

## Summary of Responses to Request for Public Comment re Legal Malpractice Insurance

<b>Topic</b>	<b>In Favor</b>	<b>Opposed</b>	<b>In Favor, with Qualifications</b>	<b>Unclear Response, or Did not Address this Topic</b>
Requiring attorneys to disclose to the State Bar whether they have legal malpractice insurance, potentially including the amount of coverage and the type of policy (i.e., claims-made or occurrence-based)				
• Making this information available to the public	3	17		286
• Limiting this information to aggregate analysis by the State Bar	6	3		297
Requiring written client acknowledgment of an attorney's disclosure that they do not have legal malpractice insurance	13	9		306
Requiring attorneys to disclose on all written communication with clients, on their websites, and on all advertising, that they do not have malpractice insurance	2	12	1	291
Eliminate disclosure requirement	8			
No change to current disclosure rule	47			251
Mandating legal malpractice insurance for attorneys as a condition of licensing, except for in-house counsel and government attorneys	44	218	18	24
• Open Market Model	36	1		269
• Captive Fund Model	9	54		243
Developing a Continuing Legal Education or Practice Management program that provides an interactive self-assessment of law practice operations in an effort to examine legal malpractice liability				
• Mandatory for all	9	4		293
• Mandatory for uninsured attorneys	2	3		301
• Optional	10	2		294
Promoting the voluntary purchase of insurance				
• Educating lawyers about the benefits of insurance (including risk assessment and claims handling functions; CLE provided; etc.)	12	3		291
• Educating the public about the significance of an attorney not having effective coverage (including claims-made "tail" policies)	9	2		295

Comments reflecting qualified support for mandatory legal malpractice insurance include the following:

- Minimum income threshold should be established, below which insurance would not be required
- Exceptions should be provided in addition to in-house counsel and government attorneys, including:
  - Pro bono work
  - Advisory role for small startups, when practice does not involve interaction with court
  - Attorneys with income below a minimum threshold
  - Attorneys who post bond or surety
- Minimum required coverage should be low
- Premium cost must be reasonable
- Evidence of harm to clients of uninsured attorneys should be provided

Comments reflecting opposition to mandatory insurance include the following:

- Malpractice insurance is not required under all circumstances
  - Examples include specific areas of practice, attorneys who are semi-retired, attorneys who maintain a license but do not provide legal representation
- The cost of insurance is prohibitive to attorneys in small and solo practices
- The increased cost would negatively impact low income clients
- Attorneys in low-risk practices would effectively subsidize those in higher-risk practices
- The State Bar should not impose increased regulations on attorneys
- More research is required before any recommendations are made

**November 2, 2018**

**The State Bar of California  
Malpractice Insurance Working Group**

**RE: California State Bar Study re Issues Related to Errors and Omissions Insurance for Attorneys**

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Thank you for the opportunity to review and provide comment on the State Bar's attorney malpractice insurance study and proposal.

Lawyers Professional Liability Insurance is extremely important in providing adequate protection particularly for higher risk areas of practice, including the difficult client demands and technology or communication issues. However, it is extremely important to maintain a free market insurance system in order to provide adequate capital, spread of risk and maintain a balance of premiums to adequately address differences in lawyer's practices and adherence to risk management.

Implementation of a captive fund model to support mandatory insurance availability for this profession has a number of significant disadvantages in providing sustainable, adequate protection for the California profession and the public. We would like to share key issues with such a model:

**1. Insurance Market Needs and Funding Responsibilities for a Captive Model:**

To maintain a Captive insurance model basically means self-insurance. There are funding requirements to maintain excess capital in reserve to pay claims. If these minimum capital requirements underestimate actual claims, there may not be enough funds available to provide an adequate level of protection. Captive models can be difficult to start up given the up-front funding needs. This could create an undue financial strain on the California legal profession. Raising capital to support this reserve will need to be mandatory to sustain a captive solution. This could also put all participants at risk for future funding, even if they remain claim free. This will significantly affect new/start up law firms with initial funding requirements as well as tax the entire industry for severe claims coming from but a few law firms.

Captives are often built to address gaps or unavailability of acceptable insurance in the free market. The Oregon Fund program was developed in 1977 in response to a lack of insurance options for law firms. This is not the current situation in California. In fact, quite the opposite as there are over 40 viable insurers in California, which is more than adequate to serve California law firms.

## **2. Financial Performance Volatility, Capacity and Premium Requirements:**

Insurance is based on a principle of risk. To keep costs down, this risk of insuring California law firms are spread among many insurers. Under a captive insurance arrangement for a California Lawyers Professional Liability Insurance Captive, the pool is available to firms domiciled in the state, which relative to the nationwide insurance industry has a small and homogenous spread of risk. That means costs can vary greatly each year, making it difficult to budget for actual insurance needs given this volatility. This volatility could provide huge financial burdens to this profession.

As we compare again to the Oregon program which provides \$300,000/\$300,000 in coverage with an additional \$50,000 for expenses. In 2018, the basic premium is \$3,500 per attorney regardless of area of practice or claims history. The fairness of a basic premium regardless of the area of practice or claims history puts great strain on those firms in low hazard areas of practice and/or without claim and therefore subsidize the firms in higher exposure areas of practice or with possibly poor controls and procedures which lead to claim activity. As these inequities develop, the sustainability of such a program is in question. Further, this "flat premium" doesn't incentivize firms to practice risk management which ultimately protects their clients as their premium will be the same no matter how many claims are brought against them.

The Oregon Fund claim frequency rate is 11% for reported claims. The average spend on a claim for defense and expense is \$21,000. Considering the DOI filings of several major carriers in California, the frequency rate in Oregon is multiples higher than those of private carriers in California. It is believed that the increased frequency in Oregon is due to more claims being made as it is known that all firms have insurance. There is also the potential for an increase in claims if the culture requires every lawyer have coverage with the expectation that every client unhappy with the outcome of their case sues their lawyer.

A Captive Fund Model will need to consider minimum insurance requirements for each law firm. Purchasing policy limits under \$250,000 is discouraged as the cost of defense can easily erode the limits leaving little for indemnity or limiting our ability to defend a defensible matter. The vast majority of insured firms in California purchase limits of \$250,000 or more. Oregon's rate of \$3,500 per attorney is significantly higher than the average rate per attorney paid in California due to the free market system and available capacity. These attorneys are carefully underwritten so that firms who practice in riskier areas of practice pay more than those who practice in less claim generating areas of practice.

The Captive model would be inferior to the free market system that provides unique coverage, capacity, pricing options and solutions to cater to specific law firm needs. Coverage provided in a mandatory captive model may not be as broad as in the free market, nor does it have the potential to provide creative solutions to firms with specific needs because of the underwriting expertise and specialization required and maintained in traditional insurance companies. Capacity or limits available to larger individual firms may not be adequate for their specific exposures requiring them to pursue supplemental solutions in addition to what the captive may offer.

### **3. Significant Administration, Actuarial and Service Requirements:**

There are numerous service, actuarial, financial, administrative and management needs built into the private insurance sector but would need to be outsourced or built which will increase costs of a Captive model.

Because captive insurance is a self-based product, the quality of service must be dictated by the state or the law firms. To cut costs, important risk management solutions, education and training may be eliminated-these tools are provided by the private insurance market to improve risks and educate clients. Third-party vendors or service providers can provide services and offer savings in the captive model, however, it can also cause services to be inadequate, inconsistent and cookie-cutter to all participants instead of catered risk management programs that can help in specific areas of practice or provide critical information as to emerging issues and trends.

Captive insurance requires additional resources to manage the administration, claim management and actuarial resources to determine initial and ongoing capital needs. This contributes to higher overall costs, as additional staffing is required to handle these daily operations and policy administration responsibilities.

### **4. Questions/Considerations:**

A potential impact will be that attorneys let their license lapse and go "inactive" due to the costs of mandatory insurance. For instance, an attorney who is practicing part-time or not at all but who wishes to maintain their license to keep their options open, may choose to go inactive.

Related to this-

- Will this result in a loss of revenue from licensing to California?
- Is there a disproportionate impact for female attorneys or older attorneys approaching retirement?
- Does this make it more difficult for a new attorney to launch a solo practice?

Thank you for your consideration.

Katherine Pettibone  
Vice President, Western Region  
American Insurance Association

Forcing ALL lawyers to purchase malpractice insurance based on the assumption that SOME lawyers may be unable to satisfy the rare malpractice judgment is a heavy-handed way of addressing what -- upon a review of the actual evidence -- may turn out to be a bogeyman.

First, what is the actual problem that this working group is trying to address? Is there reliable empirical data showing that courts are issuing judgments against lawyers for malpractice and that those judgments have been found to be uncollectible? While some lawyers are accused by clients of malpractice (often for leverage in response to a claim for unpaid fees), the legal standard to prove a malpractice claim is quite high and very difficult to meet, as any lawyer familiar with such claims knows. (For example, in the litigation context, it requires proof that the client would have obtained a better outcome at trial -- which requires a "trial within a trial.") Also, lawyers often make "mistakes," but the law in California provides several mechanisms for enabling the lawyer to correct them, such that the client does not suffer any harm.

Can the committee answer the following questions:

- A. How many lawyers each year have a judgment for malpractice entered against them? (This information should be easy for the State Bar to ascertain, including because the State Bar Act requires lawyers to report various lawsuits and/or judgments involving malpractice against them.)
- B. Of those judgments for malpractice against lawyers (or their firms), how many are ultimately found to be uncollectible?
- C. What is the average, median, lowest, and highest dollar-value of such uncollectible judgments? (Also, how many such judgments exceed even the typical malpractice coverage limit? And how many such judgments are against lawyers who not only were careless enough to have breached their duty of care to the client but also would likely not comply with a duty to purchase malpractice insurance?)

Having some actual data about the perceived issue that the committee is addressing should be the very first step in the analysis. Yet I did not see any such data in any of the committee's materials online. (If you have this important data, I think it should be prominently posted.)

The committee should not feel pressure to "do something" about a perceived issue if it does not have reliable data as to the nature and magnitude of the issue. In a free society, clients who really care about whether a lawyer carries malpractice insurance -- or what the policy limit is, or whether the lawyer has been sued before, or how many similar cases the lawyer has handled, or even whether the lawyer passed the bar on his/her first try -- are always free to ask.

And if the committee has data showing that prospective clients do not ask, and if the committee concludes that it is important enough, then it should do no more than consider ways to encourage clients to do so. On that note, it is notable that even the State Bar's guide to finding and hiring a lawyer does not suggest that clients do so: <http://www.calbar.ca.gov/Public/Free-Legal-Information/Legal-Guides/Finding-the-Right-Lawyer>.

— Anonymous Citizen

NOTICE OF POSTING  
Matters Pending Before a Privately Compensated Temporary Judge  
California Rule 2.834

75	2012-6-FL-009266	Ann Warmoth & Jeff Warmoth	Neville K. Spadafore	408.292.1717
77	2012-6-FL-009459	Erik Marth & Mary Marth	Dennis J. Durkin	650.364.6900
77	2012-6-FL-009469	James A. Phills, Jr. & Deborah H. Gruenfeld	Neville K. Spadafore	408.292.1717
73	2013-1-FL-163802	Chin Chow & Theodore Chow	Richard C. Berra	650.349.9920
73	2013-1-FL-165271	Palle Jensen & Liza M. Jensen	Neville K. Spadafore	408.292.1717
64	2013-1-FL-165297	Stephanie Liu & Etienne Liu	Edward Mills	408.752.2225
77	2013-6-FL-010246	Christine Costa & Thierry Costa	Dennis J. Durkin	650.364.6900
78	2013-6-FL-010700	Carl M. Berner & Karen A. Berner	Neville K. Spadafore	408.292.1717
77	2013-6-FL-011637	Jenifer Foulkes & David Foulkes	Richard C. Berra	650.349.9920
64	2014-1-FL-168436	Serdar Uckun & Jo A. Fahnestock	Neville K. Spadafore	408.292.1717
73	2014-1-FL-168466	Socorro Sweet & Carl Sweet	Edward Mills	408.752.2225
72	2014-1-FL-169075	Eileen Perkins & William Perkins	Richard C. Berra	650.349.9920
78	2014-6-FL-011980	Lisa Naderzad & Faramarz Naderzad	Edward Mills	408.752.2225
75	2014-6-FL-012045	Lynn K. Duc & Daniel Duc	Neville K. Spadafore	408.292.1717
77	2014-6-FL-013135	Christine Ressa & David Ressa	Neville K. Spadafore	408.292.1717
77	2014-6-FL-013220	Prashant Mehta & Rupali Mehta	Neville K. Spadafore	408.292.1717
77	2014-6-FL-013345	Richard Ogawa & Suzanne Ogawa	Richard C. Berra	650.349.9920
76	2015-1-FL-170068	Sherry A. Mengerink & Matthew W. Mengerink	Neville K. Spadafore	408.292.1717
76	2015-1-FL-171257	Mary Gourlay & Douglas Gourlay	Dennis J. Durkin	650.364.6900
65	2015-1-FL-171339	Easwar Sankar & Akhila Purushothaman	Edward Mills	408.752.2225
74	2015-6-FL-014237	Anne Wojcicki & Sergey Brin	Neville K. Spadafore	408.292.1717
74	2015-6-FL-014410	Meiying Peng & Albert Tam	Susan Vicklund Wilson	408.779.4888
78	2015-6-FL-014413	Fariba Farshchian & Mehran Moalem	Neville K. Spadafore	408.292.1717
74	2015-6-FL-014686	Lisa Sipko & Robert Sipko	Dennis J. Durkin	650.364.6900

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Dept.	Case Number	Case Title	Temporary Judge	Contact Number
	1998-1-FL-075522	Lawrence Steinman & Hana Steinman	Neville K. Spadafore	408.292.1717
72	2001-1-FL-100012	Dorothy M. Rosenthal & Donald M. Rosenthal	Neville K. Spadafore	408.292.1717
72	2001-1-FL-100747	Charles Griggs & Katherine Griggs	Neville K. Spadafore	408.292.1717
73	2001-1-FL-101193	GeneCaselli & Ronald Caselli	Richard C. Berra	650.349.9920
77	2002-1-FL-109399	Nancy A. Lai & Calbert K.h. Lai	Neville K. Spadafore	408.292.1717
72	2004-1-FL-122825	Katherine Ritchey & Thomas Ritchey	Neville K. Spadafore	408.292.1717
75	2005-1-FL-125808	David B. Mahal & Christy M. Wyatt	Neville K. Spadafore	408.292.1717
73	2005-1-FL-129072	Monica G. Read & Gary T. Read	Neville K. Spadafore	408.292.1717
78	2006-1-FL-136142	Graham Gudgin & Frances Gudgin	Neville K. Spadafore	408.292.1717
77	2007-1-FL-142479	Kimberly McNeely & DavidMcNeely	Edward Mills	408.752.2225
78	2008-6-FL-001291	Adam Simms & Denise Simms	Neville K. Spadafore	408.292.1717
79	2010-1-FL-154452	Nirit G. Peer & Gyora Peer	Neville K. Spadafore	408.292.1717
75	2010-6-FL-005204	Yeo Lee & Hee Lee	Richard C. Berra	650.349.9920
64	2011-1-FL-159600	Kent Cooper & Lisa Cooper	Neville K. Spadafore	408.292.1717
73	2011-1-FL-159996	Bryan McDonald & Catherine Giacomini-McDonald	Neville K. Spadafore	408.292.1717
78	2011-6-FL-005613	Diane Forese & Andrew Page	Neville K. Spadafore	408.292.1717
77	2011-6-FL-006304	Loraine M. Fox & Michael E. Fox	Neville K. Spadafore	408.292.1717
74	2011-6-FL-006804	Irene Reed & George Reed	Dennis J. Durkin	650.364.6900
75	2011-6-FL-006886	Karen L. Westly & Dean R. Westly	Neville K. Spadafore	408.292.1717
72	2012-1-FL-160522	Thuy DeVincent & Mark DeVincent	Neville K. Spadafore	408.292.1717
65	2012-1-FL-163041	Jeffrey Prince & Sherri Prince	Neville K. Spadafore	408.292.1717
75	2012-6-FL-007718	Monica Giacomini & Vincent Giacomini	Richard C. Berra	650.349.9920
77	2012-6-FL-008527	Barrett Saik & Dawn Saik	Neville K. Spadafore	408.292.1717

