Report of the Supreme Court Ad Hoc Committee on Attorney Malpractice Insurance

June 2017

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Introduction

Under New Jersey law, the judicial power of government is vested in the Supreme Court of the State of New Jersey. See N.J. Const. art. VI, § 1, ¶ 1. The Supreme Court has the authority to create the rules that govern the administration, practice, and procedure of all courts in our state. Id. at § 2, ¶ 3. The Court also exercises plenary authority over the regulation of the practice of law in New Jersey, including authority over disciplinary grievances against attorneys and business entities authorized to practice law in the State. Ibid.; R. 1:20-1(a); Boston Univ. v. Univ. of Med. & Dentistry of N.J., 176 N.J. 141, 144 (2003) In re Greenberg, 155 N.J. 138, 152 (l998); State v. Rush, 46 N.J. 399, 4ll (l966).

In 1991, Chief Justice Robert N. Wilentz appointed the New Jersey Ethics Commission, known as the Michels Commission, and issued a mandate to "recommend those changes needed to assure that New Jersey's ethics system becomes as effective, as efficient, and as

responsive as possible." Report of the New Jersey Ethics Commission, 133 N.J.L.J. 905 (March 15, 1993). In its report, the Michels Commission recommended that "[a]ll attorneys engaged in the private practice of law in New Jersey who do not carry professional malpractice insurance should be required to disclose such non-coverage to their clients." Ibid. (Supp. at 22). That recommendation was rejected, without comment, by the Supreme Court in its Administrative Determinations Relating to the 1993 Report, issued on July 14, 1994.

During its 2006-2008 Rules Cycle, the New Jersey Supreme Court Professional Responsibility Rules Committee (PRRC) considered the issue of whether New Jersey attorneys should be required to make disclosures concerning the existence of professional liability insurance in accordance with the American Bar Association (ABA) Model Court Rule on Insurance Disclosure, see infra. pp. 20-30; see Appendix B. In its report dated January 15, 2008, the PRRC concluded that it was not in a position to make a recommendation

at that time and, with the permission of the Court, reserved the matter for further consideration during its 2008-2010 rules cycle.

The formation of the Ad Hoc Committee on Attorney Malpractice Insurance is the result of a recommendation contained in the PRRC's December 16, 2009, 2008-2010 Rules Cycle Report. The PRRC outlined the ABA Model Court Rule and considered the related issue of compulsory professional liability insurance. It ultimately concluded

> that it is necessary to have data from various sources to accurately gauge the practical implications – the potential benefits and burdens – that realistically may flow from an insurance disclosure requirement or a mandate to maintain insurance coverage. The Committee recommends that the Court appoint a special commission (perhaps an "Ad Hoc Committee on Lawyers' Professional Liability Insurance"), which may include representatives from the Bar, the lawyers' professional liability insurance industry, and other affected groups, to carefully study the issues.

The Ad Hoc Committee on Attorney Malpractice Insurance was formed in February 2014. Over the past

three years, it has held regular meetings, conferred with authorities, and analyzed information obtained through surveys of New Jersey attorneys. This report constitutes the final findings and recommendations of the Ad Hoc Committee on matters with which it was charged.

Charge to The Ad Hoc Committee

As set forth in our respective letters of appointment, the Supreme Court, "[i]n an effort to determine whether New Jersey should implement an insurance disclosure requirement in accordance with the ABA Model Court Rule, as well as whether professional liability insurance should be mandatory," requested the Ad Hoc Committee address the following matters, "as well as any and all related issues that may arise in the course of its discussions:"

> (1) Should disclosure of professional liability insurance be required? If so, should disclosure be required only on the annual registration statement or also to clients at the inception of representation?
>
> (2) Should disclosure of the existence of insurance to clients also include disclosure of the amount of insurance?
>
> (3) Would a disclosure requirement unfairly burden small firms and solo practitioners?
>
> (4) Is a disclosure requirement necessary, or does it serve any substantial purpose, without a corresponding mandate to maintain insurance?
>
> (5) Would a currently unmet need be satisfied by mandatory professional liability insurance?
>
> (6) Would mandatory insurance unfairly burden small firms and solo practitioners, who may have

more difficulty than larger firms finding affordable coverage?

(7) If it is determined that mandatory insurance is justified, what should be the required minimum policy limits and the terms of coverage?

Executive Summary

The Ad Hoc Committee's findings and recommendations in response to the Supreme Court's charge are summarized in this Executive Summary and discussed at length in the body of the Committee's Report.[1]

A. Mandatory Insurance

For the reasons set forth infra., at pages 131-136, the Ad Hoc Committee concludes that professional liability insurance should not be mandatory for New Jersey attorneys. The Committee determined that a rule requiring 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 has also concluded that a mandate

[1] The Ad Hoc Committee's research and analysis was extensive. The Committee as a whole met 8 times from April 2014 to November 2016. In addition, members of the professional liability insurance industry attended meetings and provided valuable insight as associate members. Additionally, the Ad Hoc Committee created a Survey Subcommittee to supplement data and information available to the Committee, a Mandatory Insurance Subcommittee to examine the feasibility of requiring coverage, and a Reporting and Disclosure Subcommittee to consider whether reporting and/or disclosure requirements should be implemented.

requiring all attorneys engaged in the private practice of law to carry professional liability insurance would be unfairly punitive to small firms, solo practitioners, and to those attorneys engaged in the part-time practice of law.

B. Reporting and Disclosure

1. To the Court

The Ad Hoc Committee recommends that the Court require reporting and disclosure to the Court as to the existence of professional liability insurance. Thus, if the Court concludes that a mandatory insurance requirement should not be imposed, it would appear fully appropriate that those members of the public who seek the services of a licensed attorney have the right to access information as to whether that attorney is insured. The easiest and most efficient manner of requiring that all attorneys who have obtained a policy of professional liability insurance report that fact would be to impose a similar reporting requirement to

that which is already contained in Rules 1:21-1A, -1B, and 1C. To that end, the Ad Hoc Committee recommends the Court consider adopting the proposed Rule set forth in full infra., at pages 138-139. The Rule would require attorneys to file or cause an insurer to file a certificate of insurance setting forth basic policy information and any amendments, renewals or terminations.

The Ad Hoc Committee also concludes that the information required by such a Rule, including the limits of such insurance, should be accessible to the public in the same manner that the information required by existing Court Rules 1:21-1A, -1B and -1C is currently publicly available.

2. To Clients

The Ad Hoc Committee is persuaded that the arguments favoring a system of mandatory disclosure by an uninsured attorney to a prospective client, discussed infra., at pages 62-69, significantly

outweigh the arguments against such a system, discussed, infra., at pages 69-75.[2] See discussion and analysis, infra., at pages 139-144.

The Committee believes that the need for transparency is evident in a system that does not require attorneys engaged in the private practice of law to obtain and maintain a policy of professional liability insurance.[3] The Committee found, however, that not having a professional liability policy in place does not, of itself, speak to an attorney's ability, experience or competence.

Accordingly, the Ad Hoc Committee recommends the Court consider adoption of the proposed Rule of Court, proposed Rule 1:21-1E, as well as the proposed model

[2] We note, however, that the ABA Model Court Rule on Insurance Disclosure simply requires each attorney engaged in the private practice of law to "report" to the Supreme Court, on an annual basis, whether the attorney is covered by a policy of professional liability insurance, with the reported information publicly available.

[3] Rules 1:2-1A through -1C, although they literally require the described entities and not individual attorneys to obtain and maintain a professional liability insurance policy, do as a practical matter insure the individual attorneys by virtue of the definition of "insured" in most if not all approved policies.

form of disclosure as an Appendix to the Rule, set forth infra., at pages 144-147.

C. The Consequences of an Attorney's Failure to Comply with the Proposed Disclosure Requirements

The Committee's recommendations as to mandatory insurance and disclosure reflect the Committee's considered conclusions, with one exception. The sole exception concerns the consequences of a failure to comply with the disclosure requirement and whether the proposed Rules should address those consequences. As to proposed disclosure Rule 1:21-1E, there are two alternative versions that were discussed. The difference is the inclusion, or exclusion, of R. 1:21-1E(c), which reads:

> **"(c) Nothing in this Rule shall be construed as creating a standard for civil liability, or the basis for a malpractice claim."**

The proposed language arose from a minority view of the Committee that a disclosure requirement, if not premature, was unwarranted.

The Committee recognizes that there are valid arguments to support each version of proposed R. 1:21-1E. In fact, the Committee was fairly evenly split on which version to recommend and consequently offers, for the Court's consideration, the following arguments both supporting and opposing the inclusion of a subsection (c) to the proposed rule ("Nothing in this Rule shall be construed as creating a standard for civil liability, or the basis for a malpractice claim.").

1. The Language of Proposed Subsection (c) Should Not Be Included.

The language of proposed subsection (c) should not be included primarily because the consequences of a failure to comply with the insurance disclosure requirement of R. 1:21-1E should not be dictated by the rule itself. In order to maintain consistency with existing New Jersey Court Rules, the American Bar Association Model Court Rule on Insurance Disclosure and insurance disclosure rules enacted in other jurisdictions, the proposed rule should leave the ultimate determination of whether failure to abide by

the disclosure rule can create a standard for civil liability or the basis for a malpractice claim to the courts, to be developed through common law in the ordinary course. See discussion, infra., at pages 158-166.

2. The Language of Proposed Subsection (c) Should Be Included.

This view reflected the absence of evidence linking uncompensated victims of attorney malpractice to uninsured lawyers. This view also reflected several concerns of the minority. One was a concern that some members of the Bar intended to use a disclosure rule as a basis for a new cause of action against insured and uninsured attorneys based on questions of sufficiency of disclosure. There was also a significant concern that such a requirement would have a disproportionate adverse impact on small scale practitioners and minority attorneys largely serving the consumer public. See discussion, infra., at pages 148-158.

The New Jersey Requirement

Although New Jersey attorneys practicing as individuals or in general partnerships are not required to maintain professional liability insurance, since December 1969, law firms organized as professional corporations are required by Court rule to maintain such insurance for the attorneys they employ. Since January 1997, limited liability companies and limited liability partnerships are also required to carry professional liability insurance. Specifically, pursuant to Rules 1:21-1A, -1B and -1C, those entities

> shall obtain and maintain in good standing one or more policies of lawyers' professional liability insurance which shall insure [the entity] against liability imposed upon it for damages resulting from any claim made against [the entity] by its clients arising out of the performance of professional services by attorneys employed by [the entity] in their capacity as attorneys. The insurance shall be in an amount of at least $100,000 multiplied by the number of attorneys employed by [the entity], provided that the maximum coverage shall not be required to exceed $5,000,000 for each claim, and further provided that the deductible portion of such insurance shall not exceed $10,000 multiplied by the number of attorneys employed by [the entity], or

> $500,000, whichever is less. [The entity] may enter into an indemnity agreement with its insurer for losses in excess of the amount of the permitted deductible, provided that the insurer remains liable to pay all judgments against [the entity] up to the policy limits regardless whether [the entity] indemnifies the insurer as required under the indemnity agreement.
>
> [See R. 1:21-1A(a)(3) (professional corporations; R. 1:21-1B(a)(4) (limited liability companies); R. 1:21-1C(a)(3) (limited liability partnerships).]

Furthermore, within 30 days after each of the aforesaid entities files its required certificate of incorporation (or certificate of formation, in the case of a limited liability company or a limited liability partnership) with the Secretary of State, the entity shall file with the Clerk of the Supreme Court a certificate of insurance, issued by the insurer, setting forth the name and address of the insurance company writing the required insurance policies and the policy number and policy limits. Ibid.

Thus, to iterate, although New Jersey mandates malpractice insurance for those attorneys who practice

as designated entities, attorneys who practice as individuals or general partnerships are not required to carry professional liability insurance. Moreover, the current Rules do not require that any New Jersey lawyer or law firm, however organized, inform their clients whether they carry professional liability insurance or, if they choose to disclose, any of the terms of such insurance.

The Oregon Experience

Currently, Oregon is the only state that requires its licensed attorneys engaged in the private practice of Oregon law to maintain professional liability insurance. The Oregon State Bar Board of Governors created the "Professional Liability Fund" (PLF) in 1977 pursuant to an enabling statute, and with approval of the Bar's membership.[4] The PLF began operating on July 1, 1978, and has been the mandatory provider of primary legal malpractice insurance coverage for Oregon lawyers since that date.

A description of the Oregon system of mandatory professional liability insurance for lawyers is contained on the PLF's website[5] and reads, as follows:

> The PLF provides coverage of $300,000 per claim/$300,000 aggregate to every attorney engaged in the private practice of law in Oregon. This coverage includes defense costs and, in addition, there is a $50,000 claims

[4] Oregon's Bar is unified, and thus the PLF can provide coverage for all attorneys licensed to practice in the state.
[5] The website, found at http://www.osbplf.org, can be accessed by using the word "guest" for both the attorney identification number and attorney name.

expense allowance. In 2016 the basic assessment for this coverage is $3,500 for each attorney; the assessment has remained the same for five consecutive years.

The PLF's philosophy is that a program of this type must be mandatory for all lawyers in private practice in the state, as purely voluntary participation could result in adverse selection and a concentration of only the "bad" risks, leading to financial instability. Over time, the cost of coverage provided by the PLF has proved to be less than the cost of comparable commercial coverage.

Of the roughly 12,350 active members of the Oregon State Bar who live in Oregon, approximately 7,700 are in private practice and participate in the PLF. The remaining Bar members claim exemption from the PLF as corporate counsel, government lawyers, law professors, etc. These numbers fluctuate slightly throughout the year.

The coverage provided by the PLF is on a "claims made" rather than an "occurrence" basis. The PLF also provides automatic extended reporting or "tail" coverage at no cost to attorneys who discontinue practicing law in Oregon.

The PLF has enjoyed support from the membership and very good success with the handling of its claims. Based on recent data, roughly 67% of claim files are closed without payment of any settlement or judgment, while 33% involve some payment to a claimant. The average claim payment (including claims for which no payment was made) is approximately $9,600. Roughly 40% of claim files are closed without payment of any claims expense, while 60% involve some claims expense. The average

> claims expense paid on a claim (including claims with no claims expense) is approximately $11,400.
>
> In order to keep malpractice claims as low as possible, the PLF offers an extensive array of loss prevention programs including (1) legal education seminars, publications, and practice aids that alert lawyers to malpractice traps, (2) a practice management advisor program that helps lawyers improve office systems and procedures, and (3) a personal assistance program that helps lawyers practice more effectively (Oregon Attorney Assistance Program).
>
> [www.osbplf.org/about-plf/overview.html (emphasis added).]

There is a wealth of additional information on the PLF website concerning its operational experience. Significantly, the PLF is a stand-alone entity governed by a board of directors. The PLF has a large staff of non-public employees, and is directly accountable to the Oregon Supreme Court. No commercial insurer is involved because the PLF operates as a trust fund. The Oregon program was explained in one legal ethics journal as follows:

> The bar's reasoning is as follows:

(a) there was no profit factor;

(b) advertising commissions would be eliminated;

(c) accumulation of reserves in anticipation of unasserted claims was not necessary;

(d) broad participation spread the risk and reduced the cost; and

(e) the PLF would utilize a detailed record-keeping system to determine vulnerable areas of professional liabilities so as to minimize future problems.

The Oregon experiment demonstrates yet another advantage to mandatory malpractice insurance -- loss prevention assistance for attorneys. A mandatory fund system facilitates the collection of information that assists in loss prevention. The fund could also invest money and administrative resources in running programs and distributing information to lawyers participating in the mandatory program.

[Cunitz, Nicole A., "Mandatory Malpractice Insurance For Lawyers: Is There A Possibility Of Public Protection Without Compulsion?," 8 Georgetown Journal of Legal Ethics 637 (Spring 1995) (footnote citations omitted); see Appendix I.]

The Oregon PLF issues an annual report, copies of which are contained on the PLF's website for the years 2000 through 2016.[6] It is notable, as mentioned, that

[6]A copy of its 2016 Report is included as an appendix to this Report. See Appendix O.

the PLF also provides lawyers with a variety of loss-prevention programs (much like the New Jersey Institute for Continuing Legal Education does, at a cost, in its CLE program), as well as attorney advisors geared toward teaching lawyers how to practice law effectively and "malpractice free."

Ira Zarov, then CEO of the PLF,[7] made a presentation, via teleconference, to the Ad Hoc Committee concerning the formation and operation of the Oregon system, and answered numerous questions by Committee members. A copy of that video presentation is contained in the Appendix to this report. See Appendix Y.

Reviewing Oregon's approach, the Ad Hoc Committee concluded that significant differences between Oregon and New Jersey, would make a similar program here more challenging and perhaps impractical. For instance, in addition to being a unified Bar, Oregon's only has

[7] After 14 years as CEO of the PLF, Mr. Zarov retired on December 31, 2014, replaced by Carol J. Bernick.

12,350 active members, of whom 7,700 are engaged in the private practice of law. Recent numbers available from the Administrative Office of the Courts reflect almost 100,000 licensed attorneys in New Jersey, 37,000 of whom are engaged in the private practice of law.

