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NEW JERSEY STATE BAR ASSOCIATION

ROBERT B. HILLE, PRESIDENT
McElroy, Deutsch, Mulvaney & Carpenter, LLP
1300 Mt. Kemble Avenue
P.O. Box 2075
Morristown, NJ 07962-2075
973-348-5234 • FAX: 973-425-0161
rhille@mdmc-law.com

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Hon. Glenn A. Grant, J.A.D.
Acting Administrative Director of the Courts
Comments on Attorney Malpractice Insurance Report
Hughes Justice Complex; P.O. Box 037
Trenton, New Jersey 08625-0037

Re: Report of the Ad Hoc Committee on Attorney Malpractice Insurance

Dear Judge Grant:

Thank you for the opportunity to review and comment on the report and recommendations of the Supreme Court Ad Hoc Committee on Attorney Malpractice Insurance. The New Jersey State Bar Association (NJSBA) commends the members of the Committee for their efforts in researching, discussing and debating whether additional rules are necessary with regard to attorney malpractice, and, in particular, whether the Court should adopt a mandatory insurance and/or disclosure requirement.

The NJSBA agrees with the Committee's recommendation to reject a mandatory malpractice insurance requirement, but disagrees with the Committee's recommendation mandating attorney disclosure in connection with malpractice insurance, at this time. Frankly, there is no evidence that either requirement is necessary or will resolve any demonstrated problem in connection with the ability of consumers to obtain quality legal services and to have recourse available in the event of negligent representation. There is evidence, however, that, if mandated, both requirements will engender more confusion than clarity for the public, and will pose a myriad of problems for attorneys, particularly solo and small-firm attorneys, and those offering legal services in high risk, consumer-oriented practice areas, such as real estate, family and estate administration.

With regard to requiring attorneys to maintain malpractice insurance, the NJSBA agrees with the arguments set forth in the Committee's report. The New Jersey insurance marketplace does not effectively accommodate the liability insurance needs and circumstances presented by the diversified group of solo attorneys and small-law firms currently practicing in this state. Studies conducted by the NJSBA show that malpractice insurance rates in New Jersey start at 33% higher than in Pennsylvania and 49% higher than in New York, due to New Jersey's longer statute of limitations for malpractice claims and the potential of attorneys' fee awards under Saffer v. Willoughby, 143 N.J. 256 (1996). Additionally, there are only five carriers actually

writing legal malpractice insurance policies in New Jersey, although 25 carriers are currently authorized. Finally, the NJSBA is aware, through briefings on its own member benefit insurance program, of the difficulties of insuring solo and small-firm attorneys, as well as attorneys in certain high-risk practice areas. Thus, a mandatory insurance requirement that has no bearing on an attorney's ability to practice law might very well put some attorneys out of business through no fault of their own.

The NJSBA further notes that clients will not necessarily be better protected if an attorney is required to maintain malpractice insurance. In fact, any increase in insurance costs due to the mandatory nature of the coverage might be passed onto clients. That could make legal services even more out of reach for those who need them the most. Moreover, the mere existence of an insurance policy does not mean every claim will be covered, as insurers often deny claims asserting policy exclusions or other factors that do not meet the coverage conditions. Finally, because insuring certain practice areas can be costlier than others, attorneys may shy away from practicing in those high-risk areas to achieve insurance cost savings, leaving consumers with a restricted marketplace of attorneys to choose from for such basic, yet vital, tasks such as real estate closings, wills and estate administration.

The NJSBA's concerns with a mandatory disclosure requirement are similar. Such a requirement will be linked to a volatile market over which neither the Legislature nor the Court has control, and may force good attorneys out of practice through no fault of their own. Yet, those good attorneys will have to explain why they cannot carry malpractice insurance. In addition, clients may gain a false sense of comfort from the fact that an attorney maintains a malpractice insurance policy when, in fact, an insurance policy is no indication of an attorney's ability to handle a client matter in a competent and ethical manner. Nor is the client guaranteed to be able to collect from an insurance policy should the attorney negligently handle the client's case, as mentioned previously. Coverage may be declined for a variety of reasons, or may even have lapsed since the time of required disclosure. Finally, the NJSBA is not aware of any other professionals that are required to disclose whether they maintain malpractice insurance. Requiring attorneys to do so will unfairly single them out. If insurance coverage is important to a client, there is nothing prohibiting the client from asking about it; however, there is no clamor from the public to obtain insurance coverage information. Thus, given the potential confusion and problems disclosure can create, it should not be mandated.

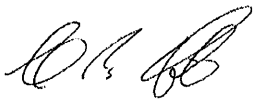
If the Court does implement a mandatory requirement for attorneys to disclose whether they maintain malpractice insurance, the NJSBA submits certain safeguards should be put into practice. The amount of coverage should not be required to be disclosed, as this may vary for a variety of reasons and may create false expectations on the part of a consumer. Furthermore, it is critical that an affirmative provision be included that prohibits an attorney's disclosure from being used as a standard for civil liability or the basis for a malpractice claim. This will ensure any disclosure requirement is limited to judicial administrative oversight and is focused on informing a client as to the existence of a coverage document. It also recognizes that any disclosure can only reflect the attorneys' effort to obtain the requisite coverage agreement since neither the Court nor the Legislature can compel coverage in every case. Consequently, a disclosure requirement cannot be read as an attorney's guarantee of coverage or form the basis

for a civil claim shifting responsibility onto an attorney in a malpractice case for declination of coverage by an insurer.

In sum, the NJSBA again thanks the members of the Committee for their diligent work. For the reasons noted above, however, the NJSBA strongly recommends that the Court not adopt either a mandatory insurance requirement or a mandatory disclosure requirement for attorneys. There is no evidence that the public is demanding these requirements or that great harm is being caused by their absence. On the contrary, there is evidence of very real harm and hardship that could arise should the Court effectuate such requirements for both the public and the profession. Finally, if the Court decides, against the NJSBA recommendation, to adopt a mandatory disclosure requirement, it should be coupled with a requirement that such disclosure cannot be used as a basis for a civil claim or a malpractice action.

Thank you for your courtesies in considering these comments. Please do not hesitate to contact me if any additional information is necessary.

Very truly yours,



Robert B. Hille, Esq.
President

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cc: John E. Keefe Jr., Esq., NJSBA President-Elect
Angela C. Scheck, NJSBA Executive Director