Prepared 4-21-2017  
By Sharon L. Roper



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75	2015-6-FL-015006	Vijay Pande & Elizabeth Stephens-Pande	Dennis J. Durkin	650.364.6900
78	2015-6-FL-015463	Haleh Motaghi & Shahram Davari	Edward Mills	408.752.2225
75	2015-6-FL-015474	Robert Delgado & Heidi Delgado	Edward Mills	408.752.2225
79	16FL174596	Richard Jones & Gail Jones	Edward Mills	408.752.2225
64	16FL174638	James Lambert & Laura Marshall-Lambert	Edward Mills	408.752.2225
79	16FL174731	Glenn Schwarzbach & Lillian Guajardo	Tracy Duell-Cazes	408.267.8484
75	16FL175250	Tianna Fu & Hezhi Ai	Edward Mills	408.752.2225
64	16FL175794	Elaine Leff & Daniel Leff	Richard C. Berra	650.349.9920
78	16FL176521	Sandeep Gupta & Shuchi Garg	Edward Mills	408.752.2225
76	16FL176755	Charles Prooth & Marcy Ratliff	Susan Vicklund Wilson	408.779.4888
65	16FL176914	Anna Griffen & Tony Griffen	Edward Mills	408.752.2225
64	16FL177214	Antonina Otero & Roger Otero	Edward Mills	408.752.2225
77	16FL177883	Daniel Murray & Joanna Murray	Richard C. Berra	650.349.9920

### Options Under Consideration:

Amending rules requiring attorneys to disclose to clients that they do not carry legal malpractice insurance.

### Options being considered:

Any of the 3 options **bolded** below are acceptable to me, and the *italicized* explanations are why I think the other options could create new problems:

Requiring attorneys to disclose to the State Bar whether they have legal malpractice insurance, potentially including the amount of coverage and the type of policy (i.e., claims-made or occurrence-based) and;

*I have no objection to the State Bar being informed, but wonder if you need that add'l record-keeping? When policies end or carriers change (by corporate merger or change of coverage), would we need to notify you further? If so, and someone didn't, would that be deemed NonCompliant? Would 'non-compliance' be failure to have coverage or a problem with the notice to you issue?*

Making this information available to the public; or

*I truly believe that 'making the information public' can best be done 1:1 between Attorney:Client (as is done now).*

*Often clients are looking for The Deep Pocket, when we are looking for The Solution (to their problem as we see it to exist) ~ but sometimes we are not being told the whole story.*

*Having this on a Member's State Bar Membership listing would invite litigation, and given how Attorneys' work is misrepresented on TV and in the media, we do NOT need a target on our back..*

**Limiting this information to aggregate analysis by the State Bar;**

**Requiring written client acknowledgment of an attorney's disclosure that they do not have legal malpractice insurance;**

Requiring attorneys to disclose on all written communication with clients, on their websites, and on all advertising, that they do not have malpractice insurance; or.

*How does this help? I may not understand the problem you are trying to solve, as I deal with a lot of marginally competent people (Conservatorship attorney). Clients, their Family Members and their CareGivers (vs CareTAKERS) have enough understanding our explanations about their legal situation, which is girdled by the Probate Code, Welfare & Institutions Code plus the other codes depending on the problem (Financial, Gov't, etc.). We all deal with FACTS and LAW ~ as well as EVIDENCE and DISCOVERY. While I am allowed to have a Client sign a Waiver, I still don't do that (and refer out that part of the case) b/c in my experience, they don't really understand it. And when others have done the Waiver Thing, I hear "well, I only signed it b/c I knew I needed*

*him to help me and if I didn't sign , he wouldn't." By analogy, I think this would work the same way.*

**No change to current disclosure rule.**

Mandating legal malpractice insurance for attorneys as a condition of licensing, except for in-house counsel and government attorneys. **I THINK EVERYONE SHOULD BE TREATED THE SAME.**

Options being considered:

Insurance to be obtained in the private insurance market ("Open Market Model"); ***this method would include competition, right? Sounds economically more healthy than the other options, but we would need at least 2 different companies.***

Insurance fund, established by statute, would provide minimum insurance coverage for all attorneys ("Captive Insurance Fund Model"); additional coverage could be purchased on the private market;

A Captive Fund could be run by the State Bar, a private insurance company, or an entity created expressly for this purpose. ***Without data, I cannot tell if this would be the least expensive way to accomplish the desired goal ~ of protection of the public ~ but why not compete in the open market? How do we Attorneys know that an "in house" administration would not become bloated and/or political?***

**No mandatory insurance requirement (except for limited liability partnerships or law corporations, as presently required by statute).**

Developing a Continuing Legal Education or Practice Management program that provides an interactive self-assessment of law practice operations in an effort to examine legal malpractice liability. Options being considered: **ALL 3 OF THE FOLLOWING ARE FINE:**

Require all attorneys to complete the self-assessment;

Require uninsured attorneys to complete the self-assessment; or

Provide the self-assessment as an optional tool, but not require it.

Promoting the voluntary purchase of insurance by:

Educating lawyers about the benefits of insurance (including risk assessment and claims handling functions; CLE provided; etc.); and/or

Educating the public about the significance of an attorney not having effective coverage (including claims-made “tail” policies).

*As someone who has been active in educating Seniors, trying to educate the public about something is an overwhelming task and can increase confusion: we Attorneys are not sly or charismatic like the Fraudsters. I have used The Script (about avoiding Fraud) and people remember the topic/title but not the do or don't do piece.*

*Years ago, when I worked for what turned out to be a Trust Mill giving the ERISA Pre-Retirement planning speech, the attendees hearing about a Trust and a Pour-over will concluded that they didn't need a Will, which may not be so if they have Beneficiary-titled assets like IRA's or Insurance policies, where the Beneficiary nomination may lapse or predeceased.*

*Now, b/c of the Estate Recovery Claim changed eff 1/1/2017, so that now it is due solely from a Probateable Estate, I am seeing very poorly drawn trusts written by Paralegals. People don't want to pay for legal services, but the harm is often being done by NON-ATTORNEYS. And sometimes we cannot fix it for them ~ depends on when they come to see us. Very hard to 'get the money back' for them. Should we be involved in litigation about that b/c we tried our best, they expected a better result, but the Judge decided correctly, and now we have to be defended???*

*There are bad eggs out there, but I'm not sure that 'insurance' is the solution: our courts need more money to have more time to really understand what is being pleaded.*

Any known fiscal/personnel impact

Unknown at this time.

Background material

Item 702 September 2018

Source

Board of Trustees

Deadline

November 5, 2018

Direct comments to

Linda Katz

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San Francisco, CA 94105

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November 1, 2018

Dear Ms. Linda Katz,

Please find my commentary on the Malpractice Insurance Working Group's study below. Thank you for providing us members of the bar with the opportunity to comment.

One of the most important core principles to follow when creating a startup is to first focus on the problem your potential customers are facing (i.e., the demand) and only after you've fully identified the problem should you focus on your proposed solution to that problem (i.e., the product or service you will be supplying as a startup). The logic behind this principle is obvious and yet often ignored: Only after fully understanding the problem your customers face can you accurately provide them with a solution, and thus, a reason for using your product or service. The cost of not following this principle as a startup is often suicidal: many startups have gone broke by investing in solutions to phantom problems or real problems that they didn't take the time to properly understand.

It seems that the Malpractice Insurance Working Group has fallen into the same potentially fatal trap as countless misguided startups - of focusing on a solution to a phantom or poorly understood problem. But in the case of the Working Group, the fatal consequence of its misdirection could be far worse than the suicidal consequence of startups' analogous misdirection - in this case, it would not be merely self-destruction, but, rather massive damage to the customer itself.

Let's start with identifying the Working Group's "customer." In its attempt to understand whether mandatory insurance is a good idea, it has turned to the public on the one hand (any member of which who could be impacted - either negatively or positively - by the solution) and attorneys on the other. Since the solution is an idea to protect the public from attorneys' misconduct, we can infer that the Working Group's client is the public. In other words, mandatory insurance is not a product for attorneys, but attorney feedback is important because, although we want to provide the customer with a product it needs, we still want to minimize the negative impact to attorneys, and we also want to understand how attorneys being impacted will ultimately impact the

customer - the public. The idea that the Working Group's customer is the public is further supported by the Working Group's [stated goal](#) to "successfully transition to the 'new state bar' - an agency focused on public protection, regulating the legal profession, and promoting access to justice."

How about the problem? The problem the Working Group is addressing is compensating the public for legal representation that has gone bad. But, of course, the first step in understanding a problem isn't to assume its existence. Let's back up for a second to look at how the public experiences legal representation, before we consider how it experiences legal representation gone bad.

The vast majority of the public cannot even access legal representation. Recently, the Federal Reserve did a study to determine how the public would fare if faced with a \$400 emergency. The answer was shocking: [47%](#) of the people in this country would either have to sell something or borrow money to cover such an emergency. If 47% can't afford a \$400 emergency, what percentage would be unable to afford a *legal* emergency? [One estimate is 85%](#).

Given that the vast majority of the public has *no* access to legal representation, the problem of the public not being able to collect compensation due to attorney malpractice is a problem faced by a slice (those who are unable to get compensation) of a slice (those who suffer malpractice) of the minority of the public who can access legal help in the first place.

While the solution, mandatory insurance, to the problem of being unable to receive compensation for attorney malpractice, might serve those members of the public who do suffer this problem quite well, we can't forget about the much larger chunk of the public and how it might be affected by this solution.

I am the co-founder of two tech startups, [Proboknow](#) and [Lowboknow](#), both of which are geared toward bridging the access to justice gap. Along with my co-founders, I have sacrificed quite a bit in order to work full-time on our solutions to the access to justice problem. I have worked more than full-time with zero income for over three years, largely drained my bank account, and lived for three years in my late 30's with my mother because of not being able to afford rent

(imagine *her* sacrifice!). Each of the co-founders has moved in with parents in order to work for no income on our startups.

Proboknow is focused on engaging attorneys in pro bono work. One of our methods of engaging attorneys is by connecting those attorneys in need of practical experience with pro bono work, on the one hand, and more experienced attorney mentors to help guide them through their pro bono work, on the other. Ever since the Global Financial Crisis of 2008, a [significant percentage](#) of new attorneys has struggled to find entry-level employment. After graduating from the University of Virginia School of Law in 2008, I myself was unable to find work for over a year – even after passing both the California and New York bars and expanding my job search from public defender jobs (my dream job) to public interest jobs across the board and then finally to any law-related job under the sun. My personal experience of struggling to find work while wanting to serve the public as an attorney (and knowing full well how many people are unable to access representation) largely provided the impetus for Proboknow.

Unsurprisingly, one of the biggest obstacles entry-level attorneys face in their job hunt is that they don't have experience actually practicing law. Generations of attorneys have relied on their first job to show them the ropes of being an attorney. Since these first jobs are harder to come by than they used to be, our method of enabling new attorneys to gain the experience they need through pro bono experience and mentorships offers them a viable solution to the conundrum of needing a job to get experience but needing experience to get a job. Their new-found practical experience bolsters their chances of landing jobs, or, alternatively of building their own practices. Despite the logic behind this happy marriage of new attorneys in need of experience with the experience they need, one of the challenges that we've encountered in engaging new, still-unemployed attorneys is that they don't typically have malpractice coverage. We have been able to mitigate this concern at times by connecting the new attorneys with legal services organizations; the legal services organizations are typically happy to accept a low-income client's case as their own because we have already done the work of finding an attorney willing to handle the case, and a mentor to guide that attorney through pro bono work, thereby allowing the legal services organization to accumulate another stat of a client served with minimal effort on their part. When we succeed in making this connection, the new attorney is covered by the umbrella policy of the legal services organization. But, this connection is not always successful, and a portion of new attorneys handle their pro bono work bare, without coverage.



In addition to new attorneys in need of practical experience, we also engage experienced attorneys who have no experiential needs but just want to give back. These attorneys sign up for our platform because it offers them a more convenient and efficient way to proactively connect with pro bono opportunities, not because it appeals to their self-interest in any way. Many of these attorneys are solos or belong to small firms that are insured, and they use their insurance policies from their practices to cover their work with their pro bono clients.

Another category of attorneys we engage in pro bono work is those at the opposite end of their careers than new attorneys - retired attorneys. Like unemployed new attorneys, they often have the spare time to do pro bono work, and, unlike new attorneys, they also have the experience needed to do it on their own. What they often don't have is malpractice insurance. Again, we can try to mitigate this concern by connecting them with legal services organizations, and having them covered by the legal services organization's insurance; but, again, this isn't always possible.

If malpractice insurance were to become mandatory, I would anticipate that this would reduce the number of attorneys willing or able to do pro bono work. Unemployed new attorneys and retired attorneys, the two groups of attorneys with the most time to spend on pro bono work, would not purchase insurance just to handle free cases. Furthermore, if a drastic transformation of the legal malpractice insurance market (such as the transition to a captive model) were to drive up the cost of insurance for employed attorneys, then it's easy to imagine them being less able to handle pro bono cases; time spent on free legal work would become a more expensive opportunity cost, as the increase in overhead brought about by higher insurance costs would necessitate a need to spend more time either billing or attracting paying clients. In the meantime, higher insurance costs faced by already under-funded legal services organizations could conceivably both shrink the size of their paid attorney staffs and their ability to use their insurance to cover cases staffed by volunteers (if using their insurance to cover volunteers somehow increases their insurance costs, or if the management of volunteers becomes a cost they can no longer afford). Since legal services organizations already are forced to turn away the majority of low-income clients in need of their services, reducing their capacity to assist these clients would make the access to justice gap even more disastrous.