Additionally, committee members expressed concern as to whether Oregon's 2014 basic coverage assessment of $3,500 per attorney would be realistic in the New Jersey marketplace. For example, tail coverage, when available, generally is provided at 2½ times the cost of the premium, as opposed to the free tail coverage offered by the PLF. No data was available as to whether Oregon's limits and surplus to support those limits were sufficient to meet the level of New Jersey claims. Additionally, no comparisons were made with respect to the impact of fee shifting under Saffer v. Willoughby, 143 N.J. 256 (1996), and liability exposure to third parties.

The PLF noted that the average claim payment for 2014 was $9,500. Sixty percent of the claims involved

some claim expense. Where a claim was paid, the average expense was approximately $11,000. Again, there were no comparison numbers to see whether these were consistent with what is occurring in New Jersey. However, the insurance industry representatives on the Ad Hoc Committee expressed concern that New Jersey is a significantly costlier market.

Moreover, the Oregon limits include defense costs, with an additional $50,000 claim expense allowance. Accordingly, it appears that defense costs erode the limits. Conversely, the New Jersey Department of Banking and Insurance imposes significant limitations in that regard.

With respect to the PLF's comparison with the commercial marketplace, it cited that the accumulation of reserves in anticipation of unasserted claims was unnecessary. No evaluation was performed as to why, nor as to the related financial instability that may be imposed by such claims.

Finally, the Oregon system required legislative enactment of an implementing statute, and the creation of yet another layer of bureaucracy to administer such a program, rendering creation of a similar system in New Jersey unlikely.

The American Bar Association Model Rule

In 2003, the American Bar Association (ABA) charged its Standing Committee on Client Protection with consideration of whether attorneys should be required to disclose the existence of professional liability insurance coverage and, if so, the form of that disclosure. The Committee issued a report in August 2004, recommending that the ABA adopt a Model Court Rule on Insurance Disclosure, which

> would reduce potential public harm by giving consumers of legal services an opportunity to decline to hire a lawyer who does not maintain professional liability insurance. Under this Model Court Rule, a lawyer would inform the highest court in the jurisdiction, or designated entity, whether insurance is maintained. The court would make this information available to the public. During the reporting year, if the policy is terminated or modified, the lawyer would be required to inform the court. The ultimate decision whether or not to maintain professional liability insurance remains with lawyers.

Not without opposition, the Model Court Rule on Insurance Disclosure was adopted by a majority vote of

the ABA House of Delegates in August 2004. It provides:

> RULE___. INSURANCE DISCLOSURE
>
> 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.
>
> [See Appendix B.]

It is clear from a reading of the August 2004 report and subsequent adoption of the Model Rule that the ABA had rejected the concept of a requirement of mandatory legal malpractice insurance, as well as any requirement that a lawyer disclose directly to clients whether insurance is maintained, opting rather for the annual reporting requirement embodied in the Model Rule. It can certainly be called the "most lawyer-friendly" version of a mandatory disclosure rule, as it only mandates disclosure as to whether an attorney has malpractice insurance or not, and only disclosure of the attorney response to that requirement is made available to the public. The Model Rule is silent as to the best way to transmit that information to the public.

Additionally, the Model Rule is a court rule, not a disciplinary rule, the penalty for non-compliance being suspension from the practice of law until the attorney provides the information. See Watters, Jeffrey D., "What They Don't Know Can Hurt Them: Why Clients Should Know If Their Attorney Does Not Carry Malpractice Insurance," 62 Baylor Law Review, 245, 255 (Winter 2010). See Appendix J. In its report, the Standing Committee explained its recommendation, in part, as follows:

> 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.
>
> Lawyers in the United States, except in Oregon, are not required to maintain professional liability insurance. While clients have the right to hire lawyers who do not maintain professional liability insurance, those who do so will likely have no avenue of financial redress if the lawyer commits an act of negligence. Lawyer disciplinary proceedings primarily offer prospective protection to the public. They either remove lawyers from practice or seek to change the lawyers' future conduct. Protection of clients already harmed is minimal. While lawyer-respondents are sometimes ordered to pay restitution in

disciplinary cases, in many jurisdictions the failure of lawyers to make restitution ordered in disciplinary proceedings will not bar subsequent readmission to practice. Clients can also seek restitution from client protection funds when dishonest conduct is involved. Client protection funds are an innovation of the legal profession unmatched by any other profession. Unfortunately, the ability of client protection funds to compensate clients is limited. Restitution is generally available only when a lawyer has misappropriated client funds. Legal malpractice claims are the only manner by which clients can seek redress for acts of negligence. Prospective clients should have the right to decide whether they want to hire lawyers who do not maintain liability insurance. The Model Court Rule offers the prospective client the ability to make an informed decision.

Malpractice insurance is not a panacea for injuries caused by lawyer negligence. Nevertheless, whether a lawyer maintains professional liability insurance is a material fact that potential clients should have a right to know in retaining counsel. Professional liability insurance does ensure that a client may find financial redress against the principal negligent party, their lawyer. The proposed Model Court Rule provides the public with access to relevant information; it does not mandate that lawyers maintain malpractice insurance. The Model Court Rule incorporates a provision requiring an entity designated by the highest court to make the reported information available to the public. The information would presumably be available by telephone, or preferably, by Internet access.

> The bar or the lawyer regulatory agency should also inform the public of the limits on the usefulness of this information, e.g., that most policies are “claims made” policies and that policies generally do not cover dishonesty or other intentional acts. Given the nature of claims-made coverage, it is possible that the insurance policy a lawyer has in place at the time when a prospective client is likely to inquire about it, may have lapsed at the time a claim for legal malpractice is made. Most lawyers will probably purchase “tail” coverage to protect themselves from this situation but the public should be made aware of the unique nature of professional liability insurance. The Committee was advised that the experience in Alaska has been that most lawyers who have malpractice insurance today will most likely have it in the future and that, therefore, the value of making the information available to the public outweighed its potential to be misleading by the fact that the policy had lapsed by the time a claim was made.
>
> The Committee recommends that each jurisdiction adopting the Model Court Rule decide if it wants to include, in its version of the Rule, minimum limits of professional liability coverage. . . .
>
> [See Appendix C.]

A minority opinion of the ABA Standing Committee on Lawyers’ Professional Liability issued the following “Statement in Opposition” to adoption of the ABA Model Rule on Insurance Disclosure, contending:

1. The proposed Rules does not assist the public in making a fully informed decision about hiring a lawyer, because it does not educate the public about the fundamental difference between professional liability insurance (claims-made policies) and the types of insurance policies with which most consumers are familiar (occurrence-based);

2. Without sufficient context and education, promoting the concept that a lawyer's insurance protects the client (rather than the lawyer) will lead to a false sense of security for the potential client;

3. The proposed Rule creates a substantial risk for increased miscommunication between lawyers and their clients, and may foster misunderstandings between the practicing bar and the public.

[See Appendix D.]

In sum, if adopted, the recommended ABA Model Rule on Insurance Disclosure is applicable to all licensed attorneys and contains the following components:

1. An annual attorney certification is completed by all attorneys licensed to practice law as to:

a. Whether the attorney is engaged in the private practice of law;

b. If so, whether the attorney is currently covered by professional liability insurance;

c. Whether the attorney intended to maintain such coverage while engaged in the private practice of law; and

d. Whether the attorney is exempt because he or she is a full-time government attorney who does not otherwise represent clients;

2. The attorney engaged in the private practice of law must notify the reporting agency in writing within 30 days if that coverage lapses or terminates for any reason;

3. The Court prescribes the form of the required certification;

4. Information disclosed pursuant to these requirements shall be made available to the public by such means designated by the Court;

5. Any attorney who fails to file a complete required disclosure certification is subject to suspension from the practice of law until compliance with the Rule; and

6. Any attorney supplying false information on the required certification shall be subject to appropriate disciplinary action.

Additionally, although not specifically set forth in the Model Rule, the ABA Standing Committee on Client Protection recommends that each jurisdiction adopting the Model Court Rule consider whether minimum liability limits should be included. As will be seen during our review of each state addressing the issue of disclosure and the ABA Model Court Rule, there have been several variations of the Model Rule adopted.

On its website, the ABA monitors state implementation of its Model Court Rule on Insurance Disclosure, and provides a state-by-state chart concerning each state's position. As of August 9, 2011, twenty-four states required some level of disclosure, five states were considering adopting a disclosure rule, five states had opted against adopting a rule, and only one state required attorneys to maintain professional liability insurance."

The following states require disclosure of insurance by the lawyer directly to the client:

Alaska
California
New Hampshire
New Mexico
Ohio
Pennsylvania
South Dakota

The following states require lawyers to disclose the existence of insurance on some form of an annual registration statement:

Arizona
Colorado
Delaware
Hawaii
Idaho
Illinois
Kansas
Massachusetts
Michigan
Minnesota
Nebraska

Nevada
North Dakota
Rhode Island
Virginia
Washington
West Virginia

Arkansas, Connecticut, Florida, Kentucky and Texas decided not to adopt the ABA Model Court Rule, and North Carolina withdrew its rule, which had been patterned after the ABA Model Court Rule. As of February 10, 2016, Maine, New York, South Carolina, Utah, and Vermont were considering adoption of the ABA Model Court Rule. Now, New Jersey has joined the debate. A copy of the Table maintained on the ABA website entitled “State Implementation of ABA Model Rule on Insurance Disclosure,” as of February 10, 2016, is contained in this report as Appendix F.

REPONSE OF THE NEW JERSEY STATE BAR ASSOCIATION TO THE MODEL RULE

Notably, in response to a request to all state bar association, the New Jersey State Bar Association (NJSBA), in 2004, addressed the issue of whether the ABA House of Delegates should adopt the ABA Model Rule.[8] In a February 26, 2004 letter to John Holtaway, Esq., counsel to the ABA Standing Committee on Client Protection, Harold L. Rubenstein, the NJSBA's then-Executive Director, reported that the NJSBA Board of Trustees had reviewed the ABA Model Rule, "and had concluded that [it] would impose cumbersome and unnecessary requirements on lawyers[,]" and that the NJSBA "would oppose the rule if it reache[d] the House

[8] Prior to adoption of the Model Court Rule, the ABA Standing Committee on Client Protection, the ABA Standing Committee on Professional Discipline, the ABA Section of Family Law, the National Association of Bar Counsel, and state bar associations of New Mexico, Virginia, Washington, and Illinois issued a "Talking Points" document concerning the ABA Model Court Rule on Insurance Disclosure, dated July 30, 2004, which attempted to address some of the concerns expressed regarding adoption of that Model Court Rule. See Appendix C.

of Delegates." More specifically, Mr. Rubenstein explained the position of the NJSBA, as follows:

> The best way a potential client can find out whether a lawyer has professional liability insurance is to ask about it. We would rather have clients make such inquiries, rather than require lawyers to report this information on an annual registration statement. Insurance coverage may be the last thing a potential client thinks about. However, a client is more likely to ask a lawyer about it, and is unlikely to either know, or to make an effort, to call a central court office to obtain this information. Therefore, we question the central rationale behind the proposed rule.
>
> Further, we question what a state supreme court may be expected to do with this information. We are concerned that the collection of such information will open the door to consideration of a requirement that all lawyers obtain professional liability insurance.
>
> The Model Rule would require a lawyer to report a substantial amount of information, and threatens disciplinary action for failure to comply. A lawyer with insurance would have to certify a range of coverage, and whether there [are] any unsatisfied judgments against the lawyer, "or any firm or professional corporation in which the lawyer has practiced . . . arising out of the performance of legal services by the lawyer. . . ." Thus, the rule would impose a significant reporting burden.
>
> The NJSBA is aware of no public outcry for this rule, nor have we any indication that our highest court has any interest in addressing

this subject. As you are well aware, the bar is already subject to extensive regulation and disciplinary oversight. It appears to the NJSBA that the Model Rule would be an unnecessary burden to the bar, and would add little in the way of consumer protection.

[See Appendix E.]

Arguments Favoring a Requirement of Mandatory Professional Liability Insurance

In January 2010, and again in January 2014, Bennett Wasserman, Esq., who would be appointed to membership of this Ad Hoc Committee, authored two articles that appeared in the New Jersey Law Journal, calling upon either the Supreme Court or the Legislature by statute to extend the mandatory malpractice insurance coverage applicable to entity law firms to all lawyers who practice law in New Jersey.[9] See Appendices Q and R. The New Jersey Law Journal's Editorial Board "endorsed the call for mandatory insurance coverage for all practicing lawyers" and "urge[d] the Court to adopt a rule requiring such coverage.[10] See Appendix S.

Proponents of mandatory legal malpractice insurance generally present the following arguments to support their position:

[9] See Wasserman, "Mandatory Legal Malpractice Insurance: The Time Has Come," New Jersey Law Journal, January 14, 2010; and Wasserman, "All Clients Deserve Protection From Professional Negligence: A Call for Universal Legal Malpractice Insurance in New Jersey," New Jersey Law Journal, January 20, 2014.
[10] New Jersey Law Journal, January 31, 2014, "Mandatory Insurance for Lawyers."

1. Mandatory Insurance Protects Clients as Well as Attorneys – The most pervasive argument in support of mandatory malpractice insurance is that it would advance New Jersey's interest in protecting the public from attorney negligence. Specifically, clients are at risk when attorneys practice law without professional liability insurance, as many attorneys may not have sufficient assets to compensate clients in the event of legal malpractice. Indeed, attorneys who handle plaintiffs' malpractice claims do not normally handle legal malpractice cases unless the defendant attorney or firm is insured.

Requiring attorneys to carry malpractice insurance as a condition precedent to exercising their license to practice law is within the state's police power and its duty to protect the general welfare of its citizens. Economic loss is the primary harm in legal malpractice, and mandatory insurance protects potentially uncompensated victims of an attorney's negligent conduct. Ethical rules and client security funds do

not address compensation for harm caused by legal malpractice and are thereby not a sufficient deterrent to the commission of negligent conduct. Moreover, it is argued that attorneys have a professional responsibility and duty to ensure that their clients' interests are placed ahead of their own, and are compensated should they be negligent in the performance of their legal services, particularly because an attorney is required to exercise the skill and knowledge normally possessed by members of that profession in good standing in similar communities. See Restatement(Second)of Torts, § 299A. Also, the sense of the Ad Hoc Committee members, based on collective experience, is that most clients, either believe that professional liability insurance already is mandated and would be surprised to learn that it is not, or do not consider the existence of insurance when retaining an attorney.

In addition to protecting clients, requiring malpractice insurance as a condition precedent to

engaging in the private practice of law also protects attorneys and their dependents. Attorneys engaged in private practice without such insurance risk financial disaster from even a minor inadvertence.

Finally, our Supreme Court has, by Court Rule, already endorsed professional liability insurance coverage for attorneys by requiring professional service corporations, limited liability companies and limited liability partnerships engaged in the practice of law to provide specified minimum amounts of coverage and deductibles to insure against claims by clients for damages arising out of the performance of professional services by attorneys employed by the entity. Therefore, proponents of mandatory professional liability insurance contend that there is no equitable basis for not requiring such coverage by all attorneys.

2. Mandatory Insurance Might Reduce Escalating Insurance Rates – Proponents assert that if mandatory insurance requirements were adopted, there would be greater stability in the insurance market, less

restrictive coverage, and greater availability of coverage. Moreover, they contend that a mandatory program would be less expensive due to the elimination of brokerage commissions, marketing costs, taxes, regulatory fees, and required contributions to state guaranty funds. As with the Oregon experience, lawyers would be able to pay a relatively small premium through state bar assessments for potentially large losses from a malpractice claim, enabling the insurer to spread the risk of loss among all of its policy holders. Additionally, law firms could obtain umbrella or excess coverage for losses beyond the base required coverage.

3. Mandatory Insurance Might Equalize Attorneys' Vulnerability to Claims – This argument asserts that attorneys now carrying professional liability insurance are the ones being sued because plaintiffs' attorneys are less likely to file claims against uninsured lawyers. This phenomenon, therefore, unfairly penalizes the lawyer who does carry insurance. It has, however, been pointed out by one commentator that

"[e]qual vulnerability is troubling . . . since clients might learn of their attorney's coverage and be tempted to raise frivolous malpractice claims." Cunitz, "Mandatory Malpractice Insurance For Lawyers: Is There A Possibility Of Public Protection Without Compulsion?" 8 Georgetown Journal of Legal Ethics 637 (Spring 1995); See Appendix I.

4. Attorneys Are In a Better Position to Insure Against Loss – This argument asserts that an insurance requirement is the more efficient method of protecting the public against harm because insurance markets provide attorneys with products specifically tailored to compensate their clients against losses due to negligent legal conduct. No similar insurance products are generally available to clients to protect them from loss due to attorneys' malpractice.

5. Oregon – Proponents of mandatory coverage argue that the compulsory malpractice program in Oregon has operated successfully and efficiently for some 35 years, as demonstrated by the annual reports issued by

its PLF. Coverage rates are based on actual claims experience, not on the size of the firm or the area of practice, and the PLF has built up a substantial fund. The reasoning of the Oregon Bar in creating the PLF in 1978 was:

> (a) there was no profit factor;
>
> (b) advertising commissions would be eliminated;
>
> (c) accumulation of reserves in anticipation of unasserted claims was not necessary;
>
> (d) broad participation spread the risk and reduced the cost; and
>
> (e) the PLF would utilize a detailed record-keeping system to determine vulnerable areas of professional liabilities so as to minimize future problems.
>
> The Oregon experiment demonstrates yet another advantage to mandatory malpractice insurance -- loss prevention assistance for attorneys. A mandatory fund system facilitates the collection of information that assists in loss prevention. The fund could also invest money and administrative resources in running programs and distributing information to lawyers participating in the mandatory program.
>
> [Cunitz, supra, at 645; see Appendix I.]

