurance is necessary.

**Recommendation on Ranges of Coverage to Protect the Public**
- If legal malpractice insurance is required, minimum coverage of $100,000 per occurrence/$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.

**Recommendations on Rule 1.4.2 of the Rules of Professional Conduct**
1. The State Bar should improve the model disclosure language provided in Rule 1.4.2 of the Rules of Professional Conduct.
2. Information about an individual attorney's lack of insurance should be included as publicly available information on the State Bar's website.
3. Attorneys should be required to report on their annual licensing statement whether they are insured.
4. The State Bar should educate lawyers and the public about legal malpractice insurance, by undertaking educational campaigns and providing information on the State Bar's website.
Recommendations on Encouraging Attorneys to Obtain and Maintain Insurance Coverage

The State Bar should encourage attorneys to purchase legal malpractice insurance, in the following ways:

1. Retain a professional communications firm to conduct an education campaign for lawyers about the benefits of insurance coverage and the risks of the lack of coverage;
2. Retain a professional communications firm to conduct an education campaign for legal consumers about the benefits of hiring insured lawyer and the risks of hiring uninsured lawyers; and
3. Require uninsured lawyers to complete a free loss avoidance program that includes educational tools and self-assessments to ensure effective practice management and risk reduction.

At its meeting on March 15th, the Board of Trustees directed staff to develop options for and an analysis of the cost of implementing the following recommendations included in the MIWG Report:

Recommendations on Mandatory Legal Malpractice Insurance

- Conduct additional research on the following topics:
  1. The actual risk to the public posed by attorneys who do not carry malpractice insurance;
  2. 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;
  3. The availability of insurance through legal aid groups, and the limitations on obtaining insurance by working with such groups;
  4. The rate of insurance coverage for California attorneys, by firm size; and
  5. The potential availability of lower cost options to encourage attorneys who do not currently buy insurance to do so.

Recommendations on 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.
Staff was direct to deliver its options for implementation and cost analysis to the Board of Trustees at its July meeting. We are available to discuss the MIWG Report and related action by the Board of Trustees at the Court’s convenience.

Sincerely,

Leah T. Wilson  
Executive Director

Enclosure
Title of Report: Malpractice Insurance Working Group Report to Board of Trustees
Statutory Citation: Business and Professions Code Section 6069.5
Date of Report: March 27, 2019

The State Bar of California has submitted a report to the Legislature in accordance with Business and Professions Code Section 6069.5, which directs the State Bar to submit a report no later than March 31, 2019, to the Supreme Court and the Legislature, reporting findings from its review and study regarding errors and omissions insurance for attorneys licensed in California.

The following summary of the report is submitted in accordance with the requirements of Government Code section 9795.

The State Bar Board of Trustees authorized the formation of a Malpractice Insurance Working Group (MIWG) to undertake the study mandated by Business and Professions Code Section 6069.5, and to report its findings to the Board. The MIWG met during 2018 and 2019 to study the statutorily identified topics in detail, reviewing historical materials from the State Bar, information from other jurisdictions, and scholarly writing on this topic. Testimony from academics, representatives from other state bars and regulatory agencies, as well as from California attorneys with an interest in this topic, was also considered, as were the results of a survey commissioned by the State Bar to determine public understanding and sentiment on the topic of legal malpractice insurance.

The report presented by the MIWG to the Board of Trustees on March 15, 2019 included detailed findings on each of the identified topics, provided recommendations in some areas, and suggested topics for further study.

The full report is available for download on the State Bar’s website at: http://www.calbar.ca.gov/About-Us/Reports. A printed copy of the report may be obtained by calling 415-538-2352.
Malpractice Insurance Working Group
Report to Board of Trustees

March 15, 2019
BACKGROUND

STATUTORY FRAMEWORK
The 2018 State Bar Fee Bill (Senate 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 Legislature by March 31, 2019. Specifically, section 6069.5 provides as follows:

6069.5. (a) In recognition of the importance of protecting the public from attorney errors through errors and omissions insurance, the State Bar shall conduct a review and study regarding errors and omissions insurance for attorneys licensed in this state. The State Bar shall conduct this review and study, which shall specifically include determinations of all of the following:

(1) The adequacy, availability, and affordability of errors and omissions insurance for attorneys licensed in this state.

(2) Proposed measures for encouraging attorneys licensed in this state to obtain and maintain errors and omissions insurance.

(3) The ranges of errors and omissions insurance limits for attorneys licensed in this state recommended to protect the public.