When we talk about free legal services - whether in the form of pro bono work provided by private attorneys in their spare time or in the form of legal services provided by staff attorneys at legal services organizations - the demographic being served is strictly “low income.” The bar to qualify as “low income” is set so low that a single-person household with a full-time minimum wage in California is too rich to qualify. In other words, free legal services apply to only a relatively small bookend of the population stranded in the access to justice gap.

Our other startup, Lowboknow, serves working class and middle class people who don’t qualify for free legal assistance and yet still cannot afford market rate for an attorney. These higher income victims of the justice gap, ironically, are, in a way, worse off when it comes to accessing an attorney than low-income clients, since they have no shot of qualifying for free help and also can’t come close to affording to pay for market rate help. To address their needs, Lowboknow engages solo attorneys and small firms in low bono, or affordable, legal work. As most solo attorneys and small firms experience periods during which they operate below capacity, we connect them with working and middle class clients during these lulls in business, and encourage them to make their services more affordable by discounting their normal rates or offering highly targeted limited scope assistance. One group of solos that is particularly motivated to offer more reasonable rates in exchange for more clients is newer attorneys who have recently hung their own shingle. Due to the aforementioned lack of entry-level jobs, this group of solo attorneys has grown over the years.

Both mandating malpractice insurance and changing the malpractice insurance market in a way that increases insurance rates for solos and small firms would most likely reduce the number of attorneys available to charge low bono rates, and could very conceivably drive up an already largely inaccessible market rate. The smaller the firm, the more likely it would seem that an attorney does not have malpractice insurance; so it might be fair to assume that solos are the largest group of uninsured attorneys. Requiring solos who are currently uninsured to obtain insurance they don’t currently have or increasing the cost of insurance for those who are already insured would obviously drive up their overhead. Increased overhead could translate into higher fees for clients or even render their practices unprofitable enough to force them instead to find employment at a larger firm. Higher insurance rates brought about by a transition to a drastically different model - such as a captive insurance one - could also discourage attorneys from hanging their own shingle in the first place. The higher cost of hanging a shingle

would be especially daunting to newer attorneys who are saddled with debt and typically have not had the opportunity to build a savings cushion from years of earning as an attorney. Newer attorneys, as already mentioned, are also the attorneys most likely to engage in low bono work, since they need to build up their clientele from scratch. If the number of solos and small firms decreases due to increased insurance costs, then the market rate for legal assistance will be higher, since solos and small firms charge lower rates than larger firms. It would also make low bono services less available, since solos and small firms are more likely to engage in low bono work than larger firms.

At this point, I have raised several concerns about how mandatory insurance, and especially a change in the insurance market that results in higher insurance costs, can shrink the public's already limited access to legal services. But why should it be up to me to advocate for the public? Since the Working Group is already focused on getting the public's feedback about the proposed initiatives, it would seem that the Working Group could hear from the public itself how it feels about the risk of losing access to legal representation versus the benefit of having greater protection against being unable to collect compensation in cases of attorney malpractice.

But, despite its efforts, the Working Group itself has, as recently as [September 14th](#), lamented that it hasn't received sufficient feedback from the public. To address this problem, it resolved to ask the board of trustees to commission a public survey, with four proposed questions for the survey:

1. Do you believe that all lawyers are now required to have malpractice insurance as a condition of practicing law?
2. If a lawyer does not have malpractice insurance, should he or she be required to disclose this fact to potential clients?
3. Have you ever hired an attorney?
4. Should all lawyers be required to have malpractice in order to be able to practice law?

Among these questions and their sub-parts, the only questions that even touch upon access to legal representation or how changes to malpractice insurance would affect such access are:

- Question #3: Have you ever hired an attorney?

This question will establish how many of the respondents have accessed attorneys.

What the question fails to establish are:

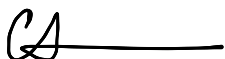
- How many respondents have had legal issues for which they haven't been able to get representation;
  - How familiar the respondents are with the fact that market rate for attorneys is already over \$250 per hour, or how familiar they are with how much in total legal representation would cost for a civil legal emergency;
  - Whether the respondents are aware that the constitutional "right to an attorney" they often hear about on TV only applies to criminal law;
  - Whether the respondents are aware that legal aids serve only the lowest income segment of society, and, are [unable to help the majority](#) of even this limited demographic group; and
  - Whether the respondents are aware that should they need help with a civil legal emergency, they most likely would have to fit the bill themselves.
- Sub-part A to Question #4
    - Question #4, again: Should all lawyers be required to have malpractice in order to be able to practice law?
    - Sub-part A: If yes to question 3, Should all lawyers be required to have malpractice insurance, even if it means that they would charge clients more for their services?

Sub-part A to Question #4 is the *only* question among all of the proposed questions and their sub-parts that asks the respondents to weigh how they would feel about the benefits provided by the proposed insurance initiatives if these initiatives were to come along with the cost of making legal services less accessible. And, ironically, this sub-part is only asked of those respondents who have been fortunate enough to have afforded an attorney in the past!

The Working Group's proposed questions for the public also don't touch upon how familiar the public is with the inaccessibility of legal services. This is a very important question. If the public isn't even aware of the cost of legal services in the first place, or that the constitutional right to an attorney only applies to criminal law, then it might not care about considering how the proposed insurance initiatives can make legal services more expensive and inaccessible. During the three years I have been working on Proboknow and Lowboknow, I have done quite a few surveys and had even more informal conversations from which I have concluded that the majority of lay people aren't aware of the access to justice problem, unless they themselves have been in the position of needing to hire a lawyer for a civil legal problem. Thanks to shows like Cops and Law & Order, many even highly-educated lay people believe that they have a constitutional right to an attorney if they can't afford one - no matter whether their legal problem is criminal or civil.

Sadly, the media has not given much coverage to the access to justice problem to remind us attorneys of the ever-present elephant in the room, or perhaps we've just resigned ourselves to believing that nothing can ever be done to meaningfully address the problem, so, we ourselves have concluded, "Why bother dwelling on it?!" Ironically, as I've already pointed out, the Working Group has stated that its goal is to assist the transition to the "new state bar" – a bar whose mission, in the Working Group's own words, includes not only protection of the public but also "[promoting access to justice](#)." But, in focusing on a consumer protection problem the public may or may not be facing, the Working Group has largely overlooked the real access to justice problem plaguing the very same public it seeks to protect. Because the access to justice problem is so disastrous already, instituting mandatory malpractice insurance or changing the insurance market so that insurance rates substantially increase might ultimately be akin to fixing the public's broken toe by amputating its leg.

Sincerely,

A handwritten signature in black ink, appearing to be 'CA' followed by a horizontal line.

Chad Trainer, Esq. (SBN 270742)  
Co-founder & CEO of Proboknow and Lowboknow  
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November 5, 2018

The State Bar of California

Re: Comments on proposed change requiring Professional Liability/Malpractice Insurance

Dear Committee:

I have been a practicing lawyer member of the California State Bar since 1989. I worked for firms for the first five years of my career, then began my own practice. I did not have malpractice insurance at that time, and duly notified my clients of that in my representation agreements as that was required. Not one client refused my representation due to lack of malpractice insurance. Because I had no insurance, I felt more obligated to be careful so as to make sure my clients were competently represented.

In 2002, I first obtained professional liability insurance as I took on a negligence case with a large number of plaintiffs and many of them minors. I have had that insurance since that time.

I have always been a sole practitioner. I never committed any acts that could be deemed malpractice. I do not have any employees, therefore there is no one potentially acting negligently on my behalf or under my authority. As you might have guessed, in almost 30 years of law practice in California, I have never had any claims of malpractice against me.

For the past 16 years, I feel I have paid for insurance I have not needed. For several years, I have practiced solely in an area that rarely has any negligence claims made by clients against any attorneys, i.e. disability insurance claims.

The malpractice insurance has at times been a hardship to me and my practice. I am semi-retired now, and was able to get a part-time practice policy a couple of years ago, which I understand a lot of companies do not offer. Were it not for that option, I would have dropped my insurance altogether as my income fell below the poverty line for a few years.

None of my grateful, disabled clients would say that I should not have been allowed to help them with their claims and, when necessary, litigation. However, these lower dollar claims would be deprived of representation if malpractice insurance were mandatory and the policies too expensive or unavailable for a lawyer who practices for the primary purpose of helping people.

Not all attorneys make a bunch of money. Requiring liability insurance for every attorney and every field of practice is overkill. If insurance is required, it should only be for the fields that draw the most claims of malpractice which is statistically identifiable.

Re: Comments on proposed change requiring  
Professional Liability/Malpractice Insurance

Further, as I have made a living out of suing insurance companies, I know that they do not want to pay claims. Having professional liability insurance will not guarantee that any client damaged by professional negligence will be made whole as the insurer will fight those claims. The only result will be insurance companies and possibly malpractice lawyers getting richer.

The State Bar of California should leave things as they are as there will not be any greater protection of clients by requiring insurance. However, to help ensure everyone knows the rules, the State Bar could require more law office management and more ethics MCLE as those two areas are where the vast majority of negligent acts occur from my observations.

Thank you for your consideration. Please feel free to contact me if you have any questions.

Very truly yours,

/s/

Debra K. Butler

DKB



Property Casualty Insurers

Association of America

Advocacy. Leadership. Results.

November 2, 2018

State Bar of California  
Attention: Malpractice Insurance Working Group  
180 Howard Street  
San Francisco, California 94015

Malpractice Insurance Working Group (MIWG):

The Property Casualty Insurers Association of America (PCI) promotes and protects the viability of a competitive private insurance market for the benefit of consumers and insurers. PCI is composed of approximately 1,000-member companies and 350 insurance groups, representing the broadest cross section of home, auto, and business insurers of any national trade association. PCI members write \$245 billion in annual premium, which is 38 percent of the nation's property casualty insurance marketplace. On behalf of our member companies, we appreciate the opportunity to provide comments to MIWG's proposed recommendations regarding proposed changes to the professional liability insurance.

### **Necessary Data Points**

PCI recognizes the intended goals of SB 36 (Business and Professions code Section 6069.5), which include studying the availability of insurance, ranges of insurance limits, disclosure rules regarding insurance, and mandatory insurance. Indeed, these are significant public policy issues that could have wide ranging implications in our legal system in California. As we review the options set forth by the MIWG, we raise a preliminary point—what data is the MIWG relying on? Some basic data that would be helpful include, but not limited to, the following:

- How many licensed attorneys do we have in California?
- How many attorneys are uninsured?
- What practice areas have the most uninsured (e.g., solos or others)?

Based on the September 14, 2018, MIWG memorandum it does appear there has been some attempts to gather data or information including reaching out to local bar leaders, legal incubator programs, and lawyer referral service and fee arbitration programs. However, such data is insufficient based on the following MIWG statement:

*To date, the MIWG has received very little input from either attorneys or legal consumers. Responses to surveys have been minimal. The MIWG requests the Board's assistance in its efforts to solicit input on the issues it is studying, and authorization to engage a reputable research agency to conduct a survey of*



*members of the public on these topics. (Emphasis Added)*

PCI recommends that the California State Bar ("Bar") authorize retaining a professional survey company to conduct a survey of all attorneys and the public to get their views on mandatory professional liability insurance (including determining the three bullet points stated above). To proceed without the necessary data would be contrary to development of sound public policy.

### **Disclosure of Legal Malpractice Insurance**

PCI members considered the options on amending the rules requiring attorneys to disclose to clients that they do not carry legal malpractice insurance. Out of the four options, we believe these two options are workable:

- Requiring attorneys to disclose to the State Bar whether they have legal malpractice insurance, potentially including the amount of coverage and the type of policy (i.e., claims-made or occurrence-based) and;
  - Making this information available to the public; or
  - Limiting this information to aggregate analysis by the State Bar;
- Requiring written client acknowledgment of an attorney's disclosure that they do not have legal malpractice insurance.

We would, however, recommend that the exception for in house counsel apply to these disclosures to stay consistent with existing rules. These disclosures would also help the data gap mentioned above because it would answer the question of how many attorneys are uninsured in California.

### **Mandating Legal Malpractice Insurance and Captive Insurance Fund Model ("Captive")**

Based on the information disclosed by the MIWG, there is insufficient data for our members to analyze and weigh in MIWG's proposal to mandate legal malpractice insurance at this point. Thus, we reiterate the Bar to conduct its due diligence to gather the data we mentioned above.

As to the issue of Captive, we recognize that the MIWG is considering the Oregon captive model, and that recently Nevada rejected the idea altogether. *PCI is opposed to the proposal.* California has a robust, competitive malpractice insurance market due to broad availability and affordability. In our estimate, there are at least 25 (admitted and non-admitted) commercial carriers currently writing malpractice insurance in the state. Requiring that insurance be purchased from a Captive will displace or replace this healthy commercial market and the benefits that healthy market brings to the public.

Fundamentally, Oregon is a different market than California. For instance, California differs in terms of scope of practice areas, size of risk exposure, maturity of system-wide risk management education, claim severity and frequency, and litigation environment.

Also, in a Captive, average premiums for primary insurance are likely to be higher because the lower risk lawyers in California will be subsidizing the proportionately larger number of higher risk lawyers. We further believe that the Bar does not have the essential market knowledge and expertise to handle the underwriting of various policies and processing of claims. More broadly, the fiscal impact to the state in creating and implementing essentially a new department within the Bar would not be insignificant.

### **Developing a Continuing Legal Education or Practice Management Program**

Of the three options available, we believe the option below is the most applicable with the addition of the words "and non-exempt." In our view, self-assessment of law practice operations related to legal malpractice liability would be most helpful in further educating insured and uninsured lawyers.

- Require uninsured and non-exempt attorneys to complete the self-assessment.

### **Promoting the Voluntary Purchase of Insurance**

Educating lawyers and the public about the benefits and significance of malpractice insurance are concepts we support as informed parties are generally helpful to our legal system.

- Educating lawyers about the benefits of insurance (including risk assessment and claims handling functions; CLE provided; etc.); and/or
- Educating the public about the significance of an attorney not having effective coverage (including claims-made "tail" policies).

We commend the Bar for its efforts to reach out to the public on these important issues, but in the interest of developing sound public policy, we emphasize the need for the Bar to collect the necessary data before issuing final recommendations. We appreciate the opportunity to comment and look forward to working with MIWG and stakeholders in discussing proposed changes to malpractice liability insurance. Feel free to contact me if you have questions or would like to discuss our comments above at (916) 440-1117 or email [armand.feliciano@pciaa.net](mailto:armand.feliciano@pciaa.net).

Respectfully Submitted



Armand Feliciano  
Vice President

Cc: Honorable Governor Jerry Brown  
Honorable Senator Glazier, Chair, Senate Insurance Committee  
Honorable Senator Ted Gaines, Vice Chair, Senate Insurance Committee  
Honorable Assemblymember Tom Daly, Chair, Assembly Insurance Committee  
Honorable Assemblymember Chad Mayes, Vice Chair, Assembly Insurance Committee

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Michael G. Zatzkin  
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October 4, 2018

Email: [linda.katz@calbar.ca.gov](mailto:linda.katz@calbar.ca.gov)

Dear Ms. Katz:

I have reviewed various materials of the Board of Trustees regarding potential mandatory legal malpractice insurance.