6. Mandatory Insurance Might Improve the Image of the Legal Profession – The argument here is that if every

attorney is insured, the public will alter its perception of the legal profession once informed that attorneys cannot completely evade the consequences of their mistakes. Moreover, adoption of a mandatory insurance program makes certain that the public will be compensated for attorney malpractice, and demonstrates that attorneys are sincerely interested in the welfare of their clients and the public. The counter to this argument, of course, is that mandatory insurance coverage will draw further public attention to the problem of legal malpractice, potentially stimulating additional negative commentary concerning the legal profession.

7. Attorneys in Many Other Western Civilization Countries Are Required to Carry Some Form of Legal Malpractice Insurance – England, Ireland, certain provinces of Canada, Norway, and Australia all require their attorneys to carry professional liability insurance, and proponents argue that their programs operate efficiently and effectively.

8. Physicians Are Required to Carry Medical Malpractice Insurance – New Jersey requires physicians to carry medical malpractice insurance. Since physicians and attorneys rely on the public trust, it is questionable why attorneys are exempt from a similar mandate. As noted, the sense of the Ad Hoc Committee members is that the public is not widely aware that all attorneys do not have this obligation, and it would be reasonable to assert that if this fact were more widely known, public confidence in the legal profession would decline.

9. Adequate Protection of the Public from Attorney Misdeeds Requires That Malpractice Insurance Be Made Compulsory – The New Jersey Lawyers' Fund for Client Protection, while laudable, is intended to compensate only a portion of the clients who suffer from the misdeeds of New Jersey attorneys. Specifically, a compensable claim by the Fund requires a showing that the attorney accepted money or property in trust from the client and then converted it. The Fund does not

cover claims for attorney negligence or gross negligence, which constitute a significant portion of malpractice claims. Therefore, if true client protection against attorney misdeeds is the public policy objective, mandatory malpractice insurance also should be instituted.

10. Malpractice Loss Prevention Programs Can Be Instituted That Will Improve the Overall Quality of Legal Services – The argument here is that the administration of a mandatory legal malpractice insurance program will provide information that will aid in developing malpractice prevention programs. Stated differently, information about the causes of losses is essential to a plan of prevention.

11. Mandatory Insurance Will Aid in Eliminating the "Bad Apples" in the Legal Professions - This argument is grounded in the claim that the underwriting standards of professional liability insurers would prevent attorneys with poor malpractice records from continuing to obtain insurance, and thus weed these

attorneys out of the active profession. While the attorney disciplinary system in New Jersey is well-regarded, it is not aimed at identifying or punishing malpractice and, thus, may not be a sufficient program to effectively move the “bad apples” to the sidelines. A market mechanism that screens all attorneys for malpractice would be much more efficient.

Arguments Opposing a Mandatory Professional Liability Insurance Requirement

Opponents of mandatory professional liability insurance general present the following arguments to support their position:

1. **There is No Proof that the Public is being Harmed By the Absence of Mandatory Insurance** – This argument asserts that there are no statistics demonstrating that the existence of uninsured attorneys results in uncompensated claims. Given the lack of statistics, it is not possible to determine the extent of public harm occurring, if any, due to the absence of mandatory insurance, and no way to measure the benefit of requiring insurance.

2. **Insurance Coverage May Not Guarantee Client Protection** - This argument focuses on the fact that insurance companies are often able to deny liability coverage by asserting policy exclusions, statutes of limitations, or attorney misrepresentation when applying for coverage. Thus, even where genuine

liability may exist, the protection afforded to injured clients may be denied. Opponents also argue that minimum mandatory policy limits may not be adequate to compensate clients in all cases.

3. A Mandatory Insurance Requirement is Coercive – The argument here is that creation of a mandatory coverage requirement usurps an attorney's freedom of choice.

4. Mandatory Insurance Coverage Would Be Too Costly - This argument contends that requiring attorneys to carry malpractice insurance may be too expensive for certain practitioners, thus pricing them out of the practice of law. The Court has for some time encouraged diversity within the legal community, seeking to have a variety of practitioner types who can more broadly serve the legal needs of all strata of the state's citizens. This includes part-time practitioners, as well as attorneys who seek to keep their fees commensurate with the financial resources of those members of the public with limited means. Mandatory insurance would force these practitioners to

either absorb the cost of insurance, harming their own financial well-being, or increase their rates, making access to legal services more difficult for the populations they seek to serve.

5. Mandatory Insurance Discriminates Against Certain Attorneys – Here, the argument is that a compulsory system incorporates discrimination against certain specialties, as some are more vulnerable to malpractice suits than others and thus face higher premiums. Additionally, smaller firms and solo practitioners are likely to find it harder to obtain insurance than large firms.

6. Insurance Costs Will Be Passed On to the Client – As mandatory malpractice insurance imposes both direct and indirect costs, the argument is that these costs will be passed on to the client, i.e., attorneys' fees would increase in order to cover increases in insurance expenses. This will tend to make legal services overall more expensive and will disproportionately affect those segments of the population that have

limited means with which to retain an attorney. Thus, mandatory insurance may have the unintended consequence of shrinking the population that can afford an attorney.

7. <u>Insurance Companies Will Gain Too Much Control Over the Attorney's Ability to Practice Law</u> – This argument highlights the fact that, in a mandatory insurance system, an insurance company finding an attorney uninsurable, for any reason, essentially eliminates that attorney's ability to practice law. Stated differently, insurance companies would be determining who practices law.

The state system for attorney qualification and admission would thus become subject to the commercial decisions related to the underwriting risk of the small number of companies that are willing to write professional liability insurance in New Jersey. Attorneys may find themselves disqualified from the practice of law due to considerations that have little to do with professional competence and character, and

more to do with business judgments about revenue and underwriting risk assessments being made by insurance executives who are not answerable to the Court.

8. In a Mandatory-Coverage Model, Bad Attorneys Are Subsidized by Good Attorneys. This argument contends that in a system where all lawyers are required to be insured, the underwriting of insurance premiums will be equalized, meaning that the premiums charged to malpractice-free lawyers will be designed to cover for the mistakes of those lawyers who commit malpractice.

9. Knowledge of the Existence of Mandatory Insurance Will Increase the Number of Claims. In other words, disgruntled clients who may not otherwise be inclined to make a claim may do so if they know attorneys must carry insurance, thereby increasing the number of malpractice claims. It should be noted, however, that the experiences of British Columbia and Oregon, with their mandatory programs, actually resulted in fewer, not more, claims.

In analyzing the pros and cons of this argument, one commentator rejected imposition of a mandatory insurance program, concluding, in pertinent part:

> This debate has been framed as a zero sum game: either adopt mandatory insurance requirements or let the market determine who will be insured and the cost of that insurance. However, the overriding goal in adopting mandatory malpractice appears to be the protection of clients. . . . [M]andatory malpractice insurance is only one of several, but not necessarily the best, means to ensure that clients are protected. Lawyers would do well to look to the current debate concerning medical malpractice to see the types of problems and limited relief such a system might provide in the legal arena.
>
> Legal malpractice claims are an integral part of the profession. As a matter of both public policy and sound business judgment, it is imperative that attorneys insure themselves. By obtaining malpractice insurance, attorneys would further the spirit and intent of the Model Rules. Yet, there is no evidence that adopting a per se requirement of malpractice insurance is the answer to the malpractice crisis. It seems more like a bandage than a panacea.
>
> . . . .
>
> While the subject of malpractice insurance is currently a priority for insurance companies and state bar associations, the solution should not be placing further regulations and requirements on the lawyer. Malpractice insurance requirements infringe upon the

attorney's right to exercise independent judgment and common sense. Rather, attorneys should be relied upon to insure themselves against risk. In this age of skyrocketing malpractice awards, most attorneys are seeking coverage rather than risking personal bankruptcy and public humiliation. Large premiums can be paid by steadily increasing attorney fees.

In balancing the costs against the benefits, one gains insight as to whether or not malpractice insurance should be compulsory. Influencing the balance is the attorney's ethical obligation to the client. Ethical considerations are often ignored in economic equations because ethical considerations are not regulatory. The Model Rules and the Model Code do not require malpractice insurance. Just as the ethical considerations in the Model Code are not mandatory, malpractice insurance might well be considered an elective rather than a condition for licensure within a state or within the nation.

It is clear that further studies must be conducted in order to collect data on the number of uninsured versus insured attorneys. This information could be obtained by adopting mandatory reporting requirements such as those considered in Arizona by interviews with attorneys defending against malpractice claims, by insurers who cover attorneys, and by questionnaires distributed through state bar associations. Until the data has been collected, it is merely speculative to assert that public harm is the impetus for adopting mandatory malpractice.

Although it is frightening for injured clients to be without recourse and disturbing

to members of the legal profession who see voluntary malpractice insurance as a problem, the decision whether or not to insure oneself against malpractice should remain a lawyer's decision. Prudent attorneys will obtain insurance to maintain their client base. Additionally, the damage of malpractice can be dealt with using preventive rather than compensatory measures. Increased deterrence against malpractice through legal education, both before and after passing the bar, coupled with business pressure will encourage attorneys to insure themselves and eventually may extirpate the problem of legal malpractice.

[Cunitz, supra, at 667-68; see Appendix I.]

Another commentator, also weighing the pros and cons, reached a contrary conclusion:

> Legal malpractice and malpractice insurance are serious problem areas. The cost of malpractice insurance continues to increase dramatically. As a result attorneys are going without insurance and more are likely to "go bare" in the future. As more attorneys practice without insurance coverage, the public stands a greater chance of suffering an unremediable injury at the hands of a negligent attorney.
>
> Practicing law is a privilege that carries with it responsibilities. Mandating legal malpractice insurance will help lawyers protect themselves and the public. Making insurance mandatory may significantly reduce premiums. More important, however, is the possibility that loss control programs made possible by a mandatory program will significantly reduce legal malpractice. The more directly the bar

> and its members are involved, the greater the likelihood of reducing the incidence of legal malpractice.
>
> As each state bar association considers plans for providing malpractice coverage for its members, serious consideration should be given to a mandatory program. The benefits of such a program appear to greatly outweigh the detriments.
>
> [Kay, Thomas, "Should Legal Malpractice Insurance Be Mandatory?", 102 Brigham Young University Law Review 131 (1978); see Appendix H.]

It is interesting to note there is a paucity of recent research and information on the issue of the imposition of mandatory legal professional liability coverage since, following promulgation of the ABA's Model Court Rule in 2004, the national debate and focus shifted from one of "compulsory coverage" to one of "compulsory disclosure."

10. The Existence in New Jersey of Mandatory Insurance Coverage for Professional Corporations, Limited Liability Companies and Limited Liability Partnerships is Not a Precedent For Extending a Mandatory Coverage Requirement for All Attorneys. The mandatory professional liability insurance requirement in our

Court Rules is a recognition of the economic and practical advantages of attorneys acting together in limited liability associations or partnerships obtaining entity-specific tax advantages, while at the same time preventing such attorneys from depriving clients of viable malpractice claims against an empty “corporate shell.” Moreover, the Rules do not mandate insurance coverage as a condition on the right to practice law, but solely on the right to practice as a certain specific entity. Thus, the Court has not spoken to the issue of mandatory professional liability insurance as a condition of practicing law.

Arguments Supporting and Opposing a Mandatory Disclosure Requirement Concerning a Professional Liability Insurance Policy

An alternative to imposition of a program of mandatory legal malpractice insurance is the adoption of a requirement that information regarding whether an attorney maintains a policy of malpractice insurance be made available to potential clients.

One form of such a requirement is contained in the referenced ABA Model Court Rule on Insurance Disclosure. In brief, that Rule requires each attorney to certify to the highest court of the jurisdiction, on an annual basis, whether the attorney is engaged in the private practice of law and, if so, whether the attorney is covered by a policy of professional liability insurance and intends to maintain that insurance during the period the attorney engages in the private practice of law. Government attorneys and inside counsel are exempt as long as they have no other clients. The Model Rule also states that the highest court will make this information “available to the

public” in such manner as it may choose. Eighteen states have adopted rules that require attorneys to report periodically to a court-related entity.

Alternatively, a disclosure requirement could mandate that an attorney, before any attorney-client relationship arises, inform the client directly that the attorney is not covered by professional liability insurance. Seven states have adopted rules requiring this type of disclosure. This requirement could be coupled with a mandate to disclose, or report, to the Court, or it could be adopted in lieu of such mandate. One state — South Dakota — requires both disclosure to the client before representation and annual reporting.

Either of these potential disclosure requirements could be expanded to include disclosure of additional information about the attorney’s insurance policy (identity of the insurer, amounts of coverage, exclusions, and deductibles), and to require the attorney to promptly disclose or report if the coverage lapses, terminates or is suspended. Except as may be

expressly noted, the arguments presented in the following discussion apply to all variants of the disclosure or reporting requirement.

Arguments supporting mandatory attorney disclosure or reporting regarding professional liability insurance include:

1. Mandatory Disclosure Is a Professional Responsibility in Furtherance of the Interest in Protecting the Public. James Towery, past chair of the ABA Standing Committee on Client Protection and past president of the California State Bar, wrote:

> One of the ironies of the situation is that many clients no doubt presume that all lawyers are required to carry malpractice insurance. The clients often discover the fallacy of that assumption for the first time when they attempt to sue their uninsured lawyers.
>
> However, there has been an encouraging trend recently, led by state supreme courts rather than by bar associations. That trend is the adoption in several states of rules of professional conduct that require a lawyer who lacks professional liability insurance to disclose that fact to every client.

[Towery, James E., “The Case In Favor of Mandatory Disclosure of Lack of Malpractice Insurance,” January 19, 2003; see Appendix N.]

Addressing the arguments of opponents to a requirement that attorneys disclose a lack of insurance, Towery stated:

> As the debate on this issue of mandatory reporting has spread over the past several years, opponents have voiced a variety of objections to the concept. Some objections are philosophical, others are technical in nature.
>
> One of the most frequent objections is to question the need for such a rule. In other words, where is the evidence that uninsured lawyers are currently harming clients? Where is the evidence, opponents ask, of malpractice judgments against lawyers that are uncollectible due to lack of insurance?
>
> It is a fair criticism that no study exists that provides data on these points. . .
>
> However, a study is hardly necessary to demonstrate that client harm results from uninsured lawyers. Without question, lawyers who lack insurance commit malpractice, just as do those with insurance (and likely with greater frequency). And no one can seriously question that claims against uninsured lawyers are often abandoned, precisely because there is no available insurance. If you doubt this, simply ask any lawyer in your community who handles plaintiff’s legal malpractice claims about the subject.
>
> . . . .

> Another objection to mandatory reporting is the suggestion that client security funds already address the issue. That is simply not the case. Client security funds have a more limited purpose—to reimburse clients when lawyers steal money.
>
> . . . .
>
> Some of the technical objections include that mandatory disclosures don't include the nuances of the adequacy of the legal malpractice carrier, or the issue of when a diminishing limits policy (where liability coverage diminishes as expenses of defense are incurred) causes coverage to fall below a certain level. It is true that such nuances are not covered by many of the mandatory disclosure rules. Certainly such considerations should be considered in drafting disclosure rules. However, these are not compelling arguments for failing to address the problem at all. An imperfect solution to the problem of uninsured lawyers is better for the public than no solution at all.
>
> [Ibid.]

In conclusion, Towery noted:

> Supporters of mandatory disclosure frame the question as follows: when a client hires a lawyer, is the lawyer's lack of insurance a material fact that the client is entitled to know? It is hard to fashion a persuasive argument that clients are not entitled to that information. Lawyers operate under a state license, and have a monopoly on "practicing law." With that monopoly go certain obligations. Full disclosure to clients of

> material information regarding the representation is certainly one of those obligations.
>
> [Ibid.]

2. Mandatory Disclosure Would Mitigate Public Harm

This argument is that disclosure would provide potential clients with the opportunity to reject being represented by an uninsured attorney. Even if the client chose to go forward with an uninsured attorney, the client would do so presumably with knowledge of the potential risk, thus avoiding the unpleasant surprise referred to by Towery's article. There may be valid reasons for a client retaining an attorney despite the lack of professional liability insurance.

3. Whether an Attorney Maintains Malpractice Insurance is a Material Fact That May Bear Upon a Client's Decision to Hire an Attorney. The proponents of this argument assert that mandatory disclosure would allow clients to make a fully-informed decision when choosing to hire an attorney. In a telephone survey conducted by the Texas State Bar, 80% of the respondents said

that it was either very important or moderately important to know whether their attorney carried legal malpractice insurance. See Watters, Jeffrey D., "What They Don't Know Can Hurt Them: Why Clients Should Know If Their Attorney Does Not Carry Malpractice Insurance," 62, Baylor Law Review 245, 247 (2010).

