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**OPINION**

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## The problem is implementation

*by Kevin Culhane*

As California practitioners are aware, the question of mandatory malpractice insurance has resurfaced recently.

The philosophical issues raised by proposals for mandatory malpractice insurance are varied and complex.

Attorneys hold widely divergent views regarding the propriety of "socializing" the cost of attorney negligence across the entire profession, and the related issue of whether "good" lawyers should be required to subsidize "bad" lawyers.

Moreover, the necessary decisions that must be made to implement any mandatory malpractice insurance program (i.e., who should be exempted and the level of mandated coverage) carry implicit value judgments regarding legal education and professional licensure in California, because many of the most perplexing issues derive from the fact that the legal license permits practice in a myriad of potentially unrelated practice areas.

In the late 1980s, the charge of the State Bar's Commission on Professional Liability was to study, design and propose a program of mandatory malpractice insurance for use in California.

In the end, it was implementation factors, rather than philosophical differences, that led to the conclusion that the all-encompassing Oregon fund experience could not be successfully or safely implemented in California.

The commission's study of the data quickly revealed that any structure for mandatory malpractice insurance required an Oregon-style fund, which would be the exclusive provider of first layer malpractice insurance.

It was readily apparent that without an exclusive provider, commercial carriers could continue to selectively underwrite the best risks.

This would in turn create insurmountable "adverse selection" problems within any remaining fund created to insure those who could not obtain malpractice insurance from commercial sources. Public comment most directly revealed the significant problems encountered by a proposal to import the Oregon experience into California.

In general, these problems centered on the significant differences between the lawyer populations in Oregon and California, and the significant disparities between practice types that were not reflected in the much smaller and more homogeneous lawyer population in Oregon.

An all-encompassing professional liability insurance fund, such as Oregon's, cannot work in California. Accordingly, the adoption of such a fund provides no answer to the question of how a mandatory malpractice insurance proposal could be implemented.

Those charged with the regulation of the profession will need to decide whether an attorney without insurance should be precluded from practicing in California, and also whether that judgment should change if it means that underserved client populations will lose access to legal services.

The leaders of the bar also will have to decide whether they will be satisfied with this basic judgment when the insurance market enters its next "hard" cycle, as it inevitably must.

When that occurs, the difficulty in distinguishing between "bad" lawyers who cannot obtain insurance at any price and "good" lawyers who simply cannot afford malpractice insurance during a hard market, will be drawn into its clearest focus.

The difficulties in implementing a mandatory malpractice insurance program do not prevent legitimate steps toward mandatory financial responsibility.

The statute requiring disclosure in the event that an attorney carries no malpractice insurance can be significantly improved, and further analysis is necessary regarding the licensing implications of unpaid malpractice judgments.

These and other pieces of the financial responsibility puzzle clearly deserve the ongoing attention of the State Bar.

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*Sacramento attorney Kevin Culhane, a former bar board member, is co-chair of the bar's Professional Liability Insurance Committee.*

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