Prior to 1998 I was Chairman of the Group Insurance Committee of the State Bar, and in 1998 I was one of the founders of Lawyers Mutual Insurance Company. I served as Senior Vice President in charge of claims until 1995 and retired from the Board of Directors in 2013. I have not been involved with Lawyers Mutual since my retirement.

In September of 1975 I wrote an article for the California State Bar Journal. (Vol 30 No. 5) entitled "Legal Malpractice: The Coming Storm. In that same issue, Equity General Agents Inc. advertised that the malpractice premium for one million dollars in coverage was \$270.00.

The nature of the legal profession is to advocate for a client. Two litigants walking into a court room believe their chances of prevailing are 100%. The loser frequently transposes the blame for the loss onto the lawyer. Requiring lawyers to carry mandatory malpractice insurance creates a substantial incentive to carry on the lost litigation against the lawyer. The report by the State Bar's Board of Trustees fails to recognize that clients rarely file claims for malpractice when they have a decent relationship with their attorney. A substantial number of claims result from the attorneys lack of communication with the client. In most instances clients are better served by leaving adverse litigation behind.

Mandatory malpractice coverage will increase the cost of practicing law for the small practitioners. 50% of all claims filed against small law firms result in the payment of no indemnity. Most policies have a substantial all expense deductible requiring the attorney to pay expenses incurred by their insurer irrespective of fault. If the case is assigned to counsel, the deductible is consumed. This leaves both the attorney and the former client unhappy with the legal profession. Rarely does the client take any responsibility for a loss of their case.

In addition to 50% of the cases resulting in the payment of no indemnity, 90% of the cases result in indemnity of less than \$100,000.00. The requirement of low indemnity limits in a mandatory program leaves very little funds for the 10% of the cases that exceed \$100,000.00. The major law firms purchase their insurance with large deductibles as high as five hundred thousand to one million dollars. A mandatory program would have no effect on the large law firms.

Funding a mandatory program creates risk within itself. In 1978 Travelers Insurance, the State Bar sponsored carrier, partially funded Lawyers Mutual Insurance Company in order to withdraw from the market. The State Bar, because of adverse results, could put themselves in a similar position where no carrier showed interest in a very complex risk with no actuarial experience available. Large premiums approaching \$10,000.00 for one million dollar indemnity coverage have driven the risk as of this date.

Kaiser Health, the leading medical malpractice insurer in California, has required policy holders to agree to arbitration as a condition of obtaining coverage. Medical malpractice claims also have dollar limitations not available to attorneys.

Mandatory malpractice insurance would not benefit the public. The real benefit would be to the plaintiff and defense attorneys.

Sincerely,

KING, KING & ZATKIN



George King

# Superior Court of California County of Santa Clara

191 North First Street  
San José, California 95113  
(408) 882-2700

Chambers of  
HON. JAMES E. TOWERY, Judge



November 1, 2018

Linda Katz  
State Bar of California  
180 Howard Street  
San Francisco, CA 94105

Re: Mandatory Malpractice Insurance Proposal

Dear Ms. Katz:

I send this letter in response to the State Bar's request for public comment about potential mandatory malpractice insurance.

A good portion of my forty-year legal career has involved client protection in various facets. This includes service as the State Bar's Chief Trial Counsel (2010-2011); State Bar President (1995-1996); chair of the State Bar Discipline Committee (1994-1995), and chair of the ABA Standing Committee on Client Protection (1998-2000). I was appointed by Chief Justice Ronald George to chair the Committee on Insurance Disclosure, which proposed the rule adopted by the Supreme Court in 2010 on that subject (old RPC 3-410; new RPC 1.4.2). I have also been actively involved in mandatory fee arbitration issues on the local, state and national levels.

The starting point of my perspective is that, without question, clients are harmed when lawyers practice without malpractice liability insurance. Critics of mandatory insurance or disclosure of malpractice insurance often argue there is no empirical data on whether clients are harmed when their attorneys lack insurance. It is true that the data is scant. However, the lack of data does not lead to the conclusion that clients are not harmed. Indeed, attorneys who specialize in plaintiffs' legal malpractice cases uniformly attest to the fact that the absence of insurance is a strong obstacle to achieving redress for clients harmed by their attorney's negligence. In short, attorneys who handle plaintiffs' legal malpractice cases routinely turn down potential cases, including meritorious claims, when the defendant attorney has no insurance. Such clients are left with no effective remedy. Of course, there is no data regarding cases that are never brought.

For many years, I advocated that the remedy for this problem was mandatory malpractice insurance for all lawyers in private practice. While I continue to believe that mandatory insurance is the ideal form of public protection, I have significant doubts as to whether it is viable. It raises many complex issues that are not susceptible of easy resolution. Would it be a

bar captive insurance company or the private market? If the vehicle is a bar-captive carrier, is it financially viable given the litigious nature of California? The fact that Oregon has made a bar-captive model work for many decades is of little assistance. The Oregon Bar is far smaller than the California bar. Only 7,200 Oregon attorneys are covered by that state's liability program. In California, the number of attorneys in private practice exceeds 100,000. How does the State Bar enforce any mandatory insurance requirement? Is this another burden assigned to the Office of Chief Trial Counsel, an agency with limited resources and the daunting task of reducing the backlog of disciplinary cases? How can insurance be provided to attorneys who do not meet basic underwriting criteria, i.e., those with numerous meritorious claims against them? During the process of adopting the insurance disclosure rule, we encountered many potent arguments about who should be covered and who should be exempt. What about attorneys who practice on a very part-time basis? What about attorneys who are semi-retired and only do occasional legal work for clients? Should exemptions apply to attorneys who do mostly or all legal services work? In short, there are numerous formidable obstacles in enacting any program for mandatory insurance.

There is a simpler approach. Before getting to that option, allow me to digress for a moment. When California adopted mandatory fee arbitration in 1978, the State Bar moved efficiently to set up the system on a state-wide and local basis. A State Bar Fee Arbitration Committee was appointed; rules were adopted, and the system worked well – with one notable exception. There was a small but persistent number of attorneys who refused to comply with fee arbitration awards that had become final and binding. These attorneys effectively said to the client: "All right. You have your arbitration award that I must refund part or all of your fees. So now try to enforce it. Take me to court." Since the fees in dispute were typically modest, it was totally impractical for clients to hire an attorney to seek to enforce the arbitration award in court. This left clients all the more frustrated.

The fee arbitration committee came up with a solution to this problem: a legislative proposal, enacted as Business & Profession Code Section 6203(d). This statute provides that an attorney who refuses to pay a final fee arbitration award is subject to being placed on administrative suspension until the award is paid. Procedurally, the State Bar Court served as a forum to oversee the Bar's request for suspension. An attorney can request the State Bar Court to approve a payment plan for paying the fee award. The State Bar Court can either approve the payment plan, thus allowing the attorney to continue to practice; or the Court can reject the proposed plan and place the attorney on administrative suspension. This is not disciplinary suspension; rather, the result is similar to the status as an attorney who fails to pay bar dues or complete MCLE requirements. The attorney has the ability to end the suspension by simply paying the fee award.

This solution has worked well for the past thirty years. Relatively few attorneys have required an enforcement proceeding before the State Bar Court. From 2013 to 2017, a total of 26 applications were made in the State Bar Court to place attorneys on administrative suspension for failure to pay a fee arbitration award. Of these petitions, the State Bar Court granted 19. As we anticipated when this statute was enacted, the mere existence of the threat of suspension

was sufficient to make attorneys pay the awards without necessity of an administrative proceeding.

I respectfully recommend the same process to address attorneys who practice without malpractice insurance. I propose that a Rule of Professional Conduct be adopted that would place any attorney who is the subject of an unpaid judgment for legal malpractice on administrative suspension until the judgment was fully satisfied. The same procedural protections for attorneys contained in B&P 6203(d) would apply—the ability of the attorney to apply to the State Bar Court for a payment plan.

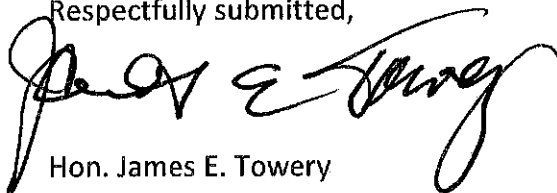
The adoption of such a rule would significantly address the goal that malpractice insurance is designed to remedy: that clients who have been harmed by negligence of their counsel would be more likely to be made whole by assuring that the judgments are paid. As was the case with the insurance disclosure rule, the adoption of this rule would provide a strong incentive for more attorneys to obtain malpractice coverage. It remains true that some attorneys would remain uninsured, and some clients of those attorneys would suffer harm if their attorneys could not satisfy a malpractice judgment. Nonetheless, this would be a significant improvement in client protection compared to the current situation. There would be fewer uninsured attorneys. Although the lack of insurance would continue to be an obstacle for malpractice attorneys to take cases against uninsured attorneys, such a rule would provide an incentive for such cases to be brought, given the consequence that an uninsured attorney faces loss of the ability to practice unless the malpractice judgment were paid or the claim otherwise resolved. Moreover, this proposal is far simpler, and thus less likely to be opposed by many California attorneys, than any proposal for mandatory insurance. Further, this proposal greatly simplifies the complexities of enactment and enforcement.

More importantly, as a matter of principle and sound public policy, an attorney should be suspended if the attorney has (1) committed malpractice, (2) caused damage to a client, (3) had a malpractice judgment entered, and (4) failed to pay that judgment. I cannot conceive of a persuasive policy argument for allowing such an attorney to remain in active status.

I do not suggest that this proposal is a panacea. Nonetheless, I think such a rule would be a very positive step toward enhancing client protection in California

Thank you for your consideration of this letter.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "James E. Towery", written in a cursive style.

Hon. James E. Towery



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October 8, 2018

Reply to Woodland Hills Office

**VIA E-MAIL**

Linda Katz  
Office of Research and Institutional Accountability  
State Bar of California  
180 Howard Street  
San Francisco, CA 94105  
Linda.Katz@calbar.ca.gov

Dear Ms. Katz:

Please allow this letter to serve as my comments relative to the statutorily mandated malpractice insurance study.

From a personal perspective I have never had one moment in my career that I was not covered by an adequate malpractice insurance policy. Frankly, I will never practice without such a policy.

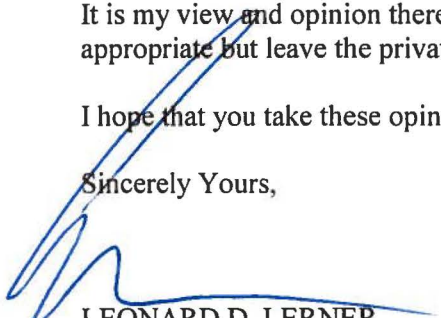
While I do think that all attorneys should be mandated to have a malpractice policy, my concern is that moving away from an open market model does a huge disservice to everyone. While I understand and respect that which the State Bar does, it is not in the business of running an insurance company. The State Bar should stick to licensing and disciplining attorneys on an as needed basis. Insurance companies and their underwriters are experienced professionals and should continue to function in that capacity.

Trying to institute a program where the State Bar of California is trying to implement a global malpractice policy fund will require the State Bar to hire hundreds, if not thousands, of people to run such a program at extreme costs. The costs would be borne by the attorneys practicing in this State.

It is my view and opinion therefore that mandating malpractice insurance as a condition to practicing is appropriate but leave the private free market insurance industry to do their job efficiently.

I hope that you take these opinions into consideration.

Sincerely Yours,



LEONARD D. LERNER  
LDL:kh



November 5, 2018

**RE: Freelance/Independent-Contractor Attorneys and Malpractice Insurance**

To the Malpractice Insurance Working Group;

By way of brief background, I'm an attorney who maintains an active license in both California and Washington State. I live in California and practice as a freelance litigation attorney for other attorneys and law firms in California (conducting legal research, drafting memoranda and motions, etc.). I neither represent members of the public nor act as an "attorney of record."

The primary purpose of mandatory malpractice insurance appears to be to protect the public. Notably, the malpractice insurance policies maintained by the attorneys and law firms with whom I work include coverage for the activities of independent-contractor attorneys like me, as the policies include language such as "an Insured is defined as, amongst other persons . . . any non-employee independent-contractor attorney to the Named Insured." To require freelance attorneys to obtain malpractice insurance is therefore not only unnecessary to protect the public, such a requirement would provide a windfall to insurance carriers who would collect multiple premiums for effectively the same coverage.

I first learned of the Malpractice Insurance Working Group ("MIWG") in an email I received from the Los Angeles County Bar Association last Thursday, November 1, 2018. I was shocked to learn in the email that the deadline for submitting comments is today, Monday, November 5th. The LACBA email included a link to the MIWG Agenda for September 14, 2018 ("Agenda"). According to the Agenda, the MIWG was authorized by the Board of Trustees in November 2017, and held its first meeting in March 2018. The Agenda also states, "Members of the MIWG, as well as staff, have made efforts to publicize the work of the MIWG, and to solicit input from both attorneys and members of the public **that may be impacted** by any recommendations that are made regarding legal malpractice insurance" (emphasis added). With regard to its outreach to attorneys, the Agenda states, "Members of the MIWG have discussed the work of the MIWG **with local bar leaders**," and "Notice was sent **to local bar leaders** with information about the MIWG and an invitation to comment" (emphasis added). With regard to attorneys who "may be impacted" by the work of the MIWG, it is not at all clear why comments appear to have been solicited from "bar leaders," as opposed to all members of the Bar. Also, Attachment A to the Agenda includes a "tentative" list of proposed questions for members of the public, and there is no attachment at all with a list of proposed questions for licensed California attorneys. Nevertheless, the Agenda goes on to lament that "to-date, the MIWG has received very little input from either attorneys or legal consumers." Given the importance of its ultimate findings and conclusions regarding malpractice insurance, I'm hopeful the MIWG will extend the period of time for accepting comments, and will solicit attorney comments by sending an email to *all* members.

Because I just learned of the MIWG a few days ago, I have not had sufficient time to consider all the potential impacts and implications of mandatory malpractice insurance on my type of practice. An extended comment period would afford me the opportunity to more thoroughly and thoughtfully consider the matter. The very limited information I saw on the Agenda and the State Bar website does not appear to address the issue of attorneys who practice as independent contractors.

Other issues also appear to be as yet unaddressed by the MIWG, including the impact of mandatory malpractice insurance on attorneys who are licensed in other states and practice outside California. I am,

for example, licensed in both California and Washington, but currently reside in and practice in California. In the future, however, I may reside in and practice in Washington, but may want to maintain my active California license. I have maintained my Washington license over the years by paying the annual fees and by keeping up with the 45-credit MCLE requirement (which is almost twice the number of MCLE credits I'm required to take for my California license) because I've wanted to keep open the option of moving back to Washington. Having worked for firms in Seattle before moving to San Diego, I've also wanted to keep open the possibility of working with them remotely from California as a freelance attorney. If I move back to Washington, will I be required to maintain malpractice insurance in California to maintain my "active" status in California? (As an aside, it would be helpful if state bar associations would work together to implement uniform solutions to issues such as these.)