Clients have a tendency to assume their attorney has, or is required to have, malpractice insurance and would generally not even think to make an inquiry concerning the existence of malpractice insurance. This may favor direct disclosure to the client, since Court reporting alone would require the potential client to seek out the information rather than have it affirmatively presented before the attorney-client relationship begins.

4. A Disclosure or Reporting Requirement Would Not Interfere With Attorneys' Ability to Practice. Unlike a mandate requiring every attorney engaged in the private practice of law to carry insurance, a disclosure or reporting requirement would allow

attorneys currently practicing to continue to do so, with no cost impact and minimal disruption to the legal community. The continued privilege to practice would not be ceded to insurance companies, but rather would remain the province of the Court and its well-settled processes of attorney qualification, self-regulation and discipline.

5. Mandatory Disclosure Would Tend to Cause Clients to Select Attorneys with Insurance – This argument rests on the premise that, all other things being equal, clients will tend to work with attorneys who have insurance because it provides added financial protection for the client. The incidence of malpractice claims brought against attorneys that have no professional liability coverage should decline. There is, of course, a risk that a small number of attorneys might misrepresent their status concerning insurance coverage, which could lessen the social benefit of such a trend.

6. <u>A Mandatory Disclosure Rule May Encourage Attorneys to Acquire Malpractice Insurance</u> – Proponents of this argument contend that competition in marketing legal services will encourage attorneys to voluntarily seek malpractice coverage, promoting self-monitoring in the legal profession. There is empirical evidence that in some states that have adopted a mandatory disclosure or reporting requirement, the percentage of lawyers carrying professional liability insurance increased significantly. For example, one commentator summarized the situation, as follows:

> Mandatory disclosure may not be the perfect solution, but it represents the best of the available choices. Only 9 to 11 percent of the Virginia attorneys remain uninsured now that the public can conveniently determine if they carry insurance. Only 2 percent of lawyers in South Dakota have been willing to forego insurance since they have been required to advertise the fact on their letterhead and disclose to their supreme court. And although a few uninsured attorneys in Ohio and Alaska will no doubt fail to disclose as required by their supreme courts, it is hard to imagine that not having to disclose to clients in writing will not encourage more to become covered.

[Johnson, Robert I., and Simpson, Kathryn Lease, "O Brother, O Sisters, Art Thou Insured"? 24 Pennsylvania Lawyer 28, 30 (May-June 2002); see Appendix L.]

See also, Watters, Jeffrey D., supra; Appendix J.

7. Disclosure Provides the State Bar and the Court Better Information About the Current State of Malpractice Insurance Coverage – There is currently a paucity of information available regarding how many attorneys not covered by the current rules carry malpractice insurance and, if so, the nature of such insurance. A rule that required regular reporting to the Court of malpractice insurance coverage, as well as limits and deductibles, would provide ongoing information about the number of attorneys who are insured and the amounts of insurance, which the Court could use to make further decisions about the regulation of the bar in this regard.

Some of the arguments advanced in opposition to a system of mandatory disclosure or reporting regarding legal malpractice insurance include:

1. <u>There is No Evidence Showing That an Attorney Who Has Insurance is More Likely to Act More Competently or Ethically Than One Who Does Not</u>. Stated differently, the argument is that there is no evidence that a mandatory-disclosure rule is necessary. Moreover, not having malpractice insurance does not speak to an attorney's ability, experience, or whether the attorney has faced prior malpractice claims.

2. <u>Mandatory Disclosure Will Tend to Skew Client Decisions</u> – This argument asserts that a mandatory-disclosure rule will encourage clients to choose attorneys based solely on the existence of malpractice insurance, thus elevating malpractice insurance above other issues, such as competency to handle the matter and billing rates.

3. <u>Knowing That An Attorney Has Malpractice Insurance May Be Misleading or Useless and Harm the Client</u> – Proponents of this argument note that malpractice claims are frequently not made in the same year that a negligent act occurs. If an attorney has insurance on

the day he or she is negligent, that attorney may not have it at the time a client discovers the mistake; therefore, there may be no correlation between disclosure and actual coverage. Moreover, a bare-bones disclosure does not address the many reasons a claim may not be covered. One recent commentator outlined the issue as follows:

> Furthermore, disclosure is inherently deceptive. Telling clients that the attorney is covered by malpractice insurance alone is not enough. Most malpractice policies are claims-made, and not occurrence, policies, which means insurance will only cover claims brought in the policy period, regardless of when the malpractice actually took place. Just because an attorney is covered by malpractice insurance now, that does not mean he will continue to be covered in the future when the client brings a malpractice case. Furthermore, each malpractice policy has a number of exclusions, most notably an intentional-acts exclusion, that will cause a number of claims not to be covered. . . .
>
> Additionally, just disclosing that an attorney has malpractice insurance does not speak to the amount of coverage that the attorney has. Passing a mandatory-disclosure rule will encourage attorneys to purchase cheap policies that do not really provide any coverage at all, just so they can say that they have malpractice insurance. And even if adequate policy limits are purchased, most

> malpractice policies are eroding, with the cost of the attorney's defense coming out of the policy limits.
>
> Finally, opponents argue that disclosure will not help because clients will not understand what malpractice insurance is and that it is not there for their benefit. Many clients will be surprised, for example, to learn that the insurance company will in fact fight to try and prove the attorney did not commit malpractice and will not pay the claim unless and until they absolutely have to.
>
> [Watters, supra, 62 Baylor Law Review at 253; see Appendix J.]

4. Mandatory Disclosure May Be Disadvantageous to Attorneys Who Cannot Afford Insurance – The argument here is that many attorneys practice on a limited budget, a part-time basis, or in a low risk practice area with respect to malpractice concerns. These attorneys, who may, given their circumstances, reasonably opt not to have insurance, would be essentially stigmatized by a disclosure requirement. Thus, such a requirement may work to the disadvantage of small firms and solo practitioners. One commentator concluded, as follows:

> If mandatory disclosure of malpractice insurance is to be a nationwide trend, there

> should be no insurance disclosure requirement without enabling lawyers to obtain affordable malpractice insurance. The Oregon model shows that it can be done. The alternative imposes an unaffordable malpractice insurance burden on the majority of lawyers who can least afford it.
>
> [Poll, Edward, "Risky Business – Some Thoughts on Legal Malpractice Insurance," Law Practice Today (February 2007); see Appendix V.]

5. Mandating Disclosure Could Negatively Impact Low-Income Clients. This argument asserts that attorneys who traditionally represent low-income or indigent clients may not be able to afford malpractice insurance. If these attorneys acquire it, the costs of their services may increase to a point that they are no longer affordable for low-income or indigent clients.

6. Mandating Disclosure Will Encourage Frivolous Malpractice Lawsuits – Proponents of this argument contend that alerting clients to the existence of insurance coverage will encourage them to sue if they are unhappy with the results of their case, notwithstanding the absence of actual negligent conduct.

Several states have rejected adoption of a mandatory disclosure rule, including Arkansas, Texas, Kentucky, Connecticut and Florida. In Kentucky, the State Bar has twice recommended adoption of a disclosure rule that would require disclosure directly to clients, but the recommendation was rejected by the Kentucky Supreme Court.[11]

One commentator summarized the experience of many states that have adopted a mandatory disclosure rule as overall a positive one, despite the foregoing arguments against it:

> In looking at how anti-disclosure objections have played out in other jurisdictions, twenty-four out of twenty-eight states that have considered mandatory disclosure have adopted some form of that rule. The earliest such adoptions took place roughly a decade ago, so a data set exists that reveals the real-world impact of mandatory disclosure. On the whole, those twenty-four states have had a positive experience with mandatory disclosure, with none experiencing the adverse effects predicted by opponents.

[11] However, it is worth noting that attorneys in Kentucky who practice as limited liability corporations are required to make public disclosure. Watters, supra, 62 Baylor Law Review, at 255-56.

> If mandatory disclosure is warranted, the best form for such a rule is to require dual-disclosure: directly to the client and also to the State Bar[.] Such a dual-disclosure requirement meets the need of adequately informing the client and the State Bar [ ] and best marries the arguments in favor of mandatory disclosure with a rule that effectuates those arguments.
>
> [Watters, supra, 62 Baylor Law Review at 265-66.]

Approaches By Some States to the Issues of Mandatory Disclosure and/or Reporting the Existence or Non-existence of a Professional Liability Policy

ALASKA

Alaska was the first state to require any form of disclosure. Rule 1.4(c) of the Supreme Court of Alaska Rules of Professional Conduct, adopted July 15, 1993, and subsequently amended on April 15, 2000, requires that an attorney must inform a client in writing if the attorney does not have malpractice insurance of at least $100,000 per claim and $300,000 annual aggregate and also must inform the client in writing if the insurance drops below those amounts or is terminated. The rule requires that a record of the written disclosures be kept for six years after the end of the representation. While the rule itself does not require any specific language to be used in the written disclosure, the comments to the rule include suggestions.

ARIZONA

Effective January 1, 2007, the Supreme Court of Arizona amended Rule 32(c)(12), "Organization of State Bar of Arizona," essentially adopting the ABA Model Court Rule on Insurance Disclosure. Arizona's rule requires disclosure in the form of a certification to the State Bar on its annual dues statement, and provides that the "State Bar of Arizona shall make the information submitted by active members pursuant to this rule available to the public on its website as soon as practicable after receiving the information." Notification also is required within 30 days if coverage lapses or terminates, and attorneys who fail to comply with the rule in a timely fashion may, on motion of the State Bar, be summarily suspended pending compliance.

ARKANSAS

On January 21, 2006 the House of Delegates of the Arkansas Bar Association voted against adopting a disclosure rule.[12]

CALIFORNIA

By order of the California Supreme Court dated January 1, 2010, the California Rules of Professional Conduct were amended to add Rule 3-410, "Disclosure of Professional Liability Insurance." Pursuant to Rule 3-410:

> (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.

[12] The Arkansas Bar Association maintains a directory service called ARKANSASFINDALAWYER© through which members of the public can search for attorneys to represent them. An attorney who wishes to participate must certify that the attorney maintains professional liability insurance in prescribed amounts of coverage, and must submit the declaration page of the insurance policy to the Association initially and at any time the coverage or terms change.

(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.

[Emphasis added.]

The Official Comment section of Rule 3-410 provides suggested language that complies with its requirements.

COLORADO

Effective January 1, 2009, Rule 227 of the Colorado Rules of Civil Procedure, entitled “Registration Fee” added the following language to the information

required by attorneys on their annual registration statement:

> . . . with respect to attorneys engaged in the private practice of law, whether the attorney is currently covered by professional liability insurance and, if so, whether the attorney intends to maintain insurance during the time the attorney is engaged in the private practice of law;
>
> [Rule 227(2)((a)(4)(c).]

Additionally,

> The information provided by the lawyer regarding professional liability insurance shall be available to the public through the Supreme Court Office of Attorney Registration and on the Supreme Court Office of Attorney Registration website.
>
> [Rule 227(2)(c).]

Failure to file this information results in suspension until the attorney complies. There also is a requirement that the attorney notify the Supreme Court Office of Attorney Registration within 30 days if the coverage lapses or is terminated. There is no requirement for attorneys engaged in the private

practice of law to disclose directly to clients whether they maintain malpractice insurance.

CONNECTICUT

At its February 23, 2009, meeting, the Connecticut Superior Court Rules Committee voted unanimously to deny a proposal to adopt an insurance disclosure rule.

DELAWARE

Since 2003, attorneys licensed to practice law in Delaware are required by Supreme Court Rule 69, "Categories of Bar Membership and Annual Registration," to disclose on their Annual Registration Statement and Certificate of Compliance whether they have malpractice insurance coverage and, if the answer is "no," then "the Court will disclose that fact to the public." Attorneys also are required to notify the Court in writing within 30 days of any change in that information. The Rule itself does not refer to insurance disclosure; section (b)(i) thereof requires

filing the annual registration statement “in a form approved by the Court.”

FLORIDA

There is no requirement in Florida that attorneys carry legal malpractice insurance, and the Florida Bar does not keep track of how many lawyers have such insurance, although it is estimated that about 65% have some form of legal malpractice insurance. Florida declined to adopt the ABA Model Court Rule.

HAWAII

Effective December 1, 2007, the Rules of the Supreme Court of Hawaii were amended to add Rule 17(d)(1)(C) to require attorney disclosure of the existence of professional liability insurance on the annual attorney registration form.

IDAHO

The Idaho Supreme Court, upon recommendation by Resolution 05-1 of the Idaho State Bar, adopted Rule 302(a)(5), effective October 1, 2006, amending the

Idaho Bar Commission Rules to essentially enact the same requirements contained in the ABA Model Court Rule, requiring all active practitioners and in-house counsel members of the Idaho Bar to certify to the Bar

> (1) whether the attorney represents private clients; (2) if the attorney represents private clients, whether the attorney is currently covered by professional liability insurance; and (3) whether the attorney intends to maintain professional liability insurance during the next twelve (12) months. Each attorney admitted to the active practice of law in this jurisdiction who reports being covered by professional liability insurance shall identify the primary carrier and shall notify the Bar in writing within thirty (30) days if the professional liability insurance policy providing coverage lapses, is no longer in effect, or terminates for any reason, unless the policy is renewed or replaced without substantial interruption.

Rule 303(a) designates information on the registration form considered to be public information, including "(6) Whether the attorney has professional liability insurance, if such disclosure is required under Rule 302(a)."

ILLINOIS

Effective October 1, 2004, the Illinois Supreme Court amended its lawyer-registration rule (Illinois Supreme Court Rule 756(e), to require, as a part of the annual registration process, that lawyers disclose whether they have legal malpractice insurance and, if so, the dates of coverage for the policy. The rule also requires lawyers to maintain, for a period of 7 years from the date such coverage is reported, documentation showing the name of the insurer, the policy number, the amount of coverage, and the term of the policy; however, that documentation need be produced only if specifically requested by the administrator of the Attorney Registration and Disciplinary Commission (ARDC).

On its website, the ARDC displays information as to whether or not a lawyer reported having malpractice insurance at the time of registration. No other information appears, and the inquirer is advised to

request more about the malpractice coverage directly from the lawyer.

Thus, in Illinois, a prospective client seeking to know if an attorney carries malpractice insurance must visit the ARDC website, which the Ad Hoc Committee found to be very difficult to navigate. For example, when the name of an attorney is inserted in the search dialog box, the only information received is the date they were admitted and whether they are authorized to practice law in Illinois. An inquirer must then click on the name of the attorney to receive additional information, including whether the attorney reported on the last registration form that he or she has legal malpractice insurance.

KANSAS

By order entered on September 6, 2005, the Supreme Court of Kansas adopted Rule 208A (Rules Relating to Discipline of Attorneys) patterned after the ABA Model Court Rule. Under the "Legal Community" section of the

Kansas Judicial Branch website[13], if "Attorney Registration" is selected under "Attorney Resources," the inquirer will see a box with additional options, including "Info on Lawyers Who Maintain Professional Liability Insurance."[14] Once that is selected, the following is displayed:

> Although Kansas lawyers are not required to carry professional liability insurance, they must report to the Kansas Supreme Court whether they have such insurance. If coverage is maintained, lawyers are required to report the name and address of the insurance carrier. This information is a matter of public record and may be obtained by contacting Attorney Registration, 301 SW 10th Avenue, Topeka, Kansas 66612. Attorney Registration may also be contacted by phone (785-296-8409)or by e-mail (registration@kscourts.org).

KENTUCKY

On or about November 14, 2006, the Kentucky Supreme Court declined to adopt a mandatory disclosure rule.

[13] www.kscourts.org

[14] This information is not found under the "General Public" section of the Judicial Branch's website.

MAINE

Rule 4(b)(4) requires that every attorney admitted to the active practice of law in Maine must annually certify to the Board of the State Bar:

> (A) whether the lawyer is engaged in the private practice of law;
>
> (B) if engaged in the private practice of law, whether the lawyer is currently covered by professional liability insurance;
>
> (C) whether the lawyer intends to maintain insurance during the period of time the lawyer is engaged in the private practice of law; and
>
> (D) whether the lawyer is exempt from the provisions of this rule because the lawyer is engaged in the private practice of law as a full-time government lawyer or is employed by an organization in a capacity in which the lawyer does not represent clients other than the employing organization.
>
> Each lawyer admitted to the active practice of law in Maine who reports being covered by professional liability insurance shall notify the Board in writing if the insurance policy providing coverage lapses, is no longer in effect, or terminates for any reason. Notice must be delivered to the Board within 30 days of the lapse, cancellation, or termination unless the policy is renewed or replaced without substantial interruption. The information submitted pursuant to this rule

shall be made available to the public by such means as designated by the Board.

MASSACHUSETTS

Massachusetts Supreme Judicial Court Rule 4:02 requires annual registration of lawyers authorized to practice law, with section 2A thereof requiring:

> (2A) Professional Liability Insurance Disclosure.
>
> (a) Each attorney shall, as part of the annual filing required by subsection (1) of this rule and on forms provided by the Board for this purpose, certify whether he or she is currently covered by professional liability insurance. Each attorney currently registered as active in the practice of law in this Commonwealth who reports being covered by professional liability insurance shall notify the Board in writing within thirty days if the insurance policy providing coverage lapses or terminates for any reason without immediate renewal or replacement with substitute coverage.
>
> (b) The foregoing shall be certified by each attorney in such form as may be prescribed by the Board. The information submitted pursuant to this subsection will be made available to the public by such means as may be designated by the Board.
>
> (c) Any attorney who fails to comply with this subsection may, upon petition filed by the bar counsel or the Board, be suspended from the practice of law until such time as the attorney complies. Supplying false information or failure to notify the Board of lapse or

> termination of insurance coverage as required by this subsection shall subject the attorney to appropriate disciplinary action.

