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I have been admitted to the bar in NJ since 1982. During that time, I have worked in firms approximately 15 years; the rest of the time, I have been in solo practice. With that background, I offer the following observations regarding the Report of the Committee on Attorney Malpractice Insurance and its recommendations

I want to primarily focus on the requirement of whether malpractice insurance should be mandated. I will briefly comment on the proposed disclosures at the end.

With regard to any mandate, I will try to avoid repeating what was addressed by the Committee in its Report, with which I fully agree, and offer these additional comments.

As the Committee observed in the Report, there are many types of practices maintained by attorneys in our state. There are the big firms; they are the mid-sized firms, there are the small multi-attorney firms. And there's the segment that consists of solo practitioners. While the malpractice insurance requirement probably would not impact the first or second groups (I suspect most if not all of these have malpractice insurance), it would have a significant impact on the second two groups, and in particular solo practitioners.

There are all kinds of solo attorneys in the state. Some who have very active practices that thrive and are highly success. Others whose practices are closer to the edge of success and so survive by reducing overhead. There are others who for personal reasons, whether childcare or family illness or personal illness or any number of other reasons, have decided to practice on a less than full time basis. Some of these are attorneys like myself who are "semi-retired" (as I like to put it), maintaining some level of practice to keep the brain functioning, but only on a limited basis. There are attorneys in all these solo sub-groups who represent clients in the regular sense. There are others who work primarily or even exclusively on a per-diem or consulting basis, providing legal services to other lawyers, in arrangements whereby the per-diem/consulting attorney only works on behalf of clients indirectly. There are even attorneys who do almost nothing other than functioning as arbitrators or mediators. Among the attorneys who have direct clients, there are some whose clients are primarily fee-paying (whether on standard billing basis or contingency basis); there are others who devote much of their time to representing persons who cannot afford an attorney.

There are firms and solos that are nominally regular practices but in reality are in-house operations for insurance carriers or other entities of that nature, and who as result represent as clients the insureds who named in personal injury and other such law suits. There are the attorneys who are employed by governmental entities, so that the employer is the client. There are attorneys who are in-house counsel and in that role appear regularly in court (for instance, the attorneys employed on in-house basis by larger residential real estate management entities and appear in landlord-tenant disputes). In short, the variety of practice models used by attorneys is virtually countless.

Point is, while for some of these attorneys malpractice insurance makes sense, and where a mandate would even be arguably appropriate, there are many others where maintaining malpractice makes no sense even as a business decision, because there simply is no exposure to a malpractice claim, and absolutely makes no sense as a mandate. Trying to accommodate all these variations in the mandate by allowing exceptions for some or all would require whatever board was established or assigned to oversee compliance to engage in micro-management of many of these situations to determine which properly could claim an exemption and which could not. Or alternatively, the Rule could provide for only very limited exceptions, which would create a situation where there are equal protection problems, if not on the level that would constitute a violation of the controlling legal principles of the constitutional provisions, then certainly on a perceptual basis. Would the Court want to start exposing itself to claims that it is giving special benefits to some attorneys while not others in very similar situations without a solid basis for differentiating them? That is one thing that it seems to me the Court has studiously avoided doing in its regulation of the practice of law over the years I've been admitted, and I would respectfully submit that it is a wise approach that the Court should continue to follow into the future.

Then there is the cost factor, and the implications it would have. The premiums for malpractice insurance have been rising over the last several years – as with other specialty lines of this nature. As we have seen with those other lines (e.g., medical malpractice insurance), one of the primary reasons this can and does occur is totally independent of underwriting considerations. There is oft times only a very limited number of carriers that write the insurance. When there is such a limited market, basic economics tells us that the carriers will raise the rates, not because they have to do so to cover claims, but because it's a way to generate a higher profit margin. And the incentive to do so becomes even stronger when the potential insureds are mandated to have coverage – then there is little to stop the carriers from raising rates to the highest levels possible. That know that is possible all we need to do is look at the pharmaceutical industry and its pricing practices, even (oft times especially) with generics

For some of the small firms and more of the solos, particularly the ones who do not maintain a full-time practice, or do not primarily have paying clients or unfortunately have not achieved economic success (whether because the practice is still in start-up mode or because of that's the way the cookie has crumbled for that particular attorney), the cost of malpractice insurance is already a major problem. Even where the attorney appreciates how important malpractice insurance is in protecting themselves, not to mention the clients, the decision between maintaining coverage and paying other expenses such as the office expenses can be and many times is a very difficult decision that will frequently be resolved in favor of keeping the lights on and phone working. Mandating coverage will only exacerbate this situation. I have no doubts it would force an appreciable number of current solos to give up practicing. Some of them would be at a point when they are still heavily burdened with debt from college and law school, or faced with other major expenses such as mortgages and childcare expenses, and so can't afford to change careers; others who are the stage of life where changing careers becomes difficult because of age and similar factors (*The Intern* might have been an entertaining movie, but it's not the reality of life in modern America). Bottom line, it would put many current members of the bar in a very difficult place personally. And it in some or many cases would deprive the profession of folks who are assets, whether because of the non-legal service they provide to the community or the service to clients they provide, or the impact they have

had on the development of law, or in some other way.

Indeed, I would submit that it is entirely foreseeable that the next generation of lawyers would, if the mandate were imposed, find it difficult to go out on their own and start a solo practice, which with some luck – and lots of skill – can become a partnership and then a mid-sized firm, and so on. The start-up costs become just too high a bar to jump over. Instead, such attorneys will be forced to continue to work for the firms they're currently at. And it is then foreseeable that at least some of those firms would take advantage of those attorneys, continuing them as associates with lower salaries while working the as hard as any first-year associate, simply because the attorney has no viable options. Is this the legacy we want to bestow on the next generation?