As you know, effective November 1, 2018, California Rule of Professional Conduct 1.4.2 provides in relevant part as follows regarding "Disclosure of Professional Liability Insurance":

(a) A lawyer who knows or reasonably should know that the lawyer does not have professional liability insurance shall inform a client in writing, at the time of the client's engagement of the lawyer, that the lawyer does not have professional liability insurance.

(b) If notice under paragraph (a) has not been provided at the time of a client's engagement of the lawyer, the lawyer shall inform the client in writing within thirty days of the date the lawyer knows or reasonably should know that the lawyer no longer has professional liability insurance during the representation of the client.

In the unlikely event that I represent a member of the public, I would be obligated to inform the potential client that I do not carry malpractice insurance. Having been so notified, the client could make an informed decision about whether to retain my services. If the State Bar nevertheless decides to make malpractice insurance mandatory, I propose an exception with language such as the following:

"Malpractice insurance shall not be required of an active member of the California State Bar Association who (a) does not represent as a client any resident of California in connection with any legal matter, litigation, or transaction inside or outside of California; and (b) does not represent any client as an attorney of record in any State or Federal court located in California."

Another option may be to exclude freelance/independent-contractor attorneys from the insurance mandate, and to require all firms and attorneys that retain the services of independent-contractor attorneys to maintain malpractice coverage for such attorneys. As indicated above, it's my understanding that this coverage is already provided by insurance carriers.

Thanks for your consideration of my initial and rather hastily composed thoughts. I'm happy to answer any questions you may have.

Regards,

Linda Patterson  
SBN 225159  
[lindajpatterson@msn.com](mailto:lindajpatterson@msn.com)  
(619) 743-3432

**Michael Barclay**  
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**Menlo Park, California 94025-6102**  
**Phone: (650) 853-1711 // Fax: (650) 853-1712**  
**email: mbarclay@yahoo.com**

October 24, 2018

Submitted online at: <https://fs22.formsite.com/sbcta/form122/index.html>

With a copy by email to: [linda.katz@calbar.ca.gov](mailto:linda.katz@calbar.ca.gov)

**Re: Comments Concerning Mandating Legal Malpractice Insurance for Attorneys as a Condition of Licensing**  
**State Bar Agenda Item No. 702, September 14, 2018**

The following are comments about the State Bar of California's request for public comments on options under consideration in its statutorily mandated malpractice insurance study, State Bar Agenda Item No. 702, dated September 14, 2018 ("Proposed Mandatory Malpractice Insurance").<sup>1</sup>

These comments discuss proposed Option #2, to mandate legal malpractice insurance for attorneys as a condition of licensing, except for in-house counsel and government attorneys. In summary, these comments request that retired attorneys performing pro bono work be exempted from obtaining mandatory malpractice insurance. The cost to retired attorneys of purchasing malpractice insurance is so high that Option #2 would in effect force such attorneys to stop doing pro bono work, which would not be in the public interest.

**Background**

I was admitted to practice before the California State Bar in 1979, State Bar No. 88,993. I spent 30 years in private practice, with my primary work in patent, copyright, and trade secret litigation. I worked for four private law firms, most recently with Wilson Sonsini Goodrich & Rosati in Palo Alto, California. I retired from the paying practice of law in 2010, after which I was no longer covered by WSGR's malpractice insurance. Since my retirement, I've been doing volunteer work for a non-profit organization, the Electronic Frontier Foundation ("EFF") in San Francisco ([www.eff.org](http://www.eff.org)). I continue to be an active member of the State Bar of California for this volunteer work, which primarily consists of writing amicus briefs in important patent and copyright cases. A list of many of those briefs is included as an appendix below.

**Discussion**

EFF "is the leading nonprofit organization defending civil liberties in the digital world. Founded in 1990, EFF champions user privacy, free expression, and innovation through impact litigation, policy analysis, grassroots activism, and technology development."<sup>2</sup> EFF is a donor-

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<sup>1</sup> The request for comments is located at <http://www.calbar.ca.gov/About-Us/Our-Mission/Protecting-the-Public/Public-Comment/Public-Comment-Archives/2018-Public-Comment/Legal-Malpractice-Insurance>

<sup>2</sup> "About EFF," located at <https://www.eff.org/about>

funded US 501(c)(3) nonprofit organization, with more than 37,000 dues-paying members. EFF's staff attorneys regularly file amicus briefs involving issues such as free speech, privacy, and creativity & innovation (the latter primarily involves patents and copyright cases).<sup>3</sup>

Under the California State Bar guidelines, EFF's legal work thus qualifies as "pro bono" since EFF is a "not-for-profit organization with a purpose of improving the law and the legal system." See State Bar of California, "Pro Bono FAQ," under "What legal work qualifies as pro bono."<sup>4</sup>

When I decided to retire from the paying practice of law, I was honored that EFF wanted me to help its legal team's patent and copyright public interest work. I estimate that since I joined EFF in February 2010, I've spent about 500-1000 hours each year working directly on EFF matters and in providing training and guidance to more junior EFF attorneys.

My primary work at EFF has been writing amicus briefs in important, high-profile patent and copyright cases. The cases are mostly in Federal appellate courts and the U.S. Supreme Court. My "clients" for such amicus briefs are either EFF itself; EFF and/or other public interest organizations; or on occasion a group of individuals such as a collection of computer scientists interested in issues pending before a court. Some of the briefs on which I've worked have been favorably cited in court decisions. See, e.g., *Brownmark Films, LLC v. Comedy Partners*, 682 F.3d 687, 691 (7th Cir. 2012); *UMG Recordings, Inc. v. Shelter Capital Partners*, 718 F.3d 1006, 1018 (9th Cir. 2013); *Golan v. Holder*, 132 S. Ct. 873, 893, 905, 906 (2012) (brief for American Library Assn. et al. cited in both majority and dissenting opinions). My EFF work has also included advocacy matters such as public comments filed with the U.S. Patent and Trademark Office and the U.S. Copyright Office.

Since 2010, I've maintained my active membership with the California State Bar (at my own expense), since an active bar license is required to sign and file amicus briefs. However, I don't need malpractice insurance to write amicus briefs. My amicus clients (primarily EFF itself or other non-profit organizations) aren't parties to the underlying lawsuits, and filing an amicus brief can't possibly trigger any malpractice claims. Neither could public comments implicate any malpractice concerns. Requiring me to obtain malpractice insurance under these circumstances would be unnecessary.

Worse yet, forcing me to buy malpractice insurance would be so enormously costly that I would have to stop doing my volunteer work, depriving the non-profit EFF of the services I've been giving them for over 8 years. A recent article about the Proposed Mandatory Malpractice Insurance estimates that mandatory insurance would cost at least \$3,500 per year (the amount charged in Oregon), or more likely \$7,500 to \$10,000 per year in California. See Kenneth Feldman, *Is Mandatory Malpractice Insurance Coming to California?*, San Francisco Daily Journal, September

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<sup>3</sup> See <https://www.eff.org/issues/free-speech>; <https://www.eff.org/issues/privacy>; and <https://www.eff.org/issues/innovation>

<sup>4</sup> See <http://www.calbar.ca.gov/Access-to-Justice/Pro-Bono/Pro-Bono-FAQ>

28, 2018, at 5, 10. The State Bar will not be surprised to hear that I can't afford to spend such amounts yearly for malpractice insurance that is unnecessary and that will never generate a claim. I can afford to pay a few hundred dollars for my active bar membership dues, but not many thousands for unnecessary insurance.

At EFF, I'm not an employee or a paid staff member.<sup>5</sup> Rather, my title is "Special Counsel," an unpaid, non-employee position.<sup>6</sup> Since I'm not an employee, I'm not eligible for EFF's malpractice insurance for its paid staff attorneys. If the State Bar makes malpractice insurance mandatory and does not grant an exemption, I'd have to stop helping EFF. There are doubtless many other retired attorneys doing work for non-profits who are in the same situation as myself.

### **Conclusion**

Both the California State Bar and the American Bar Association recognize the professional responsibility of attorneys to provide pro bono work.<sup>7</sup> Since my retirement in 2010, I've met that responsibility by providing thousands of hours of unpaid services to EFF, and therefore, to the public. The State Bar should not adopt a mandatory malpractice insurance rule that makes such pro bono work economically unfeasible.

If the State Bar decides to require active attorneys to purchase malpractice insurance as a condition of licensing, that requirement should exempt retired attorneys performing pro bono work.

Sincerely yours,



Michael Barclay  
California State Bar No. 88,993

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<sup>5</sup> See <https://www.eff.org/about/staff>

<sup>6</sup> See <https://www.eff.org/about/special-counsel>

<sup>7</sup> See ABA Model Rule 6.1, available at:

[https://www.americanbar.org/groups/probono\\_public\\_service/policy/aba\\_model\\_rule\\_6\\_1/](https://www.americanbar.org/groups/probono_public_service/policy/aba_model_rule_6_1/)

Like the California State Bar's guidelines, ABA Model Rule 6.1 also recognizes pro bono work for "groups or organizations seeking to secure or protect civil rights, civil liberties or public rights." This applies to EFF.

**APPENDIX**  
**Michael Barclay's Representative Amicus Curiae Briefs, 2010–present**  
(In chronological order)

[Viacom v. YouTube](#), S.D.N.Y. No. 07-Civ-2103, 718 F. Supp. 2d 514 (S.D.N.Y. 2010), April 12, 2010

[UMG v. Veoh](#), Ninth Circuit No. 09-56777 (opinion issued under the name of *UMG v. Shelter Capital Partners*), July 23, 2010

[Microsoft v. i4i](#), Supreme Court No. 10-290, Certiorari stage brief, September 29, 2010

[Golan v. Holder](#), Supreme Court No. 10-545, Certiorari stage brief, November 26, 2010

[Sony BMG Music v. Tenenbaum](#), First Circuit Nos. 10-883, 10-1947, 10-2052, January 3, 2011

[Microsoft v. i4i](#), Supreme Court No. 10-290, Merits stage brief, February 1, 2011

[Viacom v. YouTube](#) (and *Premier League v. YouTube*), Second Circuit Nos. 10-3270, 10-3342, April 4, 2011

[Golan v. Holder](#), Supreme Court No. 10-545, Merits stage brief, June 21, 2011

[Akamai Tech., Inc. v. Limelight Networks, Inc.](#), Federal Circuit Nos. 2009-1372, -1380, -1416, -1417, and [McKesson Tech. Inc. v. Epic Sys. Corp.](#), Federal Circuit No. 2010-1291, August 9, 2011

[Brownmark Films, LLC v. Comedy Partners, MTV Networks, Paramount Pictures Corp., South Park Digital Studios, LLC, and Viacom International, Inc.](#), Seventh Circuit No. 11-2620, December 19, 2011

[Capitol Records, Inc., et al. v. Jammie Thomas-Rasset](#), Eighth Circuit Nos. 11-2820, 11-2858, February 10, 2012

[The Authors Guild v. Google Inc.](#), S.D.N.Y. No. 05-8136, August 1, 2012

[CLS Bank v. Alice Corp.](#), Federal Circuit No. 2011-1301, December 7, 2012

[Oracle America, Inc. v. Google Inc.](#), Federal Circuit Nos. 2013-1021, -1022, May 30, 2013

Comments Concerning Mandating Legal Malpractice Insurance for Attorneys  
as a Condition of Licensing, State Bar Agenda Item No. 702, September 14, 2018  
October 24, 2018  
Page 5

[WildTangent, Inc. v. Ultramercial, LLC](#), Supreme Court No. 13-255, Certiorari stage brief,  
September 23, 2013

[Alice Corp. v. CLS Bank International](#), Supreme Court No. 13-298, Certiorari stage brief,  
October 4, 2013

[Viacom v. YouTube](#), Second Circuit No. 13-1770, November 1, 2013

[Alice Corp. v. CLS Bank International](#), Supreme Court No. 13-298, Merits stage brief, February  
27, 2014

[Limelight Networks, Inc. v. Akamai Technologies, Inc.](#), Supreme Court No. 12-786, Merits stage  
brief, March 3, 2014

[Nautilus, Inc. v. Biosig Instruments, Inc.](#), Supreme Court No. 13-369, Merits stage brief, March  
3, 2014

[The Authors Guild v. Google Inc.](#), Second Circuit No. 13-4829, July 10, 2014

[Google Inc. v. Oracle America, Inc.](#), Supreme Court No. 14-410, Certiorari stage brief,  
November 7, 2014

[Commil USA, LLC v. Cisco Systems, Inc.](#), Supreme Court No. 13-896, Merits stage brief,  
February 26, 2015

[SAS Institute, Inc. v. World Programming Limited](#), Fourth Circuit No. 16-1808, February 22,  
2017

[Oracle America, Inc. v. Google Inc.](#), Federal Circuit No. 17-1118, May 30, 2017, appeal brief

[Cisco Systems, Inc. v. Arista Networks, Inc.](#), Federal Circuit No. 17-2145, December 26, 2017

[Oracle America, Inc. v. Google LLC](#), Federal Circuit No. 17-1118, June 11, 2018, brief in  
support of petition for rehearing en banc

**Michael D. May  
Attorney at Law  
532 W. First Street, Suite 209  
Claremont, California 91711**

Board of Trustees  
California State Bar Association

Re: Mandatory Malpractice Insurance

Ladies and Gentlemen,

It was with great interest that I read about the State Bar's creation of a working group to consider a variety of issues relating to the topic of malpractice insurance which includes the possibility of not only requiring malpractice insurance as a condition of being able to practice law but then mandating that such insurance be procured through a single provider authorized by the State Bar. This information was not contained in any official correspondence from the State Bar but rather in an article published in the Los Angeles Daily Journal on October 26, 2018.

Why is it that a proposal of such potential significance to California lawyers does not come directly from the State Bar? And just how would a lawyer who does not subscribe to the Daily Journal have come to learn that the State Bar is contemplating not just requiring malpractice insurance but is also considering displacing an entire subset of the insurance industry by requiring that its mandated insurance be procured through a designated provider?

As I read the current rules regarding malpractice insurance, the subject is left to be dealt with between an attorney and his or her client. Simply put, the attorney is required to disclose whether or not he or she carries insurance and the client is then free to decide whether or not to retain the attorney. This is as it should be. If, after full and fair disclosure of whether an attorney does or does not carry malpractice insurance, a prospective client decides to hire an attorney who either carries no insurance or a level of insurance below that which the good folks at the State Bar consider an acceptable minimum, why should the Government be allowed to poke its nose into the situation by essentially regulating the attorney out of business (you either carry \$300,000.00 insurance issued by Company X — which just happened to spend the most money lobbying who knows who to “purchase” its status as the sole provider of malpractice insurance in the State of California — or find another profession)?