MICHIGAN

On August 6, 2003, the Supreme Court of Michigan entered an order requiring that the Michigan State Bar's annual dues notice include a request for information regarding the malpractice insurance covering the bar member. That information is not made available to the public.

MINNESOTA

Effective October 1, 2006, The Minnesota Supreme Court added Rule 6 to the "Rules of the Supreme Court On Lawyer Registration." This rule provides that each lawyer on active status must annually certify on the lawyer registration statement:

> (1) whether the lawyer represents private clients;
>
> (2) if the lawyer represents private clients, whether the lawyer is currently covered by professional liability insurance;

(3) if the lawyer is covered by professional liability insurance, the name of the primary carrier.

(4) whether the lawyer intends to maintain insurance during the next twelve months.

Additionally, the rule requires that lawyers on active status must notify the Lawyer Registration Office within 30 days of any lapse in coverage or termination, unless the policy is promptly renewed or replaced.

Upon inquiry, pursuant to Rule 7, the Lawyer Registration Office may disclose to the public the name, postal address, admission date, continuing legal education category, current status, and professional liability insurance coverage information submitted under Rule 6.

NEBRASKA

Effective March 2003, prior to promulgation of the ABA Model Court Rule, the Nebraska Supreme Court adopted amendments to the “Rules Creating, Controlling, and Regulating Nebraska State Bar Association,” to require annual attorney certification of the existence

of malpractice insurance. Specifically, Rule 3-803(B)(6) provides:

> (6) In order to make information available to the public about the financial responsibility of each active member of this Association for professional liability claims, each such member shall, upon admission to the Bar, and as part of each application for renewal thereof, submit the certification required by this rule. For purposes of this rule, professional liability insurance means:
>
> (a) The insurance shall insure the member against liability imposed upon the member arising out of a professional act, error, or omission in the practice of law.
>
> (b) Such insurance shall insure the member against liability imposed upon the member by law for damages arising out of the professional acts, errors, and omissions of all nonprofessional employees employed by the member.
>
> (c) The policy may contain reasonable provisions with respect to policy periods, territory, claims, conditions, exclusions, and other matters.
>
> (d) The policy may provide for a deductible or self-insured retained amount and may provide for the payment of defense or other costs out of the stated limits of the policy.
>
> (e) A professional act, error, or omission is considered to be covered by professional liability insurance for the purpose of this rule if the policy includes such act, error, or omission as a covered activity, regardless of whether claims previously made against the

policy have exhausted the aggregate top limit for the applicable time period or whether the individual claimed amount or ultimate liability exceeds either the per claim or aggregate top limit.

Each active member shall certify to the Nebraska Supreme Court, through its Administrator of Attorney Services Division, on or before January 1 of each year: 1) whether or not such member is currently covered by professional liability insurance, other than an extended reporting endorsement; 2) whether or not such member is engaged in the private practice of law involving representation of clients drawn from the public; 3) whether or not such member is a partner, shareholder, or member in a domestic professional organization as defined by the rule governing Limited Liability Professional Organizations, and 4) whether or not the active member is exempt from the provisions of this rule because he or she is engaged in the practice of law as a full-time government attorney or in-house counsel and does not represent clients outside that capacity.

The foregoing shall be certified by each active member of this Association annually through the Court's on-line system administered by the Attorney Services Division. Such certifications shall be made available to the public by any means designated by the Supreme Court. Failure to comply with this rule shall result in suspension from the active practice of law until such certification is received. An untruthful certification shall subject the member to appropriate disciplinary action. All members shall notify the Administrator of Attorney Services Division in writing within 30 days if 1) professional liability insurance

providing coverage to the member has lapsed or is not in effect, or 2) the member acquires professional liability coverage as defined by this rule.

All certifications not received by April 1 of the current calendar year shall be considered delinquent. The Administrator of Attorney Services Division shall send written notice, by certified mail, to each member then delinquent in the reporting of professional liability insurance status, which notice shall be addressed to such member at his or her last reported address, and shall notify such member of such delinquency. All members who shall fail to provide the certification within 30 days thereafter shall be reported to the Supreme Court by the Administrator of Attorney Services Division, and the Supreme Court shall enter an order to show cause why such member shall not be suspended from membership in this Association. The Supreme Court shall enter such an order as it may deem appropriate. If an order of suspension shall be entered, such party shall not practice law until restored to good standing.

This rule shall not affect this Association, its rules, procedures, structure, or operation in any way; nor shall the adoption of this rule make this Association, its officers, directors, representatives, or membership liable in any way to any person who has suffered loss by error or omission of a lawyer. This rule is adopted solely for the purposes stated herein and not for the purpose of making this Association, its officers, directors, representatives, or membership insurers or guarantors for clients with respect to the lawyer-client relationship.

This rule does not create a claim against this Association, nor the Attorney Services Division of the Court, for failure to provide accurate information or a report on the insured status of any lawyer, or for implementation of any provision of these rules.

MANDATORY REPORTING OF PROFESSIONAL LIABILITY INSURANCE COVERAGE

I am engaged in the private practice of law involving representation of clients drawn from the public:

Yes____ No____

I am currently covered by a professional liability insurance policy other than an extended reporting endorsement:

Yes____ No____

I am currently a member of a professional corporation, limited liability company, or a limited liability partnership and maintain the insurance coverage required by the rule governing Limited Liability Professional Organizations:

Yes____ No____

I am engaged in the practice of law as a full-time government attorney or in-house counsel and do not represent clients outside that capacity, and therefore, I am exempt from the provisions of this rule.

Yes____ No____

I hereby certify the truth of the information provided above.

☐ By checking this box, you certify to the Supreme Court that your answers to the foregoing are true and correct and you acknowledge the requirement that you will notify the Administrator of Attorney Services Division in writing within 30 days if 1) professional liability insurance providing coverage to the member has lapsed or is not in effect, or 2) you acquire professional liability coverage as defined by this rule.

(C) Registration. All members not already registered with the Administrator of Attorney Services Division shall, within 60 days after being admitted to the practice of law by the Supreme Court of this State, register with the Administrator of Attorney Services Division by setting forth the member's full name, business address, and signature. All members shall promptly notify the Administrator of Attorney Services Division of any change in such address by accessing and updating their personal information in the Court's on-line system.

This information is publicly available.

NEVADA

Effective November 15, 2005, Rule 79(2) of the Nevada Supreme Court Rules, requires that members of the state bar must disclose to the bar whether, if

engaged in the private practice of law, the member maintains professional liability insurance. If so, the member also must disclose the name and address of the carrier. The provided information is non-confidential and is available upon telephone or e-mail inquiry.

NEW HAMPSHIRE

Effective March 1, 2003, prior to promulgation of the ABA Model Court Rule, the Supreme Court of New Hampshire adopted Rule 1.19 under its Rules of Professional Conduct, requiring direct disclosure to the client of the existence of malpractice insurance. The specific form of such disclosure is as follows:

> (a) A lawyer shall inform a client at the time of the client's engagement of the lawyer or at any time subsequent to the engagement of the lawyer if the lawyer does not maintain professional liability insurance in the amounts of at least one hundred thousand dollars per occurrence and three hundred thousand dollars in the aggregate or if the lawyer's professional liability insurance ceases to be in effect. The notice shall be provided to the client on a separate form set forth following this rule and shall be signed by the client.

(b) A lawyer shall maintain a copy of the notice signed by the client for five years after termination of representation of the client.

(c) The notice required by paragraph (a) of this rule shall not apply to a lawyer who is engaged in either of the following:

(1) Rendering legal services to a governmental entity that employs the lawyer;

(2) Rendering legal services to an entity that employs the lawyer as in-house counsel.

NOTICE TO CLIENT

Pursuant to Rule 1.19 of the New Hampshire Rules of Professional Conduct, I am required to notify you that I do not maintain professional liability (malpractice) insurance of at least $100,000 per occurrence and $300,000 in the aggregate.

_____

(Attorney's signature)

CLIENT ACKNOWLEDGEMENT

I acknowledge receipt of the notice required by Rule 1.19 of the New Hampshire Rules of Professional Conduct that [insert attorney's name] does not maintain professional liability (malpractice) insurance of at least $100,000 per occurrence and $300,000 in the aggregate.

(Client's signature)

Date: _____

Because the disclosure is made directly to the client, there is no requirement for disclosure on the annual attorney registration form, nor is the information made public. The comment to this rule specifically states it was not derived from the ABA Model Court Rule on Insurance Disclosure.

NEW MEXICO

Rule 16-104 of the Supreme Court of New Mexico Rules of Professional Conduct was amended on November 3, 2008, effective November 2, 2009, to include a direct client disclosure provision, as follows:

> C. Disclosure of professional liability insurance.
>
> (1) If, at the time of the client's formal engagement of a lawyer, the lawyer does not have a professional liability insurance policy with limits of at least one-hundred thousand dollars ($100,000) per claim and three-hundred thousand dollars ($300,000) in the aggregate, the lawyer shall inform the client in writing using the form of notice prescribed by this rule. If during the course of representation,

an insurance policy in effect at the time of the client's engagement of the lawyer lapses, or is terminated, the lawyer shall provide notice to the client using the form prescribed by this rule.

(2) The form of notice and acknowledgment required under this Paragraph shall be:

NOTICE TO CLIENT

Pursuant to Rule 16-104(C) NMRA of the New Mexico Rules of Professional Conduct, I am required to notify you that ["I" or "this Firm"] [do not][does not][no longer] maintain[s] professional liability malpractice insurance of at least one-hundred thousand dollars ($100,000) per occurrence and three-hundred thousand dollars ($300,000) in the aggregate.

_____

Attorney's signature

CLIENT ACKNOWLEDGMENT

I acknowledge receipt of the notice required by Rule 16-104(C) NMRA of the New Mexico Rules of Professional Conduct that [insert attorney or firm's name] does not maintain professional liability malpractice insurance of at least one-hundred thousand dollars ($100,000) per occurrence and three-hundred thousand dollars ($300,000) in the aggregate.

_____

Client's signature

(3) As used in this Paragraph, “lawyer” includes a lawyer provisionally admitted under Rule 24-106 NMRA and Rules 26-101 through 26-106 NMRA; however it does not include a lawyer who is a full-time judge, in-house corporate counsel for a single corporate entity, or a lawyer who practices exclusively as an employee of a governmental agency.

(4) A lawyer shall maintain a record of the disclosures made pursuant to this rule for six (6) years after termination of the representation of the client by the lawyer.

(5) The minimum limits of insurance specified by this rule include any deductible or self-insured retention, which must be paid as a precondition to the payment of the coverage available under the professional liability insurance policy.

(6) A lawyer is in violation of this rule if the lawyer or the firm employing the lawyer maintain a professional liability policy with a deductible or self-insured retention that the lawyer knows or has reason to know cannot be paid by the lawyer or the lawyer’s firm in the event of a loss.

The official comment to this Rule provides, as follows:

Disclosure of Professional Liability Insurance

[8] Paragraph C of this rule requires a lawyer to disclose to the clients whether the lawyer has professional liability insurance satisfying the minimum limits of coverage set forth in the rule. Subparagraph (3) of Paragraph C defines “lawyer” to include lawyers provisionally admitted under Rule 24-106 NMRA and Rules 26-101 to 26-106 NMRA. Rule 24-106 NMRA applies to out-of-state lawyers who petition to be allowed

to appear before the New Mexico courts. Rules 26-101 to 26-106 NMRA apply to foreign legal consultants. Subparagraph (4) of Paragraph C of this Rule requires a lawyer to maintain a record of disclosures made under this rule for six (6) years after termination of the representation of the client by the lawyer. In this regard, the lawyer should note that trust account records must be kept for five (5) years but the statute of limitations for a breach of contract claim is six (6) years. Subparagraph (5) of Paragraph C provides that the minimum limits of insurance specified by the rule includes any deductible or self-insured retention. In this regard, the use of the term "deductible" includes a claims expense deductible. The professional liability insurance carrier must agree to pay, subject to exclusions set forth in the policy, all amounts that an insured becomes legally obligated to pay in excess of the deductible or self-insured retention shown on the declarations page of the policy.

NEW YORK

At last report, New York was considering adoption of the Model Rule.

NORTH CAROLINA

Effective January 1, 2010, lawyers are no longer required to inform the North Carolina State Bar whether they maintain legal malpractice insurance.

NORTH DAKOTA

Effective August 1, 2009, the North Dakota Supreme Court amended Rule 1.15 of the North Dakota Rules of Professional Conduct to require:

> (i) A lawyer shall certify, in connection with the annual renewal of the lawyer's license and in such form as the clerk of the supreme court of North Dakota may prescribe, that the lawyer is complying with the provisions of this Rule.
>
> (j) The form required in subsection (i) shall also contain a provision for each licensed lawyer to certify (1) whether the lawyer represents private clients; (2) if the lawyer represents private clients, whether the lawyer is currently covered by professional liability insurance; and (3) whether the lawyer intends to maintain such insurance during the next twelve months. A lawyer shall notify the clerk in writing within 30 days if the lawyer's professional liability coverage lapses, is no longer in effect, or terminates for any reason, unless the policy is renewed or replaced without substantial interruption. This information shall be disclosed to the public upon request.

OHIO

Rule 1.4(c) of the Ohio Supreme Court Rules of Professional Conduct, effective July 1, 2001, requires

attorneys to disclose the existence of malpractice insurance to the client, as follows:

(c) A lawyer shall inform a client at the time of the client's engagement of the lawyer or at any time subsequent to the engagement if the lawyer does not maintain professional liability insurance in the amounts of at least one hundred thousand dollars per occurrence and three hundred thousand dollars in the aggregate or if the lawyer's professional liability insurance is terminated. The notice shall be provided to the client on a separate form set forth following this rule and shall be signed by the client.

(1) A lawyer shall maintain a copy of the notice signed by the client for five years after termination of representation of the client.

(2) A lawyer who is involved in the division of fees pursuant to Rule 1.5(e) shall inform the client as required by division (c) of this rule before the client is asked to agree to the division of fees.

(3) The notice required by division (c) of this rule shall not apply to either of the following:

(i) A lawyer who is employed by a governmental entity and renders services pursuant to that employment;

(ii) A lawyer who renders legal services to an entity that employs the lawyer as in-house counsel.

NOTICE TO CLIENT

Pursuant to Rule 1.4 of the Ohio Rules of Professional Conduct, I am required to notify you that I do not maintain professional liability (malpractice) insurance of at least $100,000 per occurrence and $300,000 in the aggregate.

_____

Attorney's Signature

CLIENT ACKNOWLEDGEMENT

I acknowledge receipt of the notice required by Rule 1.4 of the Ohio Rules of Professional Conduct that [insert attorney's name] does not maintain professional liability (malpractice) insurance of at least $100,000 per occurrence and $300,000 in the aggregate.

_____

Client's Signature

_____

Date

The official comment provides additional insight into this portion of the rule:

Professional Liability Insurance

[8] Although it is in the best interest of the lawyer and the client that the lawyer maintain professional liability insurance or another form of adequate financial responsibility, it is not required in any circumstance other than when the lawyer practices as part of a legal professional association, corporation, legal

clinic, limited liability company, or limited liability partnership.

[9] The client may not be aware that maintaining professional liability insurance is not mandatory and may well assume that the practice of law requires that some minimum financial responsibility be carried in the event of malpractice. Therefore, a lawyer who does not maintain certain minimum professional liability insurance shall promptly inform a prospective client or client.

PENNSYLVANIA

Effective July 1, 2006, the Supreme Court of Pennsylvania amended the Rules of Professional Conduct to require, in RPC 1.4(c), that an attorney

> in private practice shall inform a new client in writing if the lawyer does not have professional liability insurance of at least $100,000 per occurrence and $300,000 in the aggregate per year, subject to commercially reasonable deductibles, retention or co-insurance, and shall inform existing clients in writing at any time the lawyer's professional liability insurance drops below either of those amounts or the lawyer's professional liability insurance is terminated. A lawyer shall maintain a record of these disclosures for six years after the termination of the representation of a client.

This provision does not apply to lawyers in full-time government practice or full-time lawyers employed as

in-house counsel and who do not have any private clients.

The official comment to that rule further provides that:

> Lawyers may use the following language in making the disclosures required by this rule:
>
> (1) No insurance or insurance below required amounts when retained: ‘‘Pennsylvania Rule of Professional Conduct 1.4(c) requires that you, as the client, be informed in writing if a lawyer does not have professional liability insurance of at least $100,000 per occurrence and $300,000 in the aggregate per year and if, at any time, a lawyer’s professional liability insurance drops below either of those amounts or a lawyer’s professional liability insurance coverage is terminated. You are therefore advised that (name of attorney or firm) does not have professional liability insurance coverage of at least $100,000 per occurrence and $300,000 in the aggregate per year.’’
>
> (2) Insurance drops below required amounts: ‘‘Pennsylvania Rule of Professional Conduct 1.4(c) requires that you, as the client, be informed in writing if a lawyer does not have professional liability insurance of at least $100,000 per occurrence and $300,000 in the aggregate per year and if, at any time, a lawyer’s professional liability insurance drops below either of those amounts or a lawyer’s professional liability insurance coverage is terminated. You are therefore advised that (name of attorney or firm)’s professional

liability insurance dropped below at least $100,000 per occurrence and $300,000 in the aggregate per year as of (date).’’