(4) The adequacy and efficacy of the disclosure rule regarding errors and omissions insurance, currently embodied in Rule 3-410 of the Rules of Professional Conduct.

(5) The advisability of mandating errors and omissions insurance for attorneys licensed in this state and attendant considerations.

(6) Other proposed measures relating to errors and omissions insurance for attorneys in this state that will further the goal of public protection.

(b) The State Bar shall report its findings under this section to the Supreme Court and the Legislature no later than March 31, 2019.

(c) The State Bar may consider any past studies, including, but not limited to, any relevant actuarial studies, and any current information that is available to the State Bar from other entities, such as the American Bar Association, regarding errors and omissions insurance.

Business and Professions Code section 6069.5 is provided as Attachment A.₁

₁ All subsequent code sections refer to the Business and Professions Code, unless otherwise specified.
WORKING GROUP CREATION
To comply with section 6069.5, the Board of Trustees of the State Bar (Board) authorized the formation of a Malpractice Insurance Working Group (MIWG) in December 2017, appointed a and criteria for membership on the working group. These decisions were subject to the approval of the Chair and Vice-Chair of the Regulation and Discipline (RAD) Committee. At its February 2018 meeting, the Board approved the MIWG charter and appointed members to the MIWG.

The MIWG charter and roster are provided as Attachments B and C, respectively.

WORKING GROUP MEETINGS
At its first meeting, on March 12, 2018, the MIWG formed four subcommittees, each of which agreed to undertake an in-depth study of one or more of the topics identified in the statute. Each subcommittee presented information to subsequent meetings of the entire MIWG. Extensive materials were provided, with guest speakers contributing information and expertise. Following is a summary of the topics discussed at each of the full meetings of the MIWG:

<table>
<thead>
<tr>
<th>Meeting Date and Location</th>
<th>Topic(s)</th>
</tr>
</thead>
<tbody>
<tr>
<td>March 12, 2018 Los Angeles</td>
<td>Background and Historical Information</td>
</tr>
<tr>
<td>June 4, 2018 San Francisco</td>
<td>Availability and Affordability of Malpractice Insurance and Recommended Coverage Levels</td>
</tr>
<tr>
<td>July 9, 2018 Los Angeles</td>
<td>Measures to Encourage Malpractice Insurance Coverage and Adequacy of the Current Disclosure Rule</td>
</tr>
<tr>
<td>November 13, 2018 Los Angeles</td>
<td>Discussion of Reports and Recommendations from Subcommittees</td>
</tr>
<tr>
<td>January 14, 2019 San Francisco</td>
<td>Review and Discussion of Draft Report to Board of Trustees Teleconferences</td>
</tr>
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The agendas and materials from each of these meetings are provided as Attachments D through K. A bibliography of materials reviewed by the MIWG is provided as Attachment L.

WORKING GROUP FINDINGS
The findings of the MIWG are reported below under headings that mirror the language of topics mandated for study by Section 6095.5. It should be noted at the outset that there was sharp disagreement among members of the MIWG regarding fundamental questions raised by the
statutory mandate. The very premise of whether data supported the existence of a problem arising from uninsured attorneys was the subject of disagreement among the MIWG.

This report has been drafted to reflect the differing points of view of members of the working group. During its study, the working group reviewed a number of materials and heard testimony from diverse sources. The fact that a publication or study is referenced in this report does not constitute universal endorsement of its respective findings by the working group.

The MIWG reviewed the insurance market and found that California has a competitive insurance market even though many attorneys consider insurance to be unaffordable. There are more than 17 admitted carriers and 18 non-admitted carriers that offer legal malpractice insurance.\(^2\) The insurance broker on the MIWG confirmed that there is a sufficient number of insurers that offer legal malpractice insurance in California, and that attorneys are able to find coverage, although premiums may be high for those with prior claims, or in higher risk practice areas.

The MIWG considered the issue of affordability, and noted that this is a subjective question. Insurance premiums in California are generally higher than in other states for the same levels of coverage, because tort liability exposure is higher in California. While the rates are commensurate with coverage, the cost is nonetheless considered unaffordable by many attorneys, especially those in solo and small practices.