Moving from the costs to another aspect of how these coverages work, attorney malpractice insurance (like most if not all such coverages) is written on a claims made basis, not an occurrence basis, as the Court knows all too well.. These policies have a host of exclusions, exclusions that would become highly problematic in an environment where coverage is mandated. In this regard, it is particularly important to keep in mind that there are no standards among the carriers with regard to the nature of the policy language, and so the coverages can vary widely from carrier to carrier. Any mandate would have to include a detailed description of the nature and extent of coverage required. Otherwise, such a Rule would fail to fulfill its primary goal – providing protections for clients. The Rule would give the appearance of coverage that would be just an illusion in far too many cases due to the exclusions.

Of course, it is debatable whether any such Rule would actually work, at least not without creating yet another reason to increase the cost. The carriers would not be subject to the Rule, and they could just continue to offer policies with all kinds of exclusions. Alternatively, they would respond by offering policies that comply, but at significantly increased costs. Neither attorneys nor clients (who would ultimately pay higher fees to cover the increased costs) would benefit.

While some might suggest that the Court could prevent this by undertaking to directly regulate the carriers with regard to the nature of coverages provided and/or costs, this would, I submit, come dangerously close to going over the Constitutional line between regulating the practice of law and areas within the domain of DOBI. Imagine if the Board of Medical Examiners or any of the other professional boards attempted to issue regulating the nature of insurance coverage provided to the professionals within their scope of responsibility. Without prejudging the result, I think we can all agree that this would present a significant and fascinating legal debate, when the insurers moved to challenge the regulation as being beyond the scope of the board's authority. The debate would become even more complex when applied in the context of the Court regulating attorney malpractice insurance, given that it would add a separations of powers issue to the mix.

So I would strongly urge the Court to adopt the recommendation of the Committee with regard to any mandate of coverage.

Turning to the disclosures, I do see the point of having some kind of disclosure. But it seems to me that the ones proposed by the Committee are far harsher upon attorneys who do not have insurance than they need to be in order to benefit clients and potential clients.

As I read that part of the Report, I kept having the feeling that the proposed disclosures would deter clients from retaining attorneys who do not have the insurance. And now, a month later, that feeling is stronger than ever. I know that if I went to, say, a psychologist (using that example since my quick research seems to indicate that they are not subject to an insurance mandate here in NJ), and at the first session the doctor pulled out a form like that for me to sign, I'd probably think three times about continuing with him/her. That's even though I've been involved in numerous medical malpractice claims and based on that experience am hard pressed to think of situation where suit against psychologist would ever be option. I'd wonder what was wrong with this person. And I am confident that lay people will have the same reaction to the proposed attorney disclosures. Because the disclosures as phrased are so strong that I would understand them to be trying to tell me not to use that attorney.

As I noted above, there are all kinds of attorney practices. And as I again noted above, there are many where maintaining attorney malpractice insurance does not make sense or is not feasible practically. And that was without taking into the account the trend that the Committee noted, the trend of insurers to discontinue writing coverage for solo and other smaller firms. These disclosures would severely hurt those attorneys.

I would especially note the impact these disclosures would have on many young attorneys just starting solo practices, especially the ones doing so within the first few years of being admitted. These are true examples of the entrepreneurial drive that gets so celebrated – rightly so – in so many other contexts in our society. They don't have an established client base that they are bringing with them from whatever their earlier experiences might have been, they often don't have a lot of money saved up to use for not just the start-up and early operating costs of the business but also their personal living expenses, indeed to the contrary they often have substantial student loan debt, and yet they are willing to take the chance so many attorneys who are role models of this profession have taken before them – to hang out a shingle and see where it takes them. Do we really want to prevent this from happening in the future? All I can say is I truly hope not. That is not the kind of bar I ever want to see in my lifetime.

So I would ask that the Court seriously consider either revising the disclosures itself or remanding to the Committee for consideration of simpler disclosures. Personally, I see nothing wrong with having a straightforward disclosure to the effect, "be advised that I do not (or no longer, if coverage is dropped during a representation) maintain attorney malpractice insurance. While I of course do not expect it to matter, if something I make a mistake in handling your case that would form the basis for suing me, there will be no insurance to pay the claim, and I will be responsible for any liability myself." Since our Rules already require written retainers in the vast majority of matters, there is no reason the disclosure should not be included there. Is this disclosure any more important than disclosure of how and how much the attorney will be paid? From the client perspective, I think not. If deemed necessary and appropriate, impose font requirements (same size as other text, bolding, etc.) to prevent any inappropriate downplaying of the disclosure.

By the way, the reason it seems to me that the opening clause of the second sentence should be allowed is that otherwise any normal lay person would start to think the attorney expects to commit

malpractice. Again, that would be unfair to those attorneys who cannot maintain insurance.

In closing, let me just say that from what I've seen over the past 35 plus years in practice the vast majority of attorneys in this state work hard on behalf of their clients, achieve good results for them, are fair and professional with in their dealings with both clients and opposing attorneys, and – most importantly in this context – do not commit malpractice. There are some who are not, of course. But the rest of us should not be put in an unfavorable light with clients and the public generally because of those few. We've worked hard to uphold the best traditions of this profession, and deserve better.

In conclusion, let me express my appreciation for this opportunity to present my thoughts and for the consideration I am sure they will receive in this process.

Respectfully submitted,

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