(3) Insurance terminated: ‘‘Pennsylvania Rule of Professional Conduct 1.4(c) requires that you, as the client, be informed in writing if a lawyer does not have professional liability insurance of at least $100,000 per occurrence and $300,000 in the aggregate per year and if, at any time, a lawyer’s professional liability insurance drops below either of those amounts or a lawyer’s professional liability insurance coverage is terminated. You are therefore advised that (name of attorney or firm)’s professional liability insurance has been terminated as of (date).’’

A lawyer or firm maintaining professional liability insurance coverage in at least the minimum amounts provided in paragraph (c) is not subject to the disclosure obligations mandated by the rule if such coverage is subject to commercially reasonable deductibles, retention or co-insurance. Deductibles, retentions or co-insurance offered, from time to time, in the marketplace for professional liability insurance for the size of firm and coverage limits purchased will be deemed to be commercially reasonable.

Whether an attorney possesses malpractice insurance appears on the Disciplinary Board’s website and is accessible by the public.

RHODE ISLAND

Pursuant to Rule 1(b), Rhode Island attorneys must certify on their annual registration statement "whether they are currently covered by professional liability insurance." The attorney must "notify the Clerk of any change in the [submitted] information . . . within thirty (30) days of such change." This information is available to the public upon request.

SOUTH CAROLINA

Beginning in 2012, any lawyer seeking renewal or a new license to practice law is asked to report whether he or she maintains professional liability insurance with a minimum coverage amount of $100,000. The South Carolina Supreme Court is gathering this information to assist in its consideration of whether: (1) to adopt a proposed Rule of Professional Conduct, possibly modeled, in part, on the ABA Model Court Rule; (2) an internal South Carolina Bar rule should be adopted authorizing disclosure to the public of each lawyer's

insurance information through the Bar and on its website; or (3) no action should be taken.

SOUTH DAKOTA

Effective January 1, 1999, Rule 1.4(c) of the South Dakota Rules of Professional Conduct provides:

> (c) If a lawyer does not have professional liability insurance with limits of at least $100,000, or if during the course of representation, the insurance policy lapses or is terminated, a lawyer shall promptly disclose to a client by including as a component of the lawyer's letterhead, using the following specific language, either that:
>
> (1) "This lawyer is not covered by professional liability insurance;" or
>
> (2) "This firm is not covered by professional liability insurance."

And, subsection (d) provides:

> (d) The required disclosure in 1.4(c) shall be included in every written communication with a client.

The disclosure requirement does not apply to full-time, in-house counsel or government lawyers, who do not represent clients outside their official capacity or in-house employment. As one commentator has stated:

> South Dakota has the most stringent reporting requirement of any state. In essence, the South Dakota rule requires disclosure to the client or potential client in every communication with them.
>
> Unlike all the other states, this rule requires continuous reporting, with disclosure mandated in "every written communication with a client." The rule also specifies that the disclosure must be "in black ink with type no smaller than the type used for showing the individual lawyer's names." Also unlike other states, the disclosure requirement extends to every advertisement by the attorney, whether written or in the media. To avoid the impact of the South Dakota mandatory-disclosure rule, the attorney must have malpractice insurance of at least $100,000.
>
> [Watters, supra, 62 Baylor Law Review 257.]

TEXAS

After a lengthy statewide debate, including seven public hearings conducted by the State Bar Task Force on Insurance Disclosure, the Task Force narrowly recommended that the Supreme Court decline to adopt an insurance disclosure rule. By letter to the President of the State Bar dated April 14, 2010, the Chief Justice of the Supreme Court of Texas stated:

> Having considered the State Bar's recommendation and the material supporting the

> recommendation, the Court will retain the status quo. In making this decision the Court is mindful of the overarching principle that clients or prospective clients are entitled to information on the existence of their lawyers' professional liability insurance, and lawyers may voluntarily disclose to clients, potential clients, or the public whether they maintain such insurance.
>
> [Emphasis added.]

UTAH

Although, since July 2005, there has been a Rule amendment proposed by the Utah State Bar patterned after the ABA Model Court Rule, it has not been adopted. The proposed rule was to be studied by the Utah Bar through the collection of data on the extent of malpractice coverage of Utah attorneys during the 2-year period from 2009-2011.[15]

[15] Utah maintains a "Modest Means" lawyer referral program to benefit those citizens who do not qualify for legal aid or other *pro bono* programs. Among the requirements for lawyer participation is a certification that the lawyer maintains malpractice insurance consistent with program rules. The Bar's primary referral service, LicensedLawyer.org, has no such requirement.

VERMONT

No action has been taken on the December 28, 2006 recommendation of the Vermont Civil Rules Committee recommendation that the Vermont Supreme Court consider adoption of a rule requiring professional liability insurance coverage disclosure, including liability limits and deductibles, as part of the Vermont Rules for Licensing of Attorneys.

VIRGINIA

The Virginia program is best summarized in the following quote from one commentator:

> The great majority of states that have adopted a mandatory-disclosure rule have followed the ABA model rule. These states only require attorneys to disclose whether they have malpractice insurance only to their respective state bar. The best example of how this type of disclosure works is in Virginia, which has the simplest and least intrusive disclosure requirement.
>
> In Virginia, each attorney must disclose whether or not he has malpractice insurance on the state bar's annual registration statement. Notably, the Virginia rule does not include any minimum limits that an attorney must certify he has, just simply whether or not the attorney

> currently has malpractice insurance written by an insurer authorized to do business in Virginia. The Virginia State Bar then takes that information from the annual registration statements and makes it available to the public via a searchable database on its website. Plugging in the first and last name of an attorney pulls up all those matches who do not carry malpractice insurance. Since first putting up the searchable database web page, Virginia officials report that the web page has averaged 1,200 hits a month.
>
> [Watters, supra, 62 Baylor Law Review at 256; see Appendix J.]

WASHINGTON

Rule 26 of the Washington Admission to Practice Rules, effective July 1, 2007, essentially follows the ABA Model Court Rule, and provides that the information will be made available to the public by such means as may be designated by the Board of Governors of the Bar Association, which may include publication on the website maintained by the Bar Association.

WEST VIRGINIA

Section III(A) of the By Laws of the West Virginia State Bar, "Financial Responsibility Disclosure," provides:

§ 1. Purpose. The purpose of this By-Law is to require disclosure about the financial responsibility for professional liability claims of each active lawyer admitted to practice law in West Virginia. Each lawyer. upon admission to practice law in West Virginia, and with each subsequent annual membership dues payment, shall submit the disclosure required by this By-Law.

§ 2. Disclosure. Every active lawyer shall disclose to the West Virginia State Bar on or before September 1 of each year: (1) whether the lawyer is engaged in the private practice of law; (2) if so engaged, whether the lawyer is currently covered by professional liability insurance with limits of not less than $100,000 per claim and $300,000 policy aggregate covering generally insurable acts, errors and omissions occurring in the practice of law, other than an extended reporting endorsement; (3) if the lawyer is so engaged and not covered by professional liability insurance in the above minimum amounts, whether the lawyer has another form of adequate financial responsibility which means funds, in an amount not less than $100,000, available to satisfy any liability of the lawyer arising from acts or omissions by the lawyer or other persons employed or otherwise retained by the lawyer and that these funds shall be available in the form of a deposit in a financial institution of cash, bank certificate of deposit or United States Treasury obligation, a bank letter of credit or a surety or insurance company bond and describing same with reasonable particularity; (4) whether there is any unsatisfied final judgment(s) after appeal against either the lawyer, or any firm or any professional corporation in which the lawyer has practiced, for acts, errors or omissions,

including, but not limited to, acts of dishonesty, fraud or intentional wrongdoing, arising out of the performance of legal services by the lawyer, including the date, amount and court where the judgments(s) rendered; and (5) 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 in-house counsel and does not represent clients outside that capacity. It is the duty of every active lawyer to report any changes which occur.

§ 3. Form and Availability to Public. The foregoing shall be certified by each active lawyer admitted to practice law in West Virginia on the State Bar's Active Membership Fee Notice and shall be made available to the public by such means as may be designated by the West Virginia State Bar.

§ 4. Non-Compliance. After the first day of September of each year, a penalty of $25 shall be assessed to any active lawyer who has not complied with this By-Law. On or after this date, the Executive Director shall notify all members in non-compliance of their delinquency and that the penalty has attached. Such notice shall be given by United States mail addressed to such member at his or her last known post office address.

§ 5. Suspension For Non-Disclosure. If an active member fails to disclose by sixty days after the date of mailing the notice provided in the preceding Section (4), he or she shall be automatically suspended from active membership in the State Bar and shall not further engage in the practice of law until he or she has been reinstated. The Executive Director shall give notice of such suspension

to the judges of the courts of record of the judicial circuit in which such non-compliant member principally practices, the Clerk of the Supreme Court of Appeals and such other courts, clerks, tribunals or bodies-judicial, administrative or executive-as the Board of Governors may designate, and it shall be the duty of said judges, courts, clerks, tribunals and bodies as are so notified to refuse and deny to such member the privilege of appearing and practicing in said courts, tribunals and bodies until such time as such member shall have been reinstated as an active member. Written notice of such suspension shall be given to such non-compliant member and service thereof shall be completed upon mailing the same addressed to such non-compliant member at his or her last address appearing upon the records of the State Bar.

§ 6. Reinstatement of Members Suspended for Non-Compliance With Disclosure. Whenever a member suspended solely for non-compliance with disclosure shall have paid all penalties and shall have shown that the member is in compliance with the disclosure requirements and pertinent CLE rules and requirements, he or she shall be automatically reinstated and the Executive Director shall thereupon give notice thereof to the judges, courts, clerks, tribunals and bodies to which notice has been given of the suspension of such member for the non-compliance with disclosure. In addition to the $25 penalty authorized by Article III (A) Section 4, a penalty of $75 shall be added to the fees owed by all members who are suspended for the non-compliance with disclosure.

SURVEYS OF NEW JERSEY ATTORNEYS

According to the "2015 State of the Attorney Disciplinary System Report," issued on April 29, 2016:

> As of the end of December 2015, there were a total of 97,187 attorneys admitted to practice in the Garden State according to figures from the Lawyers' Fund for Client Protection. Historically, New Jersey has been among the fastest growing lawyer populations in the country. This may be attributable to its location in the populous northeast business triangle between New York, Philadelphia and Washington, D.C. The total number of lawyers added to the bar population increased by 1.44% in 2015. With a general population of 8,958,013, there is now one lawyer for every 92 Garden State citizens.
>
> According to a July 1, 2015 survey compiled by the OAE of the National Organization of Bar Counsel, Inc., a total of 2,010,489 Lawyers were admitted to practice in the United States. New Jersey ranked 7th out of 51 jurisdictions in the total number of lawyers admitted, or 4.77% of the July national total.

Based on 99.7% of the 97,727 attorneys providing their dates of birth, 7,264 (7.43%) were age 70 or older, with 1,869 of those over age 80 (1.9%); 35,385 were between ages 50 and 70 (36.21%); 46,968 (48.06%) were between ages 30 and 50; and 7,800 (7.98%) were

under age 30. Additionally, 78.9% of the 97,727 attorneys were also admitted in other jurisdictions.

The Report also disclosed that, of those 97,727 attorneys, 37,440 (38.31%) stated that they were engaged in the private practice of New Jersey law, either from offices within New Jersey or at locations elsewhere. Thus, 60,287 (61.69%) of those lawyers did not practice in the private sector.

Of the 37,440 who were engaged in the private practice of law, 21,912 (58.53%) reported they practiced full-time, while 15,528 (41.47%) reported they were engaged in the private practice of law part-time, occasionally, or with unspecified frequency.

Of the 37,440 attorneys who reported they were engaged in the private practice of New Jersey law, 95.5% (35,738) provided the following information on the structure of their practice:

Solo Practitioner	10,427	29.18%
Sole Stockholder	1,127	3.15%
Other Stockholders	1,238	3.46%

Associate	10,200	28.54%
Partner	10,357	28.98%
Of Counsel	2,389	6.69%

Ninety-five percent (35,551) of those attorneys identifying themselves as being engaged in the private practice of law stated the size of the law firm of which they were a part, as follows:

Firm Size	Number	Percent
One	11,093	31.20%
Two	3,344	9.41%
3 to 5	4,930	13.87%
6 to 10	3,473	9.77%
11 to 19	2,660	7.48%
20 to 49	3,497	9.84%
50≥	6,554	18.43%

The Committee has had the benefit of two surveys, one conducted by the Solo and Small Firms Section of the New Jersey State Bar Association of its members who attended the 2015 Annual Solo and Small-Firms Conference, and the other conducted by the Ad Hoc

Committee through the New Jersey Administrative Office of the Courts in May 2016. See Appendices W and X.

Survey Conducted by the Ad Hoc Committee

The Supreme Court authorized the Ad Hoc Committee to work with the Quantitative Research Unit of the Administrative Office of the Courts to develop a free-standing survey of attorneys engaged in the private practice of New Jersey law to determine, inter alia, whether they have a professional liability policy covering their private practice of law; the coverage limits of those policies; and, if they uninsured, the reasons for not obtaining coverage.

Guided by the "Protocol for Surveys by Supreme Court Committees" issued by the Administrative Director of the Courts on January 29, 2002, and assisted by members of the Quantitative Research Unit and other AOC staff, the Survey Subcommittee of the Ad Hoc Committee undertook the task of designing a "Lawyers' Professional Liability Insurance Survey." Once a draft

of that survey was developed, it was transmitted to all Ad Hoc Committee members. Based on their comments, and upon further discussions with the Quantitative Research Unit and Staff and revisions, the final version of the survey was completed in late 2015.

It was determined that the survey should be sent electronically to those attorneys identifying themselves as engaged in the private practice of law on the Lawyers' Fund for Client Protection registration form. Since 2016 was the first mandatory online registration year, the Ad Hoc Committee waited to distribute the survey until the completion of the 2016 registration process because the new online registration system would provide access to a much larger number of email addresses and, consequently, a larger sample size, than previously existed.

On May 5, 2016, the survey was transmitted electronically to 7,892 attorneys. An initial reminder to complete the survey was sent to those attorneys on May 12, 2016, with a final reminder sent to them on May

24, 2016.[16] We received 2,629 (33.31%) affirmative responses to the survey question, "Are you engaged in the private practice of New Jersey law?", and were advised by the Quantitative Research Unit this constitutes a good representative sample of the target market. A complete copy of the survey results is included in the Appendix to this Report. See Appendix W.

In summary, 2,559 attorneys responded to the question, "Are you currently insured by a Lawyers' Professional Liability (LPL) Insurance policy?" Of those responses, 2,233 (87.26%) attorneys responded "yes," and 326 (12.74%) responded "no." We received 318 responses to the question, "If you are not currently insured by a Lawyers' Professional Liability (LPL) insurance policy, do you routinely disclose to your clients that you do not have such insurance?" Of

[16] The survey was conducted using a "Survey Monkey," approach, which is designed to maximize the number of respondents by building-in one or more reminders.

those responding, 99 (31.13%) answered “yes,” and 219 (68.87%) answered “no.”

We also received 318 responses to the question, “Why don’t you have an LPL insurance policy?” The survey provided four answer options: (1) Too Expensive; (2) Coverage Declined; (3) Believe that it is Not Necessary; and (4) Other (please specify).

Of the 318 responses, 169 (53.14%) stated it was “Too Expensive;” 5 (1.57%) reported “Coverage Declined;” and 105 (33.02%) signified “Believe that it is Not Necessary.”

There were 123 (38.66%) respondents who selected the “Other” category. Review of the specific reasons cited by those 123 responders shows that: (1) 29 of them are, in fact, covered by an LPL policy either individually or under a policy maintained by a public entity because, for example, they practice solely as pool attorneys for the Office of Public Defender; (2) 6 responders only perform mediation or arbitration work

and are not engaged in the private practice of New Jersey law; and (3) 10 others state that they are simply maintaining their license but are not engaged in the practice of law. That effectively reduces the overall number of those reporting that they did not have an LPL policy from 326 to 281, or 11.02% of the total responders. The remaining 79 specific responses generally consisted of variations on the “Too Expensive” and “Believe it is Not Necessary” options.

Another question on the survey sought to determine the number of years the responders have been admitted to the practice of law in New Jersey. We received 2,594 responses to that question, with 2,059 (79.38%) signifying they were admitted for more than 10 years; 288 (11.10%) for between 5 and 10 years; and 247 (9.52%) for less than 5 years.

To the question, “On average, do you dedicate more than 26 hours per week to the private practice of New Jersey law?”, we again received 2,594 responses, with

1,779 (68.58%) answering “yes,” and 815 (31.42%) answering “no.”

The AOC Quantitative Research Unit advised that the results of this survey are statistically significant and reliable. Thus, because New Jersey has approximately 37,446 attorneys engaged in the private practice of law on either a full-time or part-time basis, it can be reliably concluded that approximately 4,127 (11.02%) are not covered by a professional liability insurance policy.