A 2017 survey of all licensed attorneys found that virtually all firms of more than ten attorneys carry legal malpractice insurance. In early 2018, staff conducted a survey of California attorneys that was specifically directed toward those in firms of ten or fewer attorneys. Solo practitioners and those in firms of two to five attorneys reported that they were uninsured at rates of 39 percent and 12 percent, respectively. In response to a question about why they were not insured, 66 percent indicated that they could not afford it. Unaffordability was also cited by those who provided public comments to the MIWG. Many anticipated that mandatory insurance would be especially harmful to solo practitioners, and would reduce the number of attorneys that provide pro bono and low bono legal services.

Susan Saab Fortney, Professor of Law and Director of the Program for the Advancement of Legal Ethics at Texas A&M University School of Law, suggests that attorneys providing pro bono services may be able do so under the umbrella of legal services programs, which provide

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\[^2\] Admitted carriers are subject to state regulations that govern operations, reporting requirements, rate approvals and claims handling. Non-admitted carriers may sell insurance in California, but their customers are not afforded the same protections as those of admitted carriers.
insurance coverage to volunteer lawyers. Members of the MIWG stated that not all pro bono work is provided under the auspices of such a program.

In addressing the issue of fee increases to cover premium expenses, Professor Fortney stated that if a lawyer bills only 2.4 hours a day, as one study suggests, the amount of increased legal fees would be $6.07 per hour to cover a $3,500 premium. Using the 2.4 hours per day average, the amount of the fee increase would be $8.68 per hour for a premium of $5,000.

Although the issue of affordability is difficult to ascertain, as it is dependent on individual circumstances, 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. Due to the ready availability on the private insurance market, the MIWG determined that it was neither necessary nor practical to create a captive insurance fund akin to those in Oregon or the Canadian provinces.

The MIWG agreed that attorneys should be encouraged to purchase legal malpractice insurance, because of its potential to protect the public. 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.

Another measure to encourage attorneys to purchase insurance considered by the MIWG was the implementation of Proactive Management Based Regulation (PMBR) similar to the recently implemented program in Illinois. Beginning in 2018, uninsured lawyers in private practice in Illinois are required to complete a self-assessment regarding the operation of their law firm. Developing ethical law practice systems that in ze practices that result in malpractice and

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3 Susan S. Fortney, Legal Malpractice and Legal Ethics (forthcoming 2019) p.28.
4 Fortney, supra, at p. 27 (noting that the 2.4 per day figure is based on a 2018 CLIO Legal Trend study that found that an average lawyer dedicated 2.4 hours to billable work per day).
the attorney receives four hours of MCLE credit at no cost. A voluntary PMBR program was recently implemented in Colorado.

These programs are too new to determine whether they have reduced the incidence of claims to purchase legal malpractice insurance. However, completion of a self-assessment may draw attention to the risks of lack of insurance. If they determine that they can bear those risks, attorneys completing a PMBR assessment are likely to take steps to minimize the risk of malpractice by improving the management systems in their practices.

The MIWG also discussed potential legislative changes to tort liability rules to make insurance more affordable and to encourage attorneys to voluntarily buy insurance. For example, a longer statute of limitations could be provided for claims against attorneys who do not purchase insurance, and attorneys who do not purchase insurance could be limited in their ability to enforce fee agreements. There was also a discussion regarding whether the Department of Insurance could require new entrants to the California insurance markets to provide lower cost policies; such a requirement could increase the availability of low-cost insurance products and thus encourage attorneys to voluntarily buy insurance. However, such a requirement also has the potential to discourage new entrants to the insurance market.

The MIWG reviewed information about minimum coverage requirements in jurisdictions that mandate insurance coverage. While Canada and most 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 is 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.

California attorneys in certain types of practice are currently required to carry minimum insurance coverage or proof of financial responsibility. Professional corporations are required to provide proof of security in the amount of $50,000 per claim/$100,000 annual aggregate per attorney. Limited liability partnerships are required to carry minimum coverage of $1,000,000 for up to five attorneys, plus $100,000 for each additional attorney.

The MIWG reviewed data from the ABA Profile of Legal Malpractice Claims 2012-2015, which summarizes data provided by National Association of Bar-Related Insurance Companies, as well as commercial insurers. Of the 73,206 claims reported, 89 percent involved total costs.

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6 State Bar Rule 3.158(A)(1), 3.158(C)
7 California Corporations Code section 16956(a)(2)(a).
expenses and indemnity/settlement payments) under $100,000; 76% had total costs of $10,000 or less, and 15% had total costs between $10,001 and $50,000.

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. 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.

