

NOTICE TO THE BAR

REPORT OF THE SUPREME COURT AD HOC COMMITTEE ON ATTORNEY MALPRACTICE INSURANCE – PUBLICATION FOR COMMENT

The Supreme Court invites written comments on the June 2017 Report of the Ad Hoc Committee on Attorney Malpractice Insurance. The report is published with this notice. The full report, including its several appendices, is available on the Judiciary's internet web site at <https://judiciary.state.nj.us/courts/supreme/reports.html>.

Please send any comments on the report in writing **by January 2, 2018** to:

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Comments on Attorney Malpractice Insurance Report
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Comments on the report may also be submitted by e-mail to the following address:
Comments.Mailbox@judiciary.state.nj.us.

"In 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," the Supreme Court created the Ad Hoc Committee to address the following questions:

- (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?

The Ad Hoc Committee's recommendations are summarized in the report's Executive Summary (pages 7-13 of the report) and described in detail in the body of the report. With regard to the bottom line question, the Ad Hoc Committee concluded that "professional

liability insurance should not be mandatory for New Jersey attorneys.” Report at 7. The Ad Hoc Committee based that conclusion and recommendation on its determination 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” and that it would be “unfairly punitive to small firms, solo practitioners, and to those attorneys engaged in the part-time practice of law.” Report at 7-8.


Regarding reporting and disclosure, 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 [a] proposed Rule [that] 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.” Report at 8-9.

The Ad Hoc Committee also recommends disclosure to the client, concluding that “the arguments favoring a system of mandatory disclosure by an uninsured attorney to a prospective client...significantly outweigh the arguments against such a system.” Report at 9-10. However, “not having a professional liability policy in place does not, of itself, speak to an attorney’s ability, experience or competence.” Report at 10.

Both the recommended reporting requirement and the recommended disclosure requirement are set forth Proposed Rule 1:21-1E and the accompanying proposed new Rules Appendix, which are at pages 144-147 of the report.

The one aspect where the Ad Hoc Committee was not able to achieve consensus was as to the consequences of an attorney’s failure to comply with the proposed disclosure requirements and whether the proposed rule amendments should address those consequences. The Ad Hoc Committee thus presents in its report two versions of the proposed rule for consideration, one with and one without the following paragraph (c): “Nothing in this Rule shall be construed as creating a standard for civil liability, or the basis for a malpractice claim.” Report at 11. The two options are discussed at length in the report.

The Supreme Court will not consider comments submitted anonymously. Thus, those submitting comments by mail should include their name and address (and those submitting comments by e-mail should include their name and e-mail address). Comments are subject to public disclosure upon receipt.


Glenn A. Grant, J.A.D.
Acting Administrative Director of the Courts

Dated: November 14, 2017