Solo and Small-Firm Survey

Ad Hoc Committee member William C. Mack, Esq., is a member and former Chair of the Solo and Small Firm Section of the New Jersey State Bar Association. Working with the Ad Hoc Committee, Mr. Mack prepared and distributed a “Lawyers’ Professional Liability Insurance Questionnaire” to all attorneys attending the Solo and Small Firm Section’s 2015 Annual Conference.

Mr. Mack prepared and disseminated to all Ad Hoc Committee members a Report, dated March 12, 2015, outlining and summarizing the results of that survey. A copy is included in the Appendix to this Report. See Appendix X.

In summary, 151 responses were received. Using "more than 30 hours per week" as "full-time," there were 107 solo practitioners responding, with 78 full-time practitioners, and 29 part-time practitioners. 90% of the full-time solo practitioners responded that they are covered by a professional liability insurance policy, while 62% of the part-time solo practitioners stated that they are covered by such a policy.

Of the 37 responders stating they were engaged in the private practice of law with a firm consisting of between 2 and 5 attorneys, 35 stated they were practicing full-time and 2 stated they were practicing part-time. Of the 35 full-time practitioners in that firm size, 33 (94%) stated they were covered by a professional liability insurance policy. Of the 2

part-time attorney responders in that firm size, 1 was covered by such a policy.

There also were 7 responders who were engaged in the private practice of law with firms consisting of either between 6 and 10 attorneys or more than 10 attorneys, and all responded that they were covered by a professional liability insurance policy. In his report, Mr. Mack concluded:

> Clearly, part-time sole proprietors have the lowest incidence of LPL coverage. It is worth noting, however, that apparently lawyers in LLCs and other entities likely governed by R. 1:21-1 are not universally covered by LPL insurance. This may reflect the fact that R. 1:21-1 does not have a strong enforcement process that would routinely identify and bring to the Court's attention entities in violation of the Rule.

Additionally, comments were solicited, with 41 responses received and summarized in the report, as follows:

> The comments were predominately negative and ran generally to the following themes (with some commenters hitting more than one theme):
>
> **1.** LPL insurance is too expensive, or will become so (17 comments).

2. Lawyers are regulated enough and don’t need more (8 comments).
3. Reporting or disclosure of LPL insurance will encourage malpractice suits (7 comments).
4. Generally bad or ruinous for the profession (especially solos) (3 comments).
5. Clients already ask, or can ask, about LPL insurance (2 comments).

Of the 41 comments, there were 5 favorable to either mandatory insurance or mandatory reporting or disclosure.

ANALYSIS AND RECOMMENDATIONS

The Supreme Court's charge to the Ad Hoc Committee, is best discussed and analyzed by categorizing the issues, as follows:

(1) Whether a currently unmet need would be satisfied by requiring all attorneys to maintain a policy of professional liability insurance at specified minimum policy limits and terms of coverage?

(a) Whether such a requirement would unfairly burden small firms and solo practitioners, who may have more difficulty than larger firms in finding affordable coverage?

(2) Whether attorneys should be required to report and disclose on the annual registration statement the existence of a policy of professional liability insurance?

(a) Whether such a reporting requirement would unfairly burden small firms and solo practitioners?

(b) If required, should such reporting include the disclosure of the amount of insurance?

(c) If required, should that information be made available to the public?

(3) Whether attorneys should be required to disclose to their clients the existence of a policy of professional liability insurance at the inception of representation?

(a) Whether a disclosure requirement is necessary, or serves any substantial purpose without a corresponding mandate to maintain insurance?

(b) Whether such a disclosure requirement would unfairly burden small firms and solo practitioners?

The full Ad Hoc Committee conducted meetings on April 30, 2014; June 25, 2014; September 18, 2014; December 11, 2014; March 12, 2015; July 12, 2016; October 13, 2016; and November 29, 2016. In order to assist the Committee on the issues of insurance availability and coverage, we invited members of the professional liability insurance industry to attend our meetings as associate members, as indicated in the Ad Hoc Committee Membership section of this Report. Additionally, the Ad Hoc Committee created a Survey Subcommittee, charged with creating one or more surveys to gather coverage information from attorneys engaged in the private practice of New Jersey law; a Mandatory Insurance Subcommittee, to examine the feasibility of requiring all attorneys engaged in the private practice of New Jersey law to acquire and maintain a policy of

professional liability insurance, beyond the existing rule-based requirements; and a Reporting and Disclosure Subcommittee, to consider whether a reporting and/or disclosure requirement should be implemented and, if so, the form thereof. Those Subcommittees, which included the Ad Hoc Committee Chair and Supreme Court Clerk's Office Staff member, each met separately on several occasions, periodically reporting back to, and gaining guidance from, the Ad Hoc Committee as a whole. Finally, the Ad Hoc Committee created a Working Group of several of its members, its Chair and Supreme Court Clerk's Office Staff Member to draft this Report.

The Ad Hoc Committee presents the following analyses of these issues and recommendations to the Court:

(1) Whether a currently unmet need would be satisfied by requiring all attorneys to maintain a policy of professional liability insurance at specified minimum policy limits and terms of coverage?

The most persuasive argument favoring a system of mandatory professional liability insurance coverage for

attorneys is that it would advance New Jersey's interest in protecting the public, at least in part, from the consequences of attorney negligence. Moreover, New Jersey requires insurance coverage for attorneys who wish to practice through professional service corporations, limited liability companies and limited liability partnerships. Clearly, these Rules are intended to prevent attorneys who may create these entities from escaping the consequences of their negligence.

Oregon is the only state that requires all licensed attorneys engaged in the private practice of law to maintain a policy of professional liability insurance. For the reasons set forth infra., at pages 14-17, the Ad Hoc Committee concludes that imposing mandatory professional liability insurance via a method modeled on the Oregon approach would be unworkable in the New Jersey marketplace.

Moreover, the members believe that imposing a mandatory insurance requirement would place the

decision of who may practice law in the hands of private insurance carriers, the only source of professional liability insurance currently available in New Jersey. The few admitted New Jersey carriers writing this type of insurance have strict underwriting criteria and detailed application processes. This is in stark contrast to the Oregon model in which every attorney is covered with no application and no underwriting process. Attorney applicants in New Jersey are in no way guaranteed coverage, as they are in Oregon. Attorneys may be unable to obtain professional liability coverage for any number of reasons, many of which may be unrelated to the attorney's competence, integrity or history of claims. Further, some attorneys who practice in areas carriers view as particularly high-risk may not seek coverage because it is too expensive in relation to their perceived ability to earn income. Thus, mandating professional liability insurance for attorneys would effectively remove the determination of an attorney's

ability to engage in the private practice of law from the licensing authority vested in the Supreme Court and would, instead, place it in the hands of the malpractice insurance marketplace.

(a) Whether such a requirement would unfairly burden small firms and solo practitioners, who may have more difficulty than larger firms in finding affordable coverage?

The Ad Hoc Committee further concludes that a mandate requiring all attorneys engaged in the private practice of law to carry professional liability insurance would be unfairly punitive to small firms, solo practitioners, and those attorneys engaged in the part-time practice of law.

The statistical information available from the 2015 "State of the Attorney Disciplinary System Report," issued on April 29, 2016, discloses that of the 97,727 attorneys admitted to the practice of law in New Jersey, 37,440 are engaged in the private practice of New Jersey law. Of those attorneys, 15,528 (41.47%) reported that they were engaged in the private practice

of law part-time, occasionally, or with unspecified frequency.

The results of the survey conducted by the Ad Hoc Committee reveals that approximately 11.02% of the survey respondents are not covered by a professional liability policy. Applying that percentage to the 37,440 attorneys engaged in the private practice of New Jersey law, it is statistically reliable to conclude that approximately 4,126 licensed attorneys engaged in the private practice of New Jersey law are not covered by a policy of professional liability insurance.

The results of a “Lawyers’ Professional Liability Insurance Questionnaire” presented to attendees at the 2015 Solo and Small Firms Section’s Annual Conference. are consistent with those of the Ad Hoc Committee survey.

Based on the data collected by the Ad Hoc Committee, it is clear that solo and small-firm practitioners, particularly those attorneys engaged in

the part-time private practice of New Jersey law, have the lowest incidence of professional liability insurance coverage, predominately due to economic feasibility. Part-time, uninsured practitioners include, but are not limited to, attorneys who are semi-retired, those with other life responsibilities, such as the care of young children or elderly relatives, or those attempting to supplement existing household income. It is the view of the Ad Hoc Committee that a blanket mandatory professional liability insurance requirement for all attorneys engaged in the private practice of New Jersey law would essentially economically preclude many part-time, solo and small-firm practitioners from engaging in the practice of law. This might also have the unintended result of lessening the availability of legal services to middle- and lower-income clients, thereby undermining the goal of protecting the public.

(2) Whether attorneys should be required to report and disclose on the annual registration statement the existence of a policy of professional liability insurance?

(a) Whether such a reporting requirement would unfairly burden small firms and solo practitioners?

(b) If required, should that information be made available to the public?

(c) If required, should such reporting include the disclosure of the amount of insurance?

While the Committee has concluded that requiring mandatory professional liability insurance for all attorneys in New Jersey engaged in the private practice of law is both impractical and unduly burdensome, with consequences that we believe are not in the public interest, we find persuasive the several arguments set forth in support of reporting of coverage information to the Court. If the Court concurs that the conclusions set forth in the Ad Hoc Committee's analysis of the first issue presented establish an equitable and fair basis for not requiring professional liability insurance for all attorneys engaged in the private practice of law, or it is otherwise determined that a mandatory insurance requirement should not be imposed, the Ad Hoc Committee recommends that those members of the public who seek the services of a

licensed attorney should have the ability to access information as to whether that attorney is insured.

The Ad Hoc Committee can find no reasonable basis to conclude that such a requirement would impose an unfair burden on any attorney who obtains professional liability insurance coverage, particularly since the insured attorney can simply direct the procuring insurance broker to file a certificate with the Court.

To that end, the Ad Hoc Committee also concludes that the information required by a reporting Rule should be accessible to the public in the same manner that the information required by existing Rules 1:21-1A, -1B and -1C is currently publicly available, including information about coverage limits.

Therefore, the Ad Hoc Committee recommends that the Court consider adopting the following proposed rule:

1:21-1D. Individuals or Partnerships Engaged in the Private Practice of Law; Reporting of Professional Liability Insurance.

(a) If an attorney engaged in the private practice of law in New Jersey as an individual

or partnership not subject to R. 1:21-1A, R. 1:21-1B or R. 1:21-1C chooses to secure a policy of professional liability insurance, the attorney or partnership shall, within 30 days of securing such policy, file or cause to be filed, with the Clerk of the Supreme Court, a certificate of insurance, issued by the insurer, setting forth the name and address of the insurance company providing each such insurance policy, the policy number and policy limits.

(b) Amendments to and renewals of the certificate of insurance shall be filed with the Clerk of the Supreme Court, within 30 days after the date on which such amendments or renewals become effective.

(3) Whether attorneys should be required to disclose to their clients the existence of a policy of professional liability insurance at the inception of representation?

(a) Whether a disclosure requirement is necessary, or serves any substantial purpose without a corresponding mandate to maintain insurance?

(b) Whether such a disclosure requirement would unfairly burden small firms and solo practitioners?

This issue embodies the concept of requiring direct "disclosure" by an uninsured attorney to a prospective client prior to creation of the attorney-client relationship.

The ABA Model Court Rule on Insurance Disclosure simply requires disclosure in the form of “reporting” to the Supreme Court, on annual basis, whether the attorney is covered by a policy of professional liability insurance, with the reported information made publicly available.

The Ad Hoc Committee concludes that a simple “reporting” requirement is inadequate, as it only affords protection to those clients knowledgeable enough to make inquiry concerning insurance coverage. The Ad Hoc Committee believes that most prospective clients are unlikely to raise the question of whether an attorney they are seeking to retain is covered by a policy of professional liability insurance. Similarly, the Ad Hoc Committee feels that, even if a reporting requirement is imposed, most prospective clients would be unaware of the availability of professional liability insurance information. Indeed, in its February 26, 2004 letter objecting to the ABA Model Rule, the New Jersey State Bar Association acknowledges

that “[i]nsurance coverage may be the last thing a potential client thinks about[,]” and that a client is therefore “unlikely to either know, or to make an effort, to call a central court office to obtain this information.” See Appendix E. This reasoning also applies equally to other methods of making this information available, such as websites.

Consequently, the Ad Hoc Committee is persuaded that the arguments favoring a system of mandatory disclosure by an uninsured attorney to a prospective client, discussed infra., at pp. 58-62, significantly outweigh the arguments against such a system, discussed, infra., at pp. 63-68. The Rules recommended for consideration by the Court do not “open the door to consideration of a requirement that all lawyers obtain professional liability insurance.” See Appendix E. Rather, they balance the rights of the public with those of attorneys in a manner that serves only to provide prospective clients with factually accurate information.

Although no data or study supports the proposition that there is a need for attorney disclosure to a prospective client, "a study is hardly necessary to demonstrate that client harm results from uninsured lawyers[,]" and "no one can seriously question that claims against uninsured lawyers are often abandoned, precisely because there is no available insurance." Towery, James E., supra; see Appendix N.

The need for transparency is evident in a system that does not require attorneys engaged in the private practice of law to obtain and maintain a policy of professional liability insurance.[17] A requirement of direct disclosure to a client by an uninsured attorney provides consumers of legal services a choice, which is a material factor relevant to selection and retention of an attorney. Concomitant with the requirement that clients be informed of the existence of a policy,

[17] Rules 1:2-1A through -1C, although they literally require the described entities, not the individual attorneys, to obtain and maintain a professional liability insurance policy, do as a practical matter insure the individual attorneys by virtue of the definition of "insured" in most if not all approved policies.

clients also should be informed if such a policy lapses or is terminated during the period of representation.

The Ad Hoc Committee is aware that the existence of a policy of professional liability insurance is not a panacea for injuries caused by the actions of the insured attorney. Most such policies are “claims made and reported,” as opposed to “occurrence-based” policies. These policies only provide coverage for a claim made to the covered attorney, and reported to the carrier, during the policy period, which may not necessarily coincide with the occurrence of the negligent act. Additionally, policies have other exclusions, such as non-coverage for intentional or dishonest acts. We are also aware that not having a professional liability policy in place does not, of itself, speak to an attorney’s ability, experience or competence.

It is certainly true that a direct disclosure requirement does not educate the client concerning the difference between “claims made and reported” and

"occurrence-based" policies. Nonetheless, whether an attorney is insured by a professional liability insurance policy is a material fact that a prospective client has the right to know. A requirement that an attorney notify the client if the policy lapses or is terminated provides an extra measure of protection. As Towery noted, "[a]n imperfect solution to the problem of uninsured lawyers is better for the public than no solution at all." Towery, James E., supra; see Appendix N.

The Ad Hoc Committee recommends the Court consider adoption of the following Rule of Court, as well as the following model form of disclosure as an Appendix to the Rule, with or without the inclusion of subsection (c):

1:21-1E. Individuals or Partnerships in the Practice of Law; Disclosure to Client.

(a) An attorney engaged in the private practice of law as an individual or a partnership not subject to R. 1:21-1A, R. 1:21-1B or R. 1:21-1C, and who does not have in effect a policy of professional liability insurance with a minimum policy coverage of

$100,000 (if a partnership, $100,000 multiplied by the number of attorneys in the partnership), with the deductible portion of such insurance not exceeding $10,000 (if a partnership, $10,000 multiplied by the number of attorneys in the partnership), shall:

(1) If such policy is not in effect at the time a prospective client seeks representation, communicate that fact to the prospective client, in writing, prior to accepting representation;

(2) If such policy ceases to be in effect during the representation of a client, promptly communicate that fact to such client, in writing.

(b) Delivery to the client of a notice, in the form contained in Appendix XXX of these Rule, executed by the attorney, with a request that the client execute and return a copy thereof to the attorney, shall constitute compliance with the requirement set forth in subparagraph (a)(2) of this Rule.

(c) Nothing in this Rule shall be construed as creating a standard for civil liability, or the basis for a malpractice claim.

APPENDIX XXX

A. Disclosure By Attorney to Client Prior to Accepting Representation.

Delivery of a notice to the client, executed by the attorney, in the following Form shall constitute compliance with the requirement set forth in R. 1:21-1E(a)(1) as to such client:

NOTICE TO CLIENT

Pursuant to Rule 1:21-1E(a)(1) of the N.J. Court Rules, I am required to notify you that I do not have in effect a policy of professional liability insurance with coverage of at least [$100,000 multiplied by the number of attorneys in the firm] per occurrence, with the deductible portion of such insurance not exceeding [$10,000 multiplied by the number of attorneys in the firm].

Dated: _____

Attorney's Signature

CLIENT ACKNOWLEDGEMENT

I acknowledge that the aforesaid attorney has, prior to accepting representation, made the disclosure to me required by Rule 1:21-1E(a)(1) of the N.J. Court Rules.