Rule 1.4.2 requires lawyers to inform clients in writing if they do not have professional liability insurance. The following exceptions are provided: (1) when the representation is not expected to exceed more than four hours; (2) in emergency situations; and, (3) for government lawyers and in-house counsel. The rule does not require specific language for the disclosure, although it does offer the following language in a comment:

In evaluating the adequacy and efficacy of this rule, the MIWG considered two principal possible 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 assumed benefit, it is difficult to determine whether mandatory disclosure has a significant impact.

Consistent with 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.

With regard to the second assumed 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. Due 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.

Further, 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. The MIWG discussed requiring that the disclosure be provided on a separate page, and that explicit client

8 The Rules of Professional Conduct were revised and renumbered subsequent to the enactment of SB 36. Current Rule 1.4.2 corresponds with former Rule 3-410.
9 Levin, supra, p. 23.
acknowledgment be obtained. Drafting improved model disclosure language, to provide clear notice to clients, was also discussed.

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 services. The American Bar Association (ABA) Model Court Rule on insurance disclosure includes the publication of information by state status. Following is a summary of the Model Court Rule:

1. Lawyers engaged in private practice must certify annually to their regulator whether they are covered by professional liability insurance and whether they intend to maintain insurance coverage.
   a. If they report that they are insured, they must notify the regulator if the coverage lapses or is no longer in effect for any reason.
2. Information submitted pursuant to this rule will be made public by such means as may be designated by the regulator.

The MIWG heard testimony from the North Carolina State Bar about their experience with implementation of the ABA Model Rule. Beginning in 2004, North Carolina attorneys were required to report to their state bar on an annual basis whether they were in private practice and whether they were covered by malpractice insurance was made available to the public on Carolina State Bar undertook an evaluation of all its programs, including insurance disclosure. This evaluation determined that providing information about insurance disclosure was not valuable, considering the cost (approximately one part-time employee). Among its conclusions, the state bar found that information about malpractice insurance was only valid on the date it was provided, and did not provide sufficient information (e.g., levels of coverage) to be of value. Further, it was found that compliance with requirements to inform the state bar about changes to coverage was very low. The insurance disclosure requirement was eliminated in North Carolina in 2010.

To assess public sentiment on the topic, the State Bar engaged the National Opinion Research Center (NORC) at the University of Chicago to conduct a survey of California residents on issues related to legal malpractice insurance. When asked whether the State Bar should include information on its website about whether attorneys have malpractice insurance, 89 percent

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11 Testimony of Alice Mine, Assistant Executive Director of the North Carolina State Bar, to the MIWG on August 27, 2018.
responded affirmatively. The NORC report on the survey, as well as a staff presentation that provides additional analysis, is provided as Attachment M.

The MIWG concluded that the current insurance disclosure rule should be modified to provide more comprehensive information to legal consumers, and to allow

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, noting clients who have little recourse if their lawyers are uninsured are reluctant to pursue claims against uninsured lawyers.¹² Even if they are successful, the likelihood of recovering a substantial settlement or judgment is low.¹³

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.¹⁴ In the United States, only Oregon and Idaho currently have such a requirement, although the state of Washington is considering mandating coverage. The task force appointed by the Washington State Bar Association Board of Governors to study the topic concluded that malpractice insurance should be mandated for Washington lawyers. The report determined against them.¹⁵ recommendations later this year.

Other states have studied the topic of mandatory legal malpractice insurance and chosen not to mandate coverage. The Ad Hoc Committee appointed by the New Jersey Supreme Court to ng mandatory professional liability insurance would be unworkable in the New Jersey marketplace and would not satisfy a current and plain unmet need. The Ad Hoc Committee also concluded that a mandate requiring all attorneys engaged in the private practice of law carry professional liability insurance would be unfairly

¹⁴ Kritzer and Vidmar, supra. p. 38.
punitive to small firms, solo practitioners, and to those attorneys engaged in the part-time

16 

ors implemented the recommendation of its
Professional Liability Insurance Taskforce, and in June 2018 submitted a petition to the Nevada
Supreme Court to impose a rule requiring Nevada attorneys to carry malpractice insurance as a
condition of licensure. 17 The Court, however, denied the petition in October 2018, concluding
adequate detail and support demonstrating that

A review of regulations for other licensed professionals in California found that, while
professional corporations are required to provide adequate security for claims arising out of the
rendering of professional services, very few licensing boards require insurance or other proof of
financial security for individual licensees. The following exceptions were identified: licensed
contractors are required to have
19 and doctors performing
surgical procedures in outpatient settings are required to provide adequate security, either
through liability insurance or participation in an indemnity trust, for patient claims. 20 While
practical considerations lead many professionals to purchase insurance (e.g., hospitals require
doctors to be insured in order to be granted admitting privileges, lenders only work with
insured appraisers), insurance is not required as a condition of licensing, except as noted above.

