



NEW JERSEY STATE BAR ASSOCIATION

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Mr. Chairman, Madam Vice-Chair and honorable members of the Senate Judiciary Committee

I thank you for the opportunity to comment on behalf of the 18,000-plus members of the New Jersey State Bar Association concerning S-821 (Scutari), which requires all attorneys engaged in private practice of law in New Jersey be covered by legal malpractice liability insurance.

The NJSBA applauds the bill's salutary goal of mandating malpractice insurance protection for all lawyers and creating some financial protection for the public from malpractice harm. However, for the reasons expressed by the Supreme Court's Ad Hoc Committee on Attorney Malpractice Insurance in its June 2017 report and the NJSBA's January 15, 2018 comments in response, mandating coverage as proposed in S-821 cannot be supported by the current insurance marketplace. While there are currently 25 carriers admitted writing these policies in New Jersey,

only five are actually writing them and they are doing so on a selective basis. Attorneys who are not part of this group, in numbers that are increasing, are being forced into the surplus lines market where they pay substantially more for substantially less coverage. The rest are either rejected outright as too costly to insure or are quoted prices that are so exorbitant that they are effectively denials of coverage. The practice types which are most effected are the consumer-focused small firms in areas such as plaintiff's personal injury, real estate law, family law and trusts and estates. To the extent that these lawyers are serving the lower income public, mandating coverage now will have a ripple effect on access to legal services for many residents of our state. For others, the costs of insurance will inevitably be passed on to the public.

Pursuant to its exclusive constitutional mandate to regulate the practice of law, the New Jersey Supreme Court created an Ad Hoc Committee on Attorney Malpractice Insurance to study this very issue -- whether all attorneys with a license to practice in New Jersey should be required to purchase malpractice insurance. The Committee conducted an extensive investigation of the profession, the New Jersey insurance marketplace, what other states were doing, and also drafted and reviewed surveys and examined information from insurance carriers and the American Bar Association. After more than two years of careful evaluation, it recommended to the Court that mandating the purchase of policies was premature and would likely lead to harm to the lawyers and public.

Among the concerns of the Committee that we share and that are not addressed in S-821:

- Purchasing a policy did not mean there was coverage. Therefore, it is misleading to the public to equate the two and induce clients into believing that having a policy meant that they were protected.
- There were no studies or information showing the public has been harmed by uninsured lawyers. In fact, the vast majority of court decisions involving legal malpractice involve lawyers who purchased policies, but where the carriers denied coverage.
- Mandating the purchase of a policy does not mean that a company has to sell that policy, and in fact only five of the 25 carriers admitted to write business in New Jersey are doing so.

Why is malpractice insurance so difficult to obtain and so expensive in New Jersey? Studies conducted by the NJSBA show that malpractice insurance rates in New Jersey start at 33 percent higher than in Pennsylvania and 49 percent higher than in New York. In looking at these statistics one cannot conclude that New York or Pennsylvania is less litigious than New Jersey. The gross disparity in premium dollars and the simple explanation for why only five admitted carriers write legal malpractice is straightforward: The only differences in the marketplaces are New Jersey's longer statute of limitations for malpractice claims and the potential of attorneys' fee awards under the judicial opinion in *Saffer v. Willoughby*, 143 N.J. 256 (1996). Any attempt to mandate malpractice insurance without addressing these inequities would not just be unfair, it would be debilitating to the legal profession in our state and impact the public as well.

Fee shifting – where the prevailing party is entitled to have its attorney's fees paid by the non-prevailing party -- is only available in legal malpractice actions and not in actions for other professionals. New Jersey is the only state that has such fee shifting. Traditionally, fee shifting is

provided by statute as an incentive to seek to correct a purposeful or intentional societal wrong under a remedial statute, such as a claim for civil rights, discrimination or consumer fraud. We strongly believe it is misplaced in legal malpractice actions, which seek to compensate an injured party for the negligent actions of their attorney, especially when it does not exist for malpractice actions against other licensed professionals, including doctors. Because of this unique and punitive measure awarded solely for legal malpractice, lawyers are at a distinct disadvantage in the malpractice insurance marketplace.

Some have argued that doctors are required to have coverage. However, the risk marketplace for doctors is far more favorable than it is in the lawyer marketplace. Doctors have a two-year statute of limitations and no fee shifting. Even without those substantial cost drivers, though, given the rising costs of and growing limitations on access to healthcare, we question whether mandating malpractice insurance coverage benefitted physicians and the public or is harming both.

The same questions need to be asked in connection with a legal malpractice insurance mandate. Any increased costs from a mandate will be disproportionately borne by lawyers with the least economic means and opportunities. Those likely victims will be new lawyers burdened by extensive educational debt trying to open up an office, diverse attorneys who often have fewer economic resources to sustain them, women attorneys reentering the profession and practitioners serving the lower income communities. The Court's Committee was concerned that taking away licenses or denying such professionals the right to practice would have a spillover effect on the communities they represent, thus limiting access to legal services for the public.

Recent studies, which were not examined by the Court's Committee, but reviewed and conducted by the NJSBA, noted that the number of unemployed lawyers and underemployed lawyers is growing. This dynamic reflects that many practitioners are struggling to survive as economic members of their communities. The disproportionate impact a mandate would have on all of these individuals would be punitive. There is no subsidy for the purchase of insurance in S-821. Professionals on the economic margins serving those on the economic margins would be treated no differently under the bill than an attorney earning a seven-figure salary.

In sum, S-821 cannot cure the fundamental problems in the malpractice insurance marketplace, and therefore, it requires additional reform and insurance analysis.

For these reasons, the NJSBA respectfully urges this Committee to examine these issues in depth before releasing S-821. The NJSBA also stands ready to assist this Committee and the bill's sponsor in this regard.

Thank you for your time and consideration.

Respectfully submitted,



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President



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