So again I ask, how did such a significant undertaking come to pass without so much as a word from the Bar to its members? My recollection is that several years ago we were required to register an e-mail address with the State Bar. And the State Bar now uses e-mail exclusively to collect our dues. So why is it that the State Bar could not see fit to simply disseminate a copy of the document creating the so-called working group and its mandate by similar means? The word “transparent” has taken on new meaning in the way the government and its various agencies carries on its business. From my perspective the way the State Bar has proceeded on this issue is anything but transparent.

The author of the Daily Journal article referenced above notes that only two states in the Union currently require malpractice insurance as a condition of licensing and those states are radically



different from California in any number of ways. And I find it curious that California is conspicuously absent from the handful of states that require their doctors to carry malpractice insurance. So how is that the California State Bar thinks it is more imperative that a lawyer representing a poverty-stricken mother in a family law proceeding on a pro bono basis be required to carry a \$500,000.00 malpractice policy than a surgeon performing open heart surgery on an 80 year old cardiac patient?

Even if one were inclined to concede the merits of mandatory malpractice insurance, no rational human being with even a rudimentary appreciation for basic economics could possibly buy into the notion that a single provider is the best solution. I am unaware of any reputable research that supports the notion that a marketplace devoid of competition is the best solution for anybody! The author of the Daily Journal article notes that the State Bar's "working group" is considering the "Oregon model" where a minimum \$300,000.00 policy comes with a price tag of \$3,500.00 which equates to \$0.1167 per dollar of coverage. I just renewed a \$1M malpractice coverage in the highly competitive California insurance market for less than \$0.006 per dollar of coverage. More simply put the "Oregon model" — as with any other monopolistic business model — offers less coverage for more money (in my case I would pay roughly twice my current premium for my current coverage). Perhaps this fact further explains the State Bar's attempt to advance this proposal as furtively as possible. Just how far might its considerations have been advanced by a mass e-mail to all members of the California Bar which read:

Dear Member,

The Bar is currently considering enacting a new rule that would not only require you to carry a minimum of \$500,000.00 in malpractice coverage in order to continue to practice your chosen profession but would require you to purchase this coverage from a single provider chosen at the whim of a handful of your colleagues. We think this is a really good idea. What do you think?

Best Regards,

Jason P. Lee, Chairman  
California State Bar  
Board of Trustees

Having practiced successfully for nearly 40 years, the options being considered by the State Bar, as autocratic, opaque and onerous as they may be will not affect me nearly as much as lawyers admitted within the last few years or those who have incurred hundreds of thousands of dollars in debt seeking to become lawyers in the near future. Those are the ones who will truly suffer should the current proposals be enacted into law. So, by publishing my comments as widely as I can, it is my hope that many more lawyers will demand that you support your proposals with rational and logical facts borne out by statistical analysis which would ultimately support a conclusion that (1) mandatory malpractice

insurance provides an incontrovertible direct benefit to the public at large; and, (2) that requiring members to procure the mandated coverage from a single provider is in the best interests of the members of the State Bar in that it provides the mandated coverage at a cost at least equal to if not less than could be achieved in a competitive marketplace.

In the hope that you will immediately alter your present course I thank you for your consideration.

Very truly yours,

Michael D. May  
State Bar No. 80384

***Nadine M. Jett***

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2340 Boulevard, Suite C, Torrance California 90501  
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October 8, 2018

Ms. Linda Katz  
Office of Research and Institutional Accountability  
THE STATE BAR OF CALIFORNIA  
180 Howard Street  
San Francisco, CA 94106

***Re: Mandatory Legal Malpractice Insurance***

Dear Ms. Katz:

I have practiced law, in the state of California, for 20 years.

I have maintained continuous legal malpractice insurance since the day I opened my doors as a solo practitioner in December 1997. There has never been a day that I have not been insured.

Despite the fact that I carry malpractice insurance, I do not believe that malpractice insurance should be mandatory.

1. Requiring malpractice insurance, just like our mandatory health insurance, will raise the rates for everyone. Insurance companies will raise the rates because we have to have it.  
Requiring malpractice insurance will not make a lawyer a better lawyer, but it will make it more difficult to practice law in California, a state that is already extremely costly to run a practice in, and will not protect the public in any way. As a lawyer that has carried malpractice insurance for 20 years, to offset the increase in costs, I will
  - 1) charge the clients even more than I already do; or
  - 2) reduce my coverage to minimum.

Either choice I make, harms my client, i.e. the public.

The California State Bar will be harming the public by implementing mandatory malpractice insurance coverage.

Certainly, the California State Bar understands just how difficult it is to manage the costs of running a small law firm. The State Bar has cut costs to such a degree, that for the first time in 20 years, the State Bar no longer provides a plastic or paper bar card to me after I have paid my \$500.00+ dues. The bar card is now a separate cost, and I am charged \$2.00. This is but one small example of how costs are hurting all of us, the State Bar included.

The State Bar is a huge organization that clearly cannot bear the costs of a plastic card.

I am a solo practitioner that cannot bear the costs of higher insurance premiums, on top of all my other costs.

2. ***Mandatory insurance does not protect the public.***

Malpractice insurance is not created nor designed to protect the public. My malpractice carrier is diametrically opposed to a claimant. Malpractice is not intended to pay a claimant, but to defend and protect me. Why, therefore, should the State Bar, be advocating for malpractice insurance for lawyers in California? Malpractice insurance is not in the public's best interest, but seems to be a punitive action taken against lawyers by the State Bar.

If the State Bar is interested in protecting the public, it would seem that a better way to do that would be to provide free CLE, or a free malpractice program that we could qualify for, based on years of excellent service, or pro bono work.

3. ***State Bar already has remedies to protect the public.***

If a lawyer violates ethical rules, the California State Bar has the power to reprimand the lawyer in a number of ways.

4. ***Beyond the scope of the California State Bar:***

Requiring legal malpractice insurance does nothing to regulate the profession, protect the public, or improve the legal system.

**RESPONSE TO OPTIONS UNDER CONSIDERATION:**

1. Disclosure to State Bar or Public that an attorney carries Malpractice Insurance:

As stated above, such a disclosure does nothing to protect the public.

- 1.2 Requiring client acknowledgment:

This does not protect the client or the public.

This is an interference with the attorney/client relationship if

Lawyers are expected to provide this information to the State Bar.

This would be so cumbersome for the State Bar, it would greatly increase costs, to manage every attorney/client retainer.

- 1.3 Requiring attorney to disclose on all written communication with clients, on their websites, and on all advertising that they do not have malpractice insurance:

I personally send 100s of emails per day. To demand that an attorney provide on all written communication that there is no malpractice insurance is so burdensome that no practicing attorney would be able to comply.

If the goal of the State Bar is to put attorneys out of business, then this would accomplish the goal.

To disclose on a website there is no malpractice is interesting, especially in light of the fact advertising of any kind was frowned on until about 15 years ago.

It would seem that the goal of forcing a lawyer to disclose on the internet that he/she does not carry malpractice insurance is a form of punishment by the State Bar. I have not seen any other profession that requires such a disclosure. I have never seen such a requirement for doctors of accountants.

- 1.4 No change to current disclosure rule.

I am in favor of no changes.

2. Mandating legal malpractice as a condition of licensing, except in-house counsel and government attorneys.

- 2.1 Insurance to be obtained in private insurance market.

Currently, this is where all insurance is obtained. If mandatory, the prices will skyrocket, because the insurance companies will have a captive audience.

- 2.2 Insurance fund, minimum insurance coverage for all attorneys, additional coverage could be purchased on the private market;

Clearly, the "minimum" would not be enough, because the State Bar has already considered "additional" coverage. The end result will be raised rates for all, just like with health insurance. The end result for the public, higher costs, fewer attorneys. This is not in the public's best interests.

- 2.3 No mandatory insurance requirement.

I am in favor of no mandatory insurance requirements.

3. CLE that covers malpractice liability and self assessment.

- 3.1 Require all attorneys to complete the self-assessment;

Excellent idea. I believe most attorneys would like to be better educated about the nuances of malpractice. A program that is in a lawyer's self interest, will protect the public.

- 3.2 Require uninsured attorneys to complete the self-assessment;

This is a good idea. However, the rest of us (those that are insured) Could also benefit from the self-assessment.

- 3.3 Self Assessment as optional, but not required.

Excellent idea.

4. Promoting the voluntary purchase of insurance by:

- 4.1 Educating lawyers about the benefits.

Not necessary. All lawyers know the benefits of carrying insurance.

4.2 Educating the public about the significance of an attorney not having effective coverage.

This has pluses and minuses.  
It will most likely generate more litigation.  
More litigation will increase the cost of coverage.  
Cost of coverage will increase fees to the public.

In closing, as a lawyer that has ALWAYS carried continuous malpractice insurance without lapse since the day I opened my doors twenty (20) years ago, I am vehemently opposed to the State Bar demanding coverage, or supervising my coverage.

Sincerely,

A handwritten signature in black ink, appearing to read "Nadine M. Jett". The signature is fluid and cursive, with the first name "Nadine" being more prominent than the last name "Jett".

Nadine M. Jett

NMJ/st

cc: mandatory coverage  
wp/docs/NMJ/statebar.2

**WILLIAM MITCHELL MARGOLIN**

**Attorney at Law**

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**E-Mail [legalhelp@legalhelpforyou.com](mailto:legalhelp@legalhelpforyou.com)**

October 22, 2018

LINDA KATZ

Office of Research and Institutional Accountability

THE STATE BAR OF CALIFORNIA

180 Howard Street, San Francisco, CA 94105

Email: [linda.katz@calbar.ca.gov](mailto:linda.katz@calbar.ca.gov)

RE: Malpractice Insurance-NOT MANDATORY

Dear Ms. Katz,

I have been a sole practice attorney for over 25 years. I have never been challenged nor sued nor intentionally or negligently harmed a client. I have family and have never been able to afford malpractice insurance. Malpractice insurance is an excuse for attorneys to slack off of their professional responsibilities to do the right thing. As you are aware many State Bar Complaints are associated with malpractice actions. This insurance can be helpful upon failing to comply with a statute of limitation issue however any other claims and failing to pay attention and concern to a client is not excusable. Insurance alleviates this pressure on an attorney and obligation when he knows he can skate by because he is protected by insurance and defenses to his wrongdoing.

The double edged sword must remain up to the individual attorney not mandated by our bar. On the retainer agreement it clearly tells your client that you do not have malpractice insurance. It becomes the choice of the client and the attorney as it should be.

Please do not mandate malpractice insurance. However, if you do, please pay for it out of my dues which are already exorbitantly high.

Thank you.

Sincerely Yours,



William Margolin

California Attorney since 1989



Public Comments received via Email and Online Response Form

1. I practice in the area of collection law. I have never been sued by a client. I am only sued by the people I sue. Usually, these people are consumers, and they are represented by attorneys because under the Fair Debt Collections Practices Act, attorney fees are awarded to successful consumers, and attorneys know that if they sue attorneys that are collecting the debt, chances are they can attain a nuisance value settlement. The basis of these lawsuits are based in FDCPA practice, either State or Federal. Attorneys who represent creditors are never entitled to attorneys' fees even if they win a lawsuit against a consumer under the FDCPA, under either state or federal.  
  
Well, in Shea v. Morris, 17-cv-1451 AA, filed in the Oregon District Court, I performed a bank levy in California on a California Judgment. I notified the sheriff where to serve the consumer defendant. Instead, the Sheriff used a prior address they had for the consumer defendant. When she was not served with her claim of exemption packet, she sued me for the Sheriff's misstep. We end up settling for \$7,500 and forgiveness of her debt (on an auto loan) because it will be more expensive to take the case to trial than to settle. Now my insurance rates were raised from \$10k per year to \$15k. Other than giving a horrible Yelp review to the insurance company, I am seriously thinking that insurance is highly overrated at this point. What is the point in paying for insurance, making the first claim in 5 years, then having my rates raised 50%. Insurance Companies are pricing Morris Law, PC, out of business. Remind me: Does Morris Law, PC, absolutely need insurance? Can Morris Law, PC, just post an undertaking in a certain amount guaranteed by me?
2. I have a small law office. It is only me. I do not make an enormous amount of money like a large firm would. Making my office or any other small office pay the type of premiums I think you are suggesting is punitive to say the least. I believe this mandate would in effect force offices like my own to shut down. To become nonexistent, non necessities in the legal field. Believe it or not the small offices are a viable force in the legal field as well as the larger firms. We, just don't have access to the large resources that the larger firms have. We are however able to treat our clients with dignity and respect not just another billing hour. We are the underdogs with respect paying large or small premiums for this type of insurance. Don't force us out of business to protect the large firms who are able to pay and more then likely already have this insurance. I therefore am firmly against any mandatory malpractice insurance.
3. Good idea if made affordable. Make it too expensive and solos will just not buy it and practice without it, until license is suspended or revoked. I have been in practice for 47 years. I am a solo. My premium is now 5K per year for 500,000/1,000,000 coverage. I couldn't afford insurance that cost anymore.
4. I have read the proposals on Legal Malpractice Insurance. I believe requiring attorneys to have such insurance protects the public. However, I believe attorneys should be free to obtain insurance in the private market, option 2.a.  
  
1.a.i. Disclosing details of our insurance would only encourage certain clients to file claims so I am not in favor of making such information public. If and when a client makes a claim, then they will learn the details of our insurance.  
  
I would be in favor of 1.b. to ensure that a new client is aware that the attorney does not have insurance. If the CLE program is pursued, I would make it optional.  
  
Under 4., the Bar could certainly do more to educate both attorneys and the public about the importance of insurance.  
  
BTW, as a sole practitioner, I have always had insurance.
5. I have malpractice insurance for an immigration law practice. I understand I am in a low risk category and my premiums will go up based on the proposal. Please consider some sort of off-set for the type of varied work performed by the legal community. I chose a low risk category for my legal practice. It is a struggle for newly licensed bar members to practice law, so please consider the expense and burdens

placed on the new members. Equally important is that I am the head of a committee with the American Immigration Lawyers Association concerning the Unlawful Practice of Law. Added costs and burdens on attorneys increase the competitiveness of unlicensed and unregulated "Legal Services". Consider establishing a private right of action for court injunction against those practicing law in violation of California Codes, or some other relief for consumers and attorneys alike. I went to law school at great expense to try and do things the right way and others undercut attorney services by practicing law without oversight or burdens, often to the unpleasant surprise of consumers who believed they were receiving sound legal advice.