The 2018 attorney survey was directed toward attorneys in firms of ten or fewer. Due to the
intentional exclusion of attorneys in larger firms and those not in private practice, solo
practitioners made up 62 percent of the respondents to that survey. Solo practitioners reported
being uninsured at a rate of 39 percent. An additional 12 percent of attorneys in firms of 2 to 5
lawyers, and 4 percent of those in firms of 6 to 10 lawyers, reported that they were uninsured.
The principal reasons provided for not carrying insurance included unaffordability (66%), lack of
value for the cost (35%), a belief that they would not be sued (29%), working part-time (23%),
and insurance not being necessary for their area of practice (18%). 21

In a 2017 State Bar survey of all 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

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   (https://www.njcourts.gov/courts/assets/supreme/reports/2017/attmalpracticeinsurance.pdf)
   (http://caseinfo.nvsupremecourt.us/public/caseView.do?csId=46470)
   (http://caseinfo.nvsupremecourt.us/public/caseView.do?csId=46470)
19 Business and Professions Code section 7071.6.
20 Business and Professions Code section 2216.2.
21 Respondents could select more than one reason, resulting in a total greater than 100%.
they were uninsured.\textsuperscript{22} Extrapolating these percentages to the number of active attorneys provides an estimate that over 13,000 California attorneys in solo and small practices are uninsured, as shown in Table 1.

\begin{table}[h]
\centering
\begin{tabular}{|c|c|c|}
\hline
\textbf{Attorneys by Firm Size} & \textbf{Estimated Number of Uninsured Attorneys} \\
\hline
All Active Attorneys & 189,509\textsuperscript{24} & 13,208 (7.0\%) \\
Solo & 39,418 & 12,022 (30.5\%) \\
Small Firm & 34,870 & 1,186 (3.4\%) \\
\hline
\end{tabular}
\caption{Estimated Number of Uninsured Attorneys\textsuperscript{23}}
\end{table}

Quantifying the financial harm suffered by victims of uninsured lawyers who commit malpractice is especially problematic because those claims are allegedly rarely pursued. However, Professor Leslie Levin, using data from an analysis of indemnity payments made to resolve claims against insured solo practitioners and firms from between two and five lawyers, \textsuperscript{25}uld be paid annually to clients of uninsured lawyers nationwide, if only they were insured.\textsuperscript{25} known paid claims; it is not known whether uninsured lawyers represent the same level of risk as insured lawyers.

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.

One of the principal arguments against mandatory malpractice insurance is that it would impose an unnecessary financial burden. This financial burden could negatively impact access to justice for the low income population that requires legal services, since low/pro bono lawyers might reduce provision of those services or might have to increase their fees to cover

\textsuperscript{23}State Bar surveys found that virtually no firms with ten or more attorneys are uninsured.
\textsuperscript{24}(http://members.calbar.ca.gov/search/demographics.aspx)
\textsuperscript{25}Levin, \textit{supra}, p.32.
the cost of insurance. These claims were supported in a presentation made to the MIWG by San Joaquin School of Law Professor Andrew Ku 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 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 potential negative impact on attorneys in solo and small practices was also considered by the MIWG. Testimony was provided both in person at MIWG meetings and via written comment by attorneys who reported their practices could not sustain a requirement that they carry malpractice insurance. These comments were made by attorneys who are semi-retired or otherwise work part time, and others whose income from their legal practices was very limited. These attorneys reported that they would not be able to pass the cost of mandatory malpractice insurance on to their clients and that if insurance were required, they would be forced to cease practicing law.

Public comment submitted to the MIWG, almost all of which was submitted by attorneys, weighed heavily against mandatory legal malpractice insurance. More than three quarters of the comments (78 percent) opposed mandatory insurance. The reasons cited most often for opposition included the following:

- Insurance is unaffordable for attorneys in small and solo practices;
- Increased costs would negatively impact low income clients;
- Insurance is not required in all circumstances (e.g., certain areas of practice, semi-retired attorneys, attorneys who maintain a license but do not provide legal representation, etc.);
- Attorneys in low-risk practices would effectively subsidize those in high risk practices;
- The State Bar should not impose increased regulations on attorneys; and
- More research is required before any recommendations are made.