Dated: _____

Client's Signature

B. Disclosure By Attorney to Client During Representation.

Delivery of a notice to the client in the following form, executed by the attorney, shall constitute compliance with the requirement set forth in R. 1:21-1E(a)(2) as to such client:

NOTICE TO CLIENT

Pursuant to Rule 1:21-E(a)(2) of the N.J. Court Rules, I am required to notify you that I no longer have in effect a policy of professional liability insurance with coverage of at least [$100,000 multiplied by the number of attorneys in the firm] per occurrence, with the deductible portion of such insurance not exceeding [$10,000 multiplied by the number of attorneys in the firm].

Dated: _____

Attorney's Signature

CLIENT ACKNOWLEDGEMENT

I hereby acknowledge that the aforesaid attorney made the disclosure to me required by Rule 1:21-1E(a)(2) of the N.J. Court Rules.

Dated: _____

Client's Signature

There is a considerable division of opinion with the membership of the Ad Hoc Committee concerning the precise form of the proposed Rule, centering on whether the language contained in subsection (c) thereof should be included. The Ad Hoc Committee recognizes that there are valid arguments to support each version of

proposed R. 1:21-1E, with or without subsection (c). Because the Committee was fairly evenly split on which version to recommend, it offers for the Court's consideration, the following arguments favoring and opposing the inclusion of subsection (c) of proposed Rule 1:21-1E(c):

The Language of Proposed Subsection (c) Should be Included

The proposed language arose from a minority view of the Committee that a disclosure requirement was, at the very least, premature, if not entirely unwarranted.

This view reflected the absence of evidence linking uncompensated victims of attorney malpractice to uninsured lawyers. It also reflected the clear dictate of legal malpractice law that attorneys are not insurers, nor does the Model Charge given to jurors in attorney malpractice cases include a requirement that attorneys have the financial wherewithal to satisfy, at least in part, an adverse judgment.

Moreover, the minority was concerned about the potential consequences of creating a requirement that was linked to a volatile insurance market over which the Court has no control, as well as that some members of the Bar may use a disclosure rule as a basis for a new cause of action against attorneys based on questions of sufficiency of disclosure.

There also was significant concern that such a requirement would have a disproportionately adverse impact on small-scale practitioners and minority attorneys largely serving the consumer public given that insurance availability in the admitted market is most restrictive and costly to those groups. Perceived as greater risks by insurance underwriters, these groups also are more likely to be pushed into the surplus lines market where they have to pay more for less. In light of the increasing number of unemployed or underemployed attorneys, the minority sought to avoid an unintended punitive impact from market forces on these groups which would be exacerbated by higher

insurance costs brought about by higher potential risks for failure to adequately disclose.

Subsection (c) was inserted in order to limit the disclosure requirement to judicial administrative oversight and focus it on its intended purpose of informing a client as to the existence of a coverage document. In conjunction with the proposed disclosure statement, subsection (c) is intended to remove any debate as to the sufficiency of disclosure as a basis for imposition of civil liability.

Subsection (c) also recognizes that any disclosure can only reflect the attorney's effort to obtain coverage because the proposed Rule does not regulate insurers nor compel them to confirm coverage in every case. As discussed in the Committee, those cases involving uncompensated claims were actually cases where the attorneys had purchased a policy, but the carriers denied coverage. Consequently, the proposed Rule cannot be read as an attorney's guarantee of coverage nor can it form the basis for civil claims

shifting responsibility onto attorneys in malpractice cases for declinations of coverage by insurers.

Moreover, attorneys are not insurers, and their duty is limited to their professional role. See Model Jury Charge 5.51 – Legal Malpractice, stating, in pertinent part, "[t]he law does not require that an attorney guarantee a favorable result . . . The attorney is not an insurer..." See also Ziegelheim v. Appolo, 128 N.J. 250, 260-61 (1992); St. Pius X House of Retreats v. Camden Diocese, 88 N.J. 571, 588 (1932); 2175 Lemoine Ave. v. Finco, Inc., 272 N.J. Super. 478 (App. Div. 1994); Procenik v. Cillo, 226 N.J. Super. 132, 154 (App. Div. 1988); McCullough v. Sullivan, 102 N.J.L. 381 (E. & A. 1926).

The results of the survey conducted by the Ad Hoc Committee are from a claimed statistically significant sampling and indicate that almost all attorneys have some type of professional liability insurance. Ninety percent (90%) of sole practitioners have some form of coverage and ninety-four percent (94%) of two to five

member law firms have coverage. One hundred percent (100%) of law firms with more than five members are insured. What those statistics do not demonstrate is the practice profile of those firms, or whether any of those uninsured firms or practitioners were sued for malpractice resulting in an uncompensated plaintiff. See Appendix Z.

According to the ABA 2016-2017 Attorneys' Professional Liability Study, approximately ninety-four percent (94%) of attorneys are engaged in the private practice of law with five attorneys or less. New Jersey's numbers are lower but still significant. According to the 2015 New Jersey Annual State of Attorney Disciplinary System Report, there were 97,727 attorney licensees, and 35,551 of whom were engaged in the private practice of law primarily in New Jersey. Although the percentage of solo practitioners engaged in the private practice of law in New Jersey may be somewhere between fifty-five percent (55%) and seventy-five percent (75%), the number of law firms with one to

five members exceeds ninety percent (90%). See Appendix AA.

The referenced ABA Study reflects that the following areas comprise almost seventy percent (70%) of attorney malpractice claims: plaintiff's personal injury (18.24%); real estate (14.89%); family law (13.51%); wills and estates (12.05%); and collection and bankruptcy (10.59%). See Appendix BB. Those areas seem in accord with New Jersey's results, with the exception of a lag in the reduction the ABA has seen in real estate claims, which may be due to New Jersey's prolonged statute of limitations. Those areas also are heavily consumer oriented.

Based on preliminary results in a recent and ongoing study by the New Jersey State Bar Association of the New Jersey insurance marketplace, that marketplace is underperforming and, thus, more costly and restrictive than in neighboring jurisdictions. See Appendix CC. Although claim severity reported by one carrier is under the countrywide average, the number of

claims is almost double the national average. See Appendix DD. Another carrier currently serving a significant portion of the sole practitioner and small firm market is now seeking to shed many sole practitioners and limit small firms in its admitted profile because of disproportionate losses among those groups (USI verbal report to the New Jersey State Bar Association Insurance Benefits Committee). That insurer's experience is not unique in the New Jersey marketplace.

USI reported to that New Jersey State Bar Association Committee that of the approximately twenty-five (25) insurance companies authorized to write legal malpractice coverage, only five (5) are writing and renewing business in New Jersey. See Appendix CC. The New Jersey Department of Banking and Insurance's (DOBI's) rate level history for attorneys does not paint a better picture. See Appendix EE. Rate increases are the norm and the number of policies is in the hundreds or thousands. This does not mean that

most of New Jersey's 35,000 private practitioners are uninsured, but suggests that many are forced into the surplus market. That market is much more costly and permits such limitations as eroding coverage. USI also reported that the base rate for lawyer's coverage in New Jersey begins at forty-nine percent (49%) higher than New York, is twenty-three percent (23%) higher than Pennsylvania, and is thirty-three percent (33%) higher than Maryland. See Appendix FF.

The proposed disclosure Rule exerts no control over the insurance marketplace. Similarly, the Court has no ability to comprehensively control that marketplace or guarantee that any minimum insurance requirement under any Rule of Court will be available to every practitioner to disclose. It is also clear from the foregoing statistics that those with greater resources and institutional clients will fare better under any insurance requirement than someone entering the profession encumbered by debt and forced to practice on their own. Where some minority groups may have fewer

resources to meet the educational requirements to accomplish licensure, their financial burden at the outset would be even greater. To then expand their exposure civilly seems contrary to the proposed Rule's administrative purpose and disproportionately unfair.

Because there is no evidence that New Jersey attorneys perform at a lower standard than those in the rest of the country, the causes for market differences likely relate to higher exposure and greater costs associated with New Jersey claims. Subsection (c) is designed to limit that in the disclosure context. While Baxt v. Liloia, 155 N.J. 190 (1998) states that an ethics violation cannot be the basis for a malpractice claim, the RPCs may be relied upon as evidence of a standard. The proposed disclosure rule is not an RPC, but the effect will be the same unless subsection (c) is included to make it clear that the disclosure requirement cannot be used in the civil context as a basis for a personal cause of action. As can be seen by the foregoing demographics and

statistics, it is apparent that those most affected are in the groups facing the most challenges to succeed in the legal profession and to serve the general public welfare.

Finally, some members of the Ad Hoc Committee believe that there should be a personal cause of action for any breach of the proposed disclosure requirement. While it does not appear that a majority of the Committee shares that belief, the assertion of such claims will be a reality if a disclosure rule is approved without subsection (c). Moreover, such a cause of action would be available even where an attorney has coverage, under the theory that because of an attorney's failure to properly disclose, the client would have selected someone else that would not have caused whatever harm is claimed. It is unlikely that an uninsured attorney who is judgment proof would face such a claim. Therefore, it is logical to conclude that the target of these new "informed consent" claims would be insured attorneys.

While some may take the position that the Court can address these claims if they arise, such an approach ignores the dynamics of insurance. Insurance is a product where the cost is not known until after coverage is sold. Therefore, premiums are the result of a guessing game. To convert a future risk to present value, the fear factor often drives prices higher than the actual cost. As seen above, this will have a disproportionately adverse impact on small and solo practitioners who are seen by insurers as more costly or unattractive to insure. Subsection (c) clearly reduces that risk and impact.

The Language of Proposed Subsection (c) Should Not Be Included.

The language of proposed subsection (c) should not be included primarily because the consequences of failure to comply with the insurance disclosure requirement of proposed Rule 1:21-1E should not be dictated by the rule itself.

In order to maintain consistency with existing New Jersey Court Rules, the American Bar Association Model Court Rule on Insurance Disclosure and insurance disclosure rules enacted in other jurisdictions, the ultimate determination of whether failure to abide by the disclosure rule can create a standard for civil liability or the basis for a malpractice claim should be left to the courts, to be developed through common law in the ordinary course.

Significantly, the American Bar Association Model Court Rule on Insurance Disclosure does not include this language, or anything like it. See Appendix B. Although the model rule specifies that failure or refusal to provide the required information in periodic registration statements will result in a lawyer's administrative suspension from the practice of law until such time as the lawyer complies with the rule, it is silent, as it should be, on the question of whether such failure can create a standard for civil liability or the basis for a malpractice claim.

In fact, of the 26 jurisdictions that currently have disclosure requirements, either requiring lawyers to disclose this on their periodic registration statements or directly to clients, none contain language like that in proposed subsection (c). A review of each of those state's rules on insurance disclosure, whether in the state's Rules of Professional Conduct, or court rules reveals that while several states include the ABA Model Rule's suspension to practice law provision, no states include a provision similar to that found in proposed subsection (c). See, e.g., Arizona Supreme Court Rule 32(c)(12); Rules of the State Courts of Hawaii 2.17(d); Massachusetts Supreme Judicial Court Rule 4:02; Nevada Amended Supreme Court Rule 79; Washington Admission to Practice Rule 26.

As with the Model Rule and the rules adopted by the 26 states, New Jersey should allow the common law jurisprudence to develop on a case-by-case basis and should not pre-judge whether or not there are factual

circumstances in which a failure to abide by the rule can create a standard for civil liability or serve as a basis for a malpractice claim.

It also bears mentioning that our research has revealed no other New Jersey court rule that affirmatively and explicitly eliminates even the possibility of the existence of circumstances under which a violation might expose an attorney to a malpractice claim. There simply is no reason why a violation of the proposed insurance disclosure rule should have a limitation of liability provision not found in any other rule.

Moreover, inclusion of the first section of the proposed rule - "[n]othing in this Rule shall be construed as creating a standard for civil liability" - would contradict already existing New Jersey case law that provides that a violation of a statute or court rule "would be evidence of negligence to be considered by the trier of fact." Montague v. Petit-Clair, 203 N.J. Super. 210, 213-14 (Law Div. 1985). See also

Williamson v. Waldman, 291 N.J. Super. 600, 607 (App. Div. 1996), aff'd as modified, 150 N.J. 232 (1997) ("breach of a legislated standard of conduct may be regarded as evidence of negligence if the plaintiff was a member of the class for whose benefit the standard was established").

Along with existing support in the court rules and the case law analyzing violations of the court rules, there also is support for the exclusion of proposed subsection (c) in case law analyzing violations of the Rules of Professional Conduct. While this Committee's proposed malpractice insurance rule, if adopted, will be placed within the state's court rules and not the Rules of Professional Conduct, the policy considerations of the RPCs apply with equal force here – namely, guaranteeing that clients are aware that they are retaining a lawyer who is not insured, and the ability to allow clients to assess the risks involved with that decision. In fact, eight other jurisdictions have placed their malpractice insurance disclosure

rules within their respective Rules of Professional Conduct.[18] Therefore, review of the case law stemming from violations of the Rules of Professional Conduct is relevant here, and further supports the exclusion of a limitation of liability provision in the proposed rule.

Courts reviewing violations of Rules of Professional Conduct have found that while "violations of ethical standards do not *per se* give rise to tortious claims, the standards set the minimum level of competency which must be displayed by [] attorneys. Where an attorney fails to meet the minimum standard of competence governing the profession, such failure can be considered evidence of malpractice." Petrillo v. Bachenberg, 263 N.J. Super. 472, 485–86 (App. Div. 1993), aff'd, 139 N.J. 472 (1995) (*quoting* Albright v. Burns, 206 N.J. Super. 625, 634 (App. Div. 1986).

[18] Alaska (Professional Conduct Rule 1.4); California (Professional Conduct Rule 3-410); New Hampshire (Professional Conduct Rule 1.19); New Mexico (Professional Conduct Rule 16-104); North Dakota (Professional Conduct Rule 1.15); Ohio (Professional Conduct Rule 1.4(c)); Pennsylvania (Professional Conduct Rule 1.4(c)); and South Dakota (Professional Conduct Rule 1.4).

The preamble of the American Bar Association Model Rules of Professional Conduct explains that a "violation of a Rule should not itself give rise to a cause of action against a lawyer," but continues "since the Rules do establish standards of conduct by lawyers, a lawyer's violation of a Rule may be evidence of breach of the applicable standard of conduct." Courts in New Jersey and other jurisdictions similarly have recognized the relevance of the Court Rules and Rules of Professional Conduct in civil cases against attorneys. See Petrillo, supra, 263 N.J. Super. at 483 (finding RPCs to be useful in determination of whether an attorney owes a duty to a non-client third party); Gilles v. Wiley, Malehorn & Sirota, 345 N.J. Super. 119, 125-126 (App. Div.), certif. denied, 171 N.J. 340 (2001) (holding that rules of professional conduct may be relied on as prescribing requisite standard of care and scope of attorney's duty to client); Allen v. Lefkoff, Duncan, Grimes & Dermer, P.C., 265 Ga. 374, 453 S.E.2d 719, 721 (1995) (finding that "pertinent Bar

Rules are relevant to the standard of care in a legal malpractice action.") In Baxt v. Liloia, 155 N.J. 190 (1998), while the Court held that a violation of the Rules of Professional Conduct could not be used to provide a basis for civil liability against an adversary's attorney, the Court also found that the "existence of a duty owed by an attorney may be supported by reference to an attorney's obligations under the RPCs, and that plaintiffs may present evidence that an attorney has violated the RPCs in cases claiming the attorney has breached his or her duty of care." Id. at 199-200. In Albright v. Burns, supra, the court admitted applicable ethics rules into evidence in a malpractice action, holding that the defendant's violation of those rules created a presumption of negligence. The court noted that the failure to meet the minimum level of competency established by the profession should be admissible as evidence of malpractice. 206 N.J. Super. at 634.

In sum, proposed R. 1:21-1E should be adopted without proposed subsection (c) because 1) no other jurisdiction's disclosure rule has included the limiting language contained in proposed subsection (c); 2) no other New Jersey court rule contains such an explicit limitation of liability provision; and 3) New Jersey case law provides that violations of court rules and Rules of Professional Conduct can be admitted as evidence of malpractice and a failure to meet an applicable ethical standard. The issue of whether there are circumstances in which a violation of the proposed insurance disclosure rule can form the basis of a malpractice claim, or be used as evidence of malpractice, should, as with every other court rule and rule of professional conduct, be determined by case law rather than dictated by the language within a court rule.

AD HOC COMMITTEE ON ATTORNEY MALPRACTICE INSURANCE

The Ad Hoc Committee, through its three subcommittees and discussions in plenary sessions has reviewed the issues and questions presented, and submits its recommendations in an effort to balance the interests of the public and attorneys in a manner that promotes protection and transparency.

Respectfully Submitted,

Honorable Robert A. Fall, J.A.D., retired, Chair

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[19] Mr. Mack officially retired from the practice of law on June 6, 2017, and simultaneously resigned his position on this Committee. Prior to his retirement, Mr. Mack was a sole practitioner in Lake Hopatcong and served as the Committee's NJSBA Solo and Small Firm Section Designeee.

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Z. Extract of Survey Results.

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CC. "NJ Legal Malpractice Landscape Brief," USI Affinity, March 14, 2017.

DD. Bar Graph Reflecting Average Claim Costs in New Jersey, New York and Pennsylvania.

EE. Rate Level History for Lawyers chart.

FF. USI Memo dated March 29, 2017.