6. I'm a sole practitioner criminal defense attorney in Pasadena, California. What I find most distressing are the proposed options for implementation. Specifically, I'm very concerned about the Bar implementing the Captive Fund, which would either be run by the State Bar, a private insurance company, or an entity created expressly for this purpose. The ramifications of this proposal have not been thought through at all. Because there has been no rigorous actuarial analysis commissioned, the impact on insured lawyers is impossible to assess. But two very likely features of this mandatory insurance option (if modeled as in Oregon), fixes premiums and fixes limits, and this will have some predictable outcomes that will negatively affect many insured lawyers: For many low risk areas of practice, e.g. criminal, immigration, and other defense practices, there will be a significant spike in premiums. Because limits will be capped to produce an affordable rate (the impetus is to insure attorneys who presently have no insurance), attorneys seeking higher limits will have to increase their limits via an excess insurance carrier. Historically we have seen that whenever a primary carrier denies higher limits and excess must be purchased, the resulting premium is significantly higher than if the primary insurer provided the higher limits. So for this group of attorneys it also quite likely that premiums will increase. A more subtle issue arises because of the issuance of a single policy. In the current open market there are many policies that offer different levels of coverage, ranging from coverage for disciplinary proceedings, payment of all or substantial defense costs incurred, and a dozen or so more coverage features. The new plan will most likely have a single coverage for all because there is a single premium. For many lawyers like myself, setting up a Captive Fund will increase my premiums immensely. I'm strongly opposed.
7. I am opposed to a mandatory requirement that attorneys carry malpractice insurance. I do not believe the issue has been vetted through actuarial models that demonstrate how rates will spike for low-risk areas. As a solo practitioner, the cost of malpractice insurance is one of my biggest costs. If everyone is required to carry it, it will likely have the same impact on my insurance rates that the healthcare models had on individual policies - in other words, the cost is likely to quadruple. If that happens, I will be unable to carry the type of insurance I have always carried that protects my clients for the types of cases I handle. I am not opposed to mandatory disclosure of whether you carry malpractice insurance and believe any responsible attorney would disclose this to clients in their engagement letter. I don't think it should be required on all letterhead, cards, etc., and that a single disclosure should suffice.
8.
  - 1.a. The State Bar should not be involved in attorney's malpractice insurance and information on insurance should not be communicated to the public as it will tend to increase litigation and put attorneys in a position of having to defend groundless claims.
  - 1.b. No. See comments to 1.(a).
  - 1.c. No. See comments to 1.(a).
  - 1.d. Agreed. 2.a. The State Bar should not be involved with attorney's malpractice insurance. If there is a requirement that an attorney have insurance, then the attorney should be able to purchase insurance wherever the attorney wants.
  - 2.b. The State Bar should stay out of the insurance business and there should not be a "captive".
  - 2.c. Agreed.
  3. No.
  - 4.a. Not needed. If you are an attorney, you have the knowledge to know if you should have insurance.
  - 4.b. There is no reason for the State Bar to create claims and litigation for attorneys.

For your information, I was admitted to the California Bar in 1967. I am a sole practitioner. I have never had a claim. I have always carried insurance.

9. I'm opposed to this. We are attorneys and entitled to be honored and trusted, not looked at as scoundrels as so many of the rules and positions taken by the bar seem to suggest. The obligation to disclose our insured or noninsured status to prospective clients allows the clients to choose. If we are captive, the insurers, who are not regulated with regard to malpractice insurance, will do whatever they can to prejudice us economically. We should be protected by the bar, and this proposed rule will not do that at all.
10. I have been in practice, running solo since 1999 and rarely carried professional liability insurance. Concentrating in criminal defense and related areas, malpractice insurance has not been necessary since CA and US supreme courts have imposed a very high burden on criminal defendants to prevail against their lawyers on malpractice suit: criminal defendants will prevail if they are exonerated on appeal or habeas, and their conviction was due to their lawyer's deficient performance/ineffective counsel. The current mandatory disclosure under CA Rule of professional conduct 3-410 is perfect and sufficient to apprise criminal defendants and their families. Mandatory professional liability insurance would be a financial burden on many members of the Bar (like myself) who often struggle to make a decent living. I strongly object to mandating it.
11. Respectfully, I think it is a horrible idea to require malpractice insurance or mandatory disclosures regarding its lack thereof. It hurts sole practitioners like myself who have no affiliation with large wealthy firms and whose overhead costs are already through the roof. I know for a fact that if I had to get E+O insurance right now, I would not be able to afford it. When I researched this several months ago, they were all quoting me at several thousand dollars of per year. This is overhead that I do not need.
12. I strongly urge the State Bar to refuse to require mandatory Errors and Omissions Insurance and not be involved at all in the purchase or regulation of it. I am someone who has it, but the State Bar should not be involved in what is a business decision. This appears to be another poorly-research and poorly-planned idea that sounds good but because it has not been well thought out, would amount to a disaster in its implementation. There is nothing wrong with the system as it now stands. If consumers want their lawyer to have insurance, then all they need to do is ask. Or they can hire someone else. I am confident that if the State Bar tries to involve itself in any way in E&O insurance, it will result in skyrocketing premiums, particularly (and unfairly) for people in low-risk categories of practice like mine, criminal defense. I don't want to have to subsidize lawyers with poorly-run practices or who practice in high-risk areas of practice. That's not fair to me. I run my business properly and in a way that is ethical, and I assume the risks in the area of which I practice. It is unfair to foist upon me the risks of other attorneys who don't run their practices and their businesses as I do or who choose an area of law fraught with frequent malpractice lawsuits. I do not wish the State Bar to be involved in any manner who requiring, directing, or administering legal liability insurance.
13. I am writing to address option 2 under consideration by the Malpractice Insurance Working Group listed on the California Bar website. In particular, I am concerned with the proposal to mandate "legal malpractice insurance for attorneys as a condition of licensing, except for in-house counsel and government attorneys."

A mandate should not be imposed on all active attorneys. Numerous lawyers need or want to retain their active status but are not actively providing legal representation to the public.

For example, I am required in my current position as a university lecturer teaching business law courses to maintain active status with the California Bar. I do not know whether the definition of "government attorney" would fit my position but it would not fit faculty employed by private colleges. I am particularly concerned with the language used for any exceptions. For example, law school professors are exempt from MCLE requirements but undergraduate university faculty teaching legal courses are not. I hope we would not be overlooked in this situation. As a lecturer, I cannot afford to purchase

insurance I do not need. The cost of bar dues and MCLE courses is already a significant burden.

In addition, some retired lawyers want to remain on active status because they can afford the higher bar dues to continue to support the bar and they enjoy the social connections attending MCLE events. They have no need for malpractice insurance. I am also concerned for lawyers who provide cost-effective assistance to low income clients. Any mandate should not cripple public access to justice. I appreciate the desire to provide greater protection to the public but do not believe mandating insurance for all active members is an appropriate solution.

14. I just wanted to provide my brief comments regarding malpractice insurance. It is my belief that it should be mandatory. The cost is reasonable and clients should have some financial protection against their attorney's malpractice. As an attorney that went to law school in Oregon, I believe the Oregon model is worth consideration, as the insurance is through the BAR and the BAR is much more active in preventing malpractice claims and facilitating finding clients new counsel in the event their attorney drops dead, is suspended, or just walks out the door.
15. I am not pleased with the proposal of mandatory liability insurance. I already have a professional liability insurance policy, and have been so insured for about 4 or 5 years. Unless the State Bar and its economists have plausibly projected that the imposition of mandatory insurance will likely lead to lower premiums, I am opposed. I don't see how the public would be benefitted with this proposal.
16. I am a sole practitioner and have been since admission in 1989. I have never been the subject of a SB complaint. I have never received complaints from clients about my work or my fees. I am studious and very careful when providing work and opinions to my clients or dealing with opponents. I have relatively low rates, and I have kept them low by keeping overhead down. I maintain a home office to keep overhead low. My client base is not composed of companies or wealthy individuals, but the ordinary and usually low-income "man or woman on the street." As it is now, my first dollars go to my Bar dues, and I fear the next dollars will go to an insurance carrier. I do not have a large practice. Requiring me to purchase E & O insurance will definitely force me to raise my rates to clients and I will no longer be able to forgive or discount billings as I now do. I do not know how mandatory insurance purchase will help these clients, but it may hurt them and I do not believe that is the SB's intention. I am against a mandatory malpractice insurance regulation.
17. I appreciate the opportunity to comment on the proposal to require California attorneys to carry malpractice insurance. While I have always carried it, I do not believe it should be a requirement, and think the rule requiring disclosure of lack of insurance is adequate. Attorneys who do not carry it may be able to offer lower fees to clients who otherwise might not be able to afford an attorney. The proposed requirement would eliminate this option for both consumers and attorneys.
18. I suggest that the State Bar work to create MICRA style limits for non-economic damages in lawsuits against attorneys.

Non-economic damages against attorneys should be limited to a maximum of \$100,000. If this commonsense limit was created there would be a lower risk of unpaid judgments against attorneys.

I suggest that the State Bar examine an insurance coverage issue that is harming hundreds of thousands of people in California every year who are victims of auto accidents. Many victims of auto accidents find that the persons who are responsible for their injuries either have zero auto insurance, or have a minimum 15k/30k liability policy.

I represented a man that was killed by a drunk driver that had a total of 15k of liability coverage. How do you tell the family of a dead man that the driver had a legally sanctioned policy of 15k? These minimum auto liability limits have never been increased or adjusted for inflation. Auto insurance brokers are not required to explain the importance of buying uninsured motorist coverage, which is not required.

If the State Bar wants to protect a huge number of people from a real and pressing insurance coverage issue, I suggest that the State Bar work to require that every driver in the State of CA have at least \$50k of auto liability, and uninsured motorist coverage. A human life should be worth more than \$15K in California.

19. The captive fund idea for legal malpractice insurance is a very bad idea. I recall that some years ago the official state bar insurance program went belly up and left many people high and dry. Risk should be diversified through many companies, not consolidated into one mega risk. Consolidating all the risk into one company could leave many potential claimants completely without recourse, and attorney with zero coverage.

There is a large risk that the single policy will be a poorly negotiated policy with terms that are less favorable than terms available on the open market.

Making lawyers disclose their insurance to clients and potential clients is a bad idea. It is without precedent for any business to be required to tell people how much insurance they have. Providing this information before any services has been rendered has the risk of poisoning the well and the attorney client relationship by immediately creating an adversarial relationship between the client and the attorney with an eye towards suing the attorney. \*It is like telling people not to think about elephants; by forcing every client to think about all the money they could get by suing their lawyer, and the tens of thousands or hundreds of thousands of dollars of coverage available, you will be encouraging more people to sue their lawyers.

Have you considered requiring clients to post a bond to cover damages, attorneys fees and costs payable to an attorney who has counter-sued for malicious prosecution? Many clients are judgment proof, and attorneys representing people with nothing to lose will be a greater risk of being sued. The State Bar should create a guarantee to cover damages and expenses of attorneys who are unjustly sued by clients who have no assets to pay judgments held by the attorneys that they improperly sued.

Doctors are not required to provide patients with evidence of malpractice coverage and limits before seeing patients, even though they run the distinct risk of killing and maiming their patients. Doctors enjoy MIRCA limits on their potential liability even though they kill and injure thousands of people every year.

If the Bar wants to do something useful in the area of malpractice, how about providing automatic coverage of at least \$10,000 of zero deductible, no exclusions, malpractice coverage that comes with the current cost of bar membership. This automatic coverage would allow lawyers to choose higher deductible insurance in the open market in order to get more coverage at better rates.

20. Upon reflection, I believe the State Bar should not require every practicing lawyer to have malpractice insurance. For instance, I have a friend from law school who is General Counsel to a relative's business. They know she does not have malpractice insurance and that is acceptable to them. She stopped carrying insurance some years ago due to the cost. Many lawyers are struggling today, not everyone is making a lot of money, as I'm sure you know, and some might not be able to work, or would raise their rates, if they had to add the cost of malpractice insurance. Also, if a client is willing to hire a lawyer without malpractice insurance, he or she should be allowed to do that, the State Bar should not be acting as Big Brother to adults capable of making their own informed decisions. I think disclosure of whether an attorney has malpractice insurance is imperative and the State Bar instituted a rule on that many years ago.

21. It is strongly my opinion that attorneys should carry malpractice insurance. I am strongly opposed to any fund that that does NOT allow free open market competition!

22. I believe malpractice insurance should be mandatory; however the premiums are presently astronomical. A pool sponsored by the bar should be created to offer insurance at a reasonable rate.

23. I have been a sole practitioner since 1994, and I have been an attorney since December 1989 . I just barely make ends meet each month as it is. More and more people are representing themselves and are using the court's help clinics. There are too many attorney's in California. If I am required to pay for malpractice insurance, which I have not need in almost 30 years of practice, I do not know where the money will come from to pay for premiums I do not need to be paying. I think mandatory malpractice insurance is not a good idea and I do not support it.
24. A very bad idea. To be certain every small practice and part-time lawyers can afford insurance, there will have to be a bare-bones limited policy, which will become the standard for small firms, resulting in a race to the bottom. The bar already mandates too much from attorney (MCLE, fingerprints, etc.) another mandate is a burden on small practices.
25. I think it's absurd that the Bar would even consider requiring attorneys to disclose to the Bar whether they have malpractice insurance. The Bar's job, as concerned here, is to ensure the public isn't being exposed to the risk of getting a "bad" attorney. Disclosing whether we have insurance is irrelevant to that goal, and only serves to micromanage us attorneys. Further a rule requiring disclosure of this on letters, advertisements and/or our websites is equally as absurd.  
The public as a whole is unaffected by an attorney's decision to have such insurance and therefore such disclose is unwarranted.
- I would also disagree with a rule requiring us to have insurance. This is surely going to lead to cost increases, and small practitioners are only going to get hurt.
- That said, I have no objection to a rule requiring attorneys to disclose to clients whether we have malpractice insurance or not. This "risk" is one borne between the attorney and client only, and it makes sense that some clients may not be savvy enough to know to ask this question of their own volition.
26. I have reviewed the options which are listed in the report today, and in response to requests for comment, as a former State Bar Governor, I feel that certain of the proposals are subject to discussion. First, generally, I favor attorneys having malpractice coverage, and my comments should be taken in that light. As to specific recommendations, I am designating each Option by the numbers used in the report:
- 1.1 I favor this recommendation and I think that of the two subparagraphs #1 (making information available to public) is the more appropriate proposal.
- 1.2 This is probably unworkable, and I would not advise this.
- 1.3 "All written communications" is very broad. I think notification to a client at time of engagement is sufficient. I like the idea of disclosure on websites (if the attorney has one) and in advertising.
2. I favor the Open Market Model so that any carrier recognized by the California Insurance Commissioner can sell insurance to attorneys. The idea of a Captive Insurance Fund Model as the sole alternative is bad. However, as in the case of fire insurance, consideration might be given to a "Fair Plan" type of approach. As you know in fire coverage, certain fire-prone areas are not entitled to normal coverage, but the Fair Plan will afford coverage. We might have a similar plan for attorneys who are marked up because of their practice (e.g. entertainment is marked up) where a broad Captive Fund could provide a lower rate. Also, some sort of minimum coverage at minimum rates for smaller firms might be considered. My main thought is that having only a Captive Fund is not a good idea; also if the SB wee to have it, I do not think we have the ability to actually fund it or manage it, so this has to be looked into.
3. Mandatory self-assessment won't work. It reminds me that , when I was on the Board, when the Bar first considered Mandatory Continuing Education (at the insistence of the Legislature) some legislators wanted 4 courses paralleling first year law, i.e. Criminal Law, R.E. Law, etc.—my guess was that they had not gone passed first year(joke!). We had to fight to allow study for specialties and, by the same token, I think that practices are so different that the self-assessment would not be able to cover all types

- of practices. The tendency is to cover calendaring, ant eh like, which is not important in many phases of transactional practice.
27. I am not in favor of a mandatory requirement to have professional liability insurance as a precondition to maintain my license to practice law in the State of California. However, I am in favor of full disclosure to inform clients that a attorney does not maintain professional liability insurance; i.e., a client being fully informed can factor into their decision to hire an attorney whether the attorney has professional liability insurance.
  28. If the proposed changes are adopted to have a single insurance fund which would result in an increase in premiums or force a purchase of additional insurance from a third party carrier that would adversely affect attorneys who have limited their practice to achieve a lower premium either by elimination of certain areas of practice or the amount of time devoted to the practice or both. That could cause attorneys so limiting their practice to give up or suspend their license. It would make sense to have all attorneys purchase malpractice insurance for the benefit of their clients. But, it should not be a "one size fits all" approach for the reasons set forth above.
  29. I just semi-retired in mid-August from 33 years in the aerospace environment where I did not require my own legal malpractice insurance. After relocating from Irvine to Carlsbad, CA., I am networking to try and plug into part-time only, Juvenile Ct. representation. I cannot afford to obtain normal insurance coverage as if I am in a full-time private practice. I do not plan on working more than two days a week, with an estimate of 15 to 20 hours of work maximum. I am finding out that San Diego County is different than Orange County in this area of practice, in that there are county agencies and groups with contracts that are engaged in both Juvenile delinquency and dependency, and private firms tend to shy away from these areas of law as probably geographically inconvenient, as well as not remunerative enough.  
  