The remaining 22 percent of comments favoring mandatory malpractice insurance included 6 percent who supported such a requirement with specific qualifications, including the following:

- A minimum income threshold should be established, below which insurance would not be required;
- Exceptions should be provided for attorneys performing pro bono work, in specified practice types, and those who provide evidence of financial responsibility (e.g., bond or surety);
- Minimum required coverage levels should be low;

Many legal services programs have legal malpractice insurance that provides coverage for volunteer attorneys that provide pro bono services through their programs.
• Premium costs should be reasonable; and
• Evidence of harm to clients of uninsured attorneys should be provided.

The MIWG concluded that further study is required before a recommendation can be made with respect to mandatory legal malpractice insurance. The following topics were identified for further study:
• The actual risk to the public posed by attorneys who do not carry malpractice insurance;
• The likelihood that attorneys who currently provide pro bono or low bono services would withdraw from practice and/or reduce the pro bono/law 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;
• Data obtained from State Bar questionnaires included in annual licensing fee statements regarding firm size and insurance coverage; and
• The potential availability of lower cost options to encourage attorneys who do not currently buy insurance to do so.

MALPRACTICE INSURANCE WORKING GROUP RECOMMENDATIONS
At its January 14, 2019 meeting, the MIWG considered recommendations related to each of the topics it studied.

Recommendations re Mandatory Legal Malpractice Insurance
More data, as identified above, is required prior to making a recommendation regarding whether mandatory malpractice insurance is necessary.27
• This recommendation was supported by a majority of members present.

Recommendations re Ranges of Coverage to Protect the Public
If legal malpractice insurance is required, minimum coverage of $100,000 per occurrence/$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.
• This recommendation was adopted unanimously by the MIWG.

Recommendations re Rule 1.4.2 of the Rules of Professional Conduct
1. The State Bar should improve the model disclosure language provided in Rule 1.4.2 of the Rules of Professional Conduct.
• This recommendation was adopted unanimously by the MIWG

27 The MIWG also considered but rejected a recommendation to require malpractice insurance as a condition for licensing for attorneys who represent private clients; a significant minority supported this recommendation.
2. The lack of insurance should be included as publicly available information.
   • This recommendation was supported by a majority of the MIWG.
3. Attorneys should be required to report on their annual licensing statement whether they are insured.
   • This recommendation was supported by a majority of the MIWG.
4. The State Bar should educate lawyers and the public about legal malpractice insurance, website.
   • This recommendation was adopted unanimously by the MIWG.

Recommendations re Encouraging Attorneys to Obtain and Maintain Insurance Coverage

The State Bar should encourage attorneys to purchase legal malpractice insurance, in the following ways:
1. Retain a professional communications firm to conduct an education campaign for lawyers about the benefits of insurance coverage and the risks of the lack of coverage;
2. Retain a professional communications firm to conduct an education campaign for legal consumers about the benefits of hiring insured lawyer and the risks of hiring uninsured lawyers;
3. Require uninsured lawyers to complete a free loss avoidance program that includes educational tools and self-assessments to ensure effective practice management and risk reduction.
   • This recommendation was adopted unanimously by the MIWG.
The State Bar of California

Legal Malpractice Insurance
Public Survey Responses

Conducted by the National Opinion Research Center at the University of Chicago
November 26 – December 11, 2018

Linda Katz, Office of Research and Institutional Accountability

The State Bar of California, Malpractice Insurance Working Group, January 14, 2019
• Representative sample of California population
• 1,038 completed surveys
  – 93% English
  – 7% Spanish
• Respondent Household Income

![Bar Chart]

- 22% < $25k
- 27% $25k - $60k
- 16% $60k - $85k
- 30% $85k - $200k
- 5% > $200k
Do you think all lawyers should be required to have legal malpractice insurance in order to practice law in California?

*Follow-up to 78% who responded yes:*

Do you think all lawyers should be required to have legal malpractice insurance, *even if it means that they may charge higher fees to cover the cost of their insurance premiums?*
Would you vote in favor of a proposed law requiring lawyers to have legal malpractice insurance, if it would result in lawyers raising their hourly fees by [$10/$20/$30/$40/$50]?

<table>
<thead>
<tr>
<th>Hourly Fee Increase</th>
<th>% Votes in Favor</th>
</tr>
</thead>
<tbody>
<tr>
<td>$10</td>
<td>72%</td>
</tr>
<tr>
<td>$20</td>
<td>62%</td>
</tr>
<tr>
<td>$30</td>
<td>60%</td>
</tr>
<tr>
<td>$40</td>
<td>48%</td>
</tr>
<tr>
<td>$50</td>
<td>45%</td>
</tr>
<tr>
<td>Total</td>
<td>57%</td>
</tr>
</tbody>
</table>
Would you vote in favor of a proposed law requiring lawyers to have legal malpractice insurance, if it would result in lawyers raising their hourly fees?

<table>
<thead>
<tr>
<th>Respondent Income</th>
<th>% Votes in Favor</th>
</tr>
</thead>
<tbody>
<tr>
<td>&lt; $25k</td>
<td>57%</td>
</tr>
<tr>
<td>$25k - $60k</td>
<td>62%</td>
</tr>
<tr>
<td>$60k - $85k</td>
<td>61%</td>
</tr>
<tr>
<td>$85k - $200k</td>
<td>55%</td>
</tr>
<tr>
<td>&gt; $200k</td>
<td>53%</td>
</tr>
<tr>
<td>Total</td>
<td>58%</td>
</tr>
</tbody>
</table>
Should the State Bar's website include information about whether each lawyer has malpractice insurance?

89% Yes
10% No
1% Don't Know
Rule 3-410 Disclosure of Professional Liability Insurance

(A) A member who knows or should know that he or she does not have professional liability insurance shall inform a client in writing, at the time of the client's engagement of the member, that the member does not have professional liability insurance 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.

(B) If a member does not provide the notice required under paragraph (A) at the time of a client's engagement of the member, and the member subsequently knows or should know that he or she no longer has professional liability insurance during the representation of the client, the member shall inform the client in writing within thirty days of the date that the member knows or should know that he or she no longer has professional liability insurance.

(C) This rule does not apply to a member who is employed as a government lawyer or in-house counsel when that member is representing or providing legal advice to a client in that capacity.

(D) This rule does not apply to legal services rendered in an emergency to avoid foreseeable prejudice to the rights or interests of the client.

(E) This rule does not apply where the member has previously advised the client under Paragraph (A) or (B) that the member does not have professional liability insurance

Discussion:

[1] The disclosure obligation imposed by Paragraph (A) of this rule applies with respect to new clients and new engagements with returning clients.

[2] A member may use the following language in making the disclosure required by Rule 3-410 (A), and may include that language in a written fee agreement with the client or in a separate writing:

"Pursuant to California Rule of Professional Conduct 3-410, I am informing you in writing that I do not have professional liability insurance."

[3] A member may use the following language in making the disclosure required by Rule 3-410 (B):
"Pursuant to California Rule of Professional Conduct 3-410, I am informing you in writing that I no longer have professional liability insurance."

[4] Rule 3-410(C) provides an exemption for a "government lawyer or in-house counsel when that member is representing or providing legal advice to a client in that capacity." The basis of both exemptions is essentially the same. The purpose of this rule is to provide information directly to a client if a member is not covered by professional liability insurance. If a member is employed directly by and provides legal services directly for a private entity or a federal, state or local governmental entity, that entity presumably knows whether the member is or is not covered by professional liability insurance. The exemptions under this rule are limited to situations involving direct employment and representation, and do not, for example, apply to outside counsel for a private or governmental entity, or to counsel retained by an insurer to represent an insured. (Added by order of the Supreme Court, operative January 1, 2010.)
The Washington State Bar Association’s board recently rejected a recommendation that it require the state’s licensed lawyers to obtain malpractice insurance.

Washington’s decision last week came not long after the State Bar of California’s board also decided against moving forward with a malpractice mandate.

Oregon and Idaho remain the only two states with a malpractice requirement for attorneys.

A task force that studied the issue in Washington highlighted that 14 percent of the private lawyers in the state do not carry insurance, and the panel “determined that this lack of protection poses a distinct risk to clients.”

The 17-member task force also said uninsured lawyers create an access-to-justice problem.

“[T]heir clients are typically unable to pursue legitimate malpractice claims against them because plaintiffs’ lawyers cannot afford to bring actions against uninsured practitioners,” the panel wrote.

The task force recommended that the Washington State Bar’s Board of Governors propose a rule to the state Supreme Court requiring all lawyers in private practice to maintain malpractice insurance in the minimum amount of $250,000 per occurrence/$500,000 total per year.

It suggested attorneys obtain coverage through the private insurance market and report their coverage status during the annual licensing process. Lawyers who failed to comply would have their licenses suspended.

The task force recommended exempting various categories of the state’s 40,000 legal licensees from the rule, including in-house government lawyers, judges, and retired lawyers maintaining their licenses.

The Washington State Bar’s board voted 9-5 against implementing the task force’s mandatory malpractice recommendations.

Some of the arguments made in opposition echoed those expressed in California, including that it was a solution in search of a problem.

Concerns were also raised that a malpractice requirement would hurt access to justice because lawyers would be required to raise their fees to cover the cost of insurance.

In addition, board members cited widespread opposition from members of the bar in explaining their votes against a new requirement.

https://abovethelaw.com/2019/05/washington-state-bar-decides-against-malpractice-insurance-mandate/
While some board members agreed with mandate supporters that the percentage of uninsured lawyers was a consumer-protection issue, they suggested there were other ways of addressing the matter.

One proposal was to examine the “South Dakota model.” In that state, lawyers who do not carry a minimum of $100,000 in insurance must disclose that information at the formation of the attorney-client relationship.

“The rule further requires the lawyer to disclose the information in every written communication with the client on firm letterhead and in all advertising,” according to the Washington malpractice task force’s report.

Washington Board of Governors member P.J. Grabicki, who supported a malpractice mandate, suggested a proposal combining South Dakota and Illinois’s approaches be brought back to the board for consideration.

In Illinois, lawyers in private practice who lack malpractice insurance must complete a four-hour online self-assessment course regarding their law firm management and business practices.

But board member Carla Higginson, who voted against a malpractice requirement, recommended the Washington Board of Governors drop the issue entirely.

“I think we do our members a huge, huge disservice by continuing this dialogue in the face of the overwhelming opposition we have heard,” Higginson said.

Even if the State Bar ultimately moves on, that may not be the last of the issue in Washington.

A member of the public told the board he planned to pursue the state’s initiative process in hopes of establishing a malpractice insurance mandate for lawyers.
Model Court Rule on Insurance Disclosure

PREFACE

The ABA Model Court Rule on Insurance Disclosure requires lawyers to disclose on their annual registration statements whether they maintain professional liability insurance. The Model Court Rule excludes from the Rule’s reporting requirement those lawyers who are not engaged in the active practice of law and those who are engaged in the practice of law as full-time government lawyers or as counsel employed by an organizational client and do not represent clients outside that capacity. The Model Court Rule places an affirmative duty upon lawyers to notify the highest court whenever the insurance policy covering the lawyer’s conduct lapses or is terminated. This ensures that the information reported to the highest court is accurate during the entire reporting period. Lawyers who do not comply with the Model Court Rule are not unauthorized to practice law until they comply.

The purpose of the Model Court Rule is to provide a potential client with access to relevant information related to a lawyer’s representation in order to make an informed decision about whether to hire a particular lawyer. The Model Court Rule is a balanced standard that allows potential clients to obtain relevant information about a lawyer if they initiate an inquiry, while placing a modest annual reporting requirement on lawyers. The information submitted by lawyers will be made available by such means as designated by the highest court in the jurisdiction.

A. Each lawyer admitted to the active practice of law shall certify to the [highest court of the jurisdiction] on or before [December 31 of each year]: 1) whether the lawyer is engaged in the private practice of law; 2) if engaged in the private practice of law, whether the lawyer is currently covered by professional liability insurance; 3) whether the lawyer intends to maintain insurance during the period of time the lawyer is engaged in the private practice of law; and 4) whether the lawyer is exempt from the provisions of this Rule because the lawyer is engaged in the practice of law as a full-time government lawyer or is counsel employed by an organizational client and does not represent clients outside that capacity. Each lawyer admitted to the active practice of law in this jurisdiction who reports being covered by professional liability insurance shall notify [the highest court in the jurisdiction] in writing within 30 days if the insurance policy providing coverage lapses, is no longer in effect or terminates for any reason.

B. The foregoing shall be certified by each lawyer admitted to the active practice of law in this jurisdiction in such form as may be prescribed by the [highest court of the jurisdiction]. The information submitted pursuant to this Rule will be made available to the public by such means as may be designated by the [highest court of the jurisdiction].

C. Any lawyer admitted to the active practice of law who fails to comply with this Rule in a timely fashion, as defined by the [highest court in the jurisdiction], may
be suspended from the practice of law until such time as the lawyer complies. Supplying false information in response to this Rule shall subject the lawyer to appropriate disciplinary action.