There ought to be "Obamacare" for lawyers, particularly for senior lawyers like myself at age 67, who are interested in trying to make a difference on a part-time basis.
  30. Mandating insurance is a horrible idea. Mandating insurance would be and is a restraint of trade.
  31. Item #1: I oppose. I have been practicing for over 50 years. All my clients are large corporations. They do not need disclosure. I have never had a malpractice claim.  
Item #2. I oppose mandatory insurance. I approve of 2 (c).  
Item #3. I agree with 3 (c), disagree with the rest of 3.
  32. Mandatory malpractice coverage is not practical. First, a whole new bureaucracy will need to be created to track, ensure, and force compliance. Second, certain practices are higher risk than others (probate, criminal defense, personal injury). The cost of coverage for them should not be fixed at the same premium as low risk practices. The cost of high risk practices should be borne by those in high risk practices paying the same fixed premium. Third, a fixed coverage limit would essentially limit the financial recovery by claimants. For example, an attorney buys a compliant fixed coverage policy (which would have to be artificially low to make all practices insurable) and does not think of the actual exposure she has. In short, fixed mandatory coverages would not reflect or cover the actual risk an attorney has. Four, many attorneys will buy "just enough" coverage to meet the mandatory minimum in order to save on expenses. A claimant is artificially capped on his recovery because his lawyer only carried the mandatory minimum. Five, attorneys can be trusted to make a sound business decision commensurate with their risk. If one chooses to not carry coverage (which has to be disclosed to the client), then that is a reflection of the attorney's risk analysis. Last, there is a fund to compensate those claimants whose attorneys did not carry coverage. That fund could simply charge bar members a larger "fee" to adequately capitalize the fund.
  33. I'm writing about the issues the Bar is studying on the subject of malpractice insurance. I have been a practicing attorney since I was admitted to the California Bar in January 1976. All but a few of those years I have been in private practice. I am a former member of the Bar's Standing Committee on Professional Responsibility and Conduct. I am the former chair of the Bar's Standing Committee on Alternative Dispute Resolution. I am the dean of Peoples College of Law, a registered/unaccredited law

school in Los Angeles.

The law and standard principles of legal ethics do not treat malpractice insurance as a duty of lawyers to their clients, but I believe it is. Lawyers are required by law and professional responsibility rules to protect their clients in many ways, but many of them are a great deal less important to protecting clients than malpractice insurance is. I support the advertising rules, but they afford less protection to clients than malpractice insurance. Same with the rules on fee sharing. There are other examples.

Everyone makes mistakes, and that includes lawyers practicing law, including me. That is true even for the most diligent lawyers. Thus, it is inevitable that even the best of lawyers will err in handling their clients' affairs, and inevitably many of those errors will harm the clients. Lawyers are privileged to earn high, sometimes enormous incomes compared to their clients and the general public, and in my view accepting that privilege responsibly requires malpractice insurance.

I strongly support requiring that every California attorney in private practice to have malpractice insurance. I believe the minimum coverage should be \$100,000 per claim, with a sliding scale upwards to \$1 million per claim, perhaps higher, depending on the attorney's income from the practice of law. However, I also strongly support exceptions for attorneys who can show that the premiums would be a serious financial hardship or that no insurer will issue them the minimum required coverage. Many graduates of Peoples College of Law, where I am dean, and other law schools, have practices that serve low and medium income clients who cannot pay usual legal fees. Those lawyers usually have incomes low enough not to subject them to the insurance requirements I support, or to allowed them to purchase lesser coverage. Also, because malpractice insurance premiums can be so high and sometimes unfair (for example, the first year's premium usually covers nothing), I believe another exception should be that a lawyer may furnish a bond or collateral equal to the limits of the required insurance.

Disclosure of Insurance: I could easily be wrong, but I don't see the value in lawyers disclosing their insurance situation to the Bar, as opposed to the public and clients. But I do support disclosing to the public and clients that the lawyer does or does not have insurance and the coverage limits, and that it be disclosed in all advertising, including websites, and in all agreements to provide legal services, and that the disclosure in the agreements be updated yearly.

I support establishing violations of these requirements as violations of the Rules of Professional Conduct, and a law that would provide that violation of these requirements not be prohibited as evidence in an action against an attorney for professional liability. I am not sure whether violation of the requirements should be a cause of action in itself – haven't thought about that enough.

I support an item I saw on the Bar's website: "Insurance fund, established by statute, would provide minimum insurance coverage for all attorneys ("Captive Insurance Fund Model"); additional coverage could be purchased on the private market."

I support another item on the Bar's website: "Developing a Continuing Legal Education or Practice Management program that provides an interactive self-assessment of law practice operations in an effort to examine legal malpractice liability, ... Require all attorneys to complete the self-assessment".

I support still another item on the Bar's website: "Promoting the voluntary purchase of insurance" especially by "Educating the public about the significance of an attorney not having effective coverage" but also by "Educating lawyers about the benefits of insurance." On this, I learned a few years ago that there is probably an astonishing level of ignorance among attorneys about malpractice liability. Several years ago an experienced and rather highly regarded litigation attorney told me he was not concerned about being sued in a case in which he was my co-counsel, because he had incorporated and thus he



could not be personally liable for malpractice!

34. I am an attorney contracted to provide legal assistance to non-represented parties, as Facilitator/Self Help Attorney/Small Claims Advisor for Tehama County Superior Court. This is a contracted, no benefits, part time position. The contract pays \$3500/mo. (My private practice is very limited by the contract. ) I am proud of my position, the job that I do, and believe that I am of great help to my community. However, on the small income I receive, I am expected to pay malpractice insurance, with coverage of \$1,000,000, which is almost \$700/mo. This amounts to 20% of my pay. Since I do not represent individuals nor appear nor advocate for the litigants in court, I believe that it is an oppressive, costly burden to someone like me. I would like to see exceptions to be made for individuals in my position.
35. As a first year attorney that took up law later in life, I chose to open my own solo practice. In doing so, I obtained Malpractice Insurance at a very good rate from Lawyers Pacific Insurance Company. They have a special insurance program specifically for first year lawyers and premiums graduate up as the lawyer practices for more years and presumably is exposed to more liability tail.
- Regarding the proposals being evaluated, I have the following comments. I would not be in favor of a mandatory malpractice insurance program or requirement. While I think it is extremely important to have insurance, I do not believe it should be mandated by the State Bar or a condition for being licensed. This may drive insurance premiums up or lead to a "one size fits all" insurance program that would be too expensive for small, solo practice attorneys to afford. I do not think it should be mandated that an attorney must state on advertising or a website they do not carry malpractice insurance. However, I do believe clients should be informed at time of engagement if the attorney does not carry insurance.
- I do believe that the current requirement to disclose lack of malpractice insurance upon engagement of a client per PR 3-410 is sufficient to notify the prospective client that the attorney does not carry insurance and the client can then make an informed decision at that time whether to engage the attorney.
- I would be in favor of mandatory CLE for all attorney's on the value of malpractice insurance and for a Bar mandated self-assessment of risk factors that may determine the levels of insurance that should be carried.
36. I would urge the State Bar to use an Open Market approach if it decides to mandate insurance. A competitive market would keep premiums lower and would permit those of us doing pro bono work in criminal law to continue to practice.
37. I see no benefit to mandated errors and omission insurance for attorneys. No matter how specious the claim against the attorney, the insurance company always settles and the attorney is always out the deductible. This encourages vexatious litigants to take advantage of the attorney and the insurance company. If a client wants that E & O coverage, then they can choose an attorney who voluntarily provides it. I currently disclose to my clients in my retainer agreement that I do not carry E & O coverage. I do not see the need for an additional sheet of paper for the client to sign regarding this.
38. I favor keeping the Rule as it is. Disclosing the absence of malpractice insurance to clients is responsible. However, retaining an attorney without malpractice insurance (and likely with a lower fee) should be a matter for the client to decide.
- Mandating insurance as a condition of licensing would be unduly burdensome to attorneys like myself who have practiced for over 40 years without any claims. I do not currently handle client matters myself, but I do refer clients to other attorneys and work along with those attorneys sharing the fee. My extensive experience as a trial attorney is a great asset to both the client and the firms I refer clients to. I also provide simple legal advice (pro bono) to a non-profit organization on whose Board I sit. These are activities which I would no longer be able to perform due to the expense involved in carrying

malpractice insurance.

I believe lawyers who have passed the bar and maintain their continuing education requirements should be entitled to practice law without the added expense of malpractice insurance. This could severely limit pro bono services except by attorneys who have a profitable practice.

39. I am in favor of mandatory malpractice insurance and requirement of insurance coverage disclosures to clients. I have been continually insured for 20 years and still floored at the prices. We try to shop it every other year and there seems to be too few carriers and little transparency in underwriting. More coverage should mean lower prices. Not in favor of Captive Insurance Fund Model because it seems to create inefficiencies because settlement costs are passed on in the form of higher premiums. An example is State Fund for worker's compensation insurance. My opinion - the type of lawyers who do not have malpractice insurance are likely the same lawyers who would prefer not to make the disclosures. So better to make the reporting available on the State Bar website (meets the minimum insurance requirements).
40. The current rules in place are adequate, and the proposed amendments create additional bars to practice for solo and small firms, as well as public disclosure of matters that are not required to be disclosed by any other professional class, including doctors, as to whether insurance is maintained, the amounts maintained, and the type of coverage - facts that no doctor, broker, realtor, or any other professional organization requires.
41. Stay out of this. Leave It up to attorneys to cover themselves or not. Let the free market provide various carriers and various coverages. There previously was a requirement to notify clients regarding insurance. That disclosure can easily be handled and required in retainer agreements period. Nothing more. The State Bar is increasing becoming BIG BROTHER. Stop it!
42. As an attorney, I have malpractice insurance. If I did not, I would need to inform my clients that I don't. If it would be required for all attorneys to have malpractice insurance, then the ones currently not covered should sign up with an existing carrier. It appears to be a total waste of time and money to force one type of policy on all lawyers, when the current system is working.
- If the premiums are very high for an attorney, it would be due to one of two things: the type of law practiced which has a higher malpractice rate or an attorney's past with malpractice cases. So maybe if an attorney is in one of those areas and can't afford the premiums, they should switch areas. If there have been a large numbers of malpractice cases which the attorney has lost, maybe it is time to stop practicing. So if a requirement for malpractice insurance is in effect, if one cannot get the insurance, then they should quit practicing.
- If some basic policy terms should be required, then one should not be required to purchase a basic policy and then purchase an additional policy for additional coverage. It should be like auto insurance. You choose your carrier and select coverage at least meeting those very basic terms. Being an attorney in California is expensive enough with bar dues. ( I am also a CPA here where the dues are a fraction of the bar dues.) I believe that this proposal, if implemented in the wrong fashion, could drive up the cost of practicing law and make it un-affordable to many sole practitioners and small law offices.
43. Is the bar looking into tail coverage options? It seems to me, as an estate planning attorney, this is a big deal. Cases typically come years later. Not all attorneys qualify for tail coverage for various reasons. Having a state bar fund, with some minimum tail coverage might be a nice feature for both the general public and for retiring attorneys. I am happy the bar is examining the insurance issue as I think a lot of attorneys do not fully understand it and most of the general public has no clue what it really means if their attorney has no coverage.
44. I am concerned about potential unintended issues as follows. Please look carefully into them. We have always maintained professional insurance. We are a very small-- two lawyer and no staff-- firm and represent low income clients. It is important that our premiums remain relatively low. For many low risk areas of practice, e.g. criminal, immigration, and other defense practices, there will be a significant

spike in premiums. Because limits will be capped to produce an affordable rate (the impetus is to insure attorneys who presently have no insurance), attorneys seeking higher limits will have to increase their limits via an excess insurance carrier. Historically we have seen that whenever a primary carrier denies higher limits and excess must be purchased, the resulting premium is significantly higher than if the primary insurer provided the higher limits. So for this group of attorneys it also quite likely that premiums will increase. A more subtle issue arises because of the issuance of a single policy. In the current open market there are many policies that offer different levels of coverage, ranging from coverage for disciplinary proceedings, payment of all or substantial defense costs incurred, and a dozen or so more coverage features. The new plan will most likely have a single coverage for all because there is a single premium.

45. Mandatory malpractice insurance as this good and its bad points. I had clients where the attorney did not have my practice insurance and she got stuck not being able to collect much. at the same time I've had clients where the attorney did have malpractice insurance but it was a burning type of insurance where by the time anything was left for the client there was not much money because the attorney representing the insurance company milked the amount of insurance down to almost nothing which is very sad on its own at their attorneys that do that type of unfair Acts. So if there's going to be any kind of a mandatory malpractice, the burning type Insurance should be not allowed and the minimum amount of coverage should be at least 5 million for each attorney because anything less than that will just create Injustice for the client.

46. This would be a terrible idea for a few reasons. There needs to be multiple sources of companies/ carriers for malpractice insurance. This breeds competition and competitive pricing. If there was a captive carrier, this would be a legalized monopoly, which violates anti trust provisions, as well as reducing the ability for other carriers to bid against one another, for better or more competitive pricing.

If the State Bar provides insurance, what happens in the event of a lawyer, who does commit malpractice, but also commits an offense in violation of state bar rules. As the carrier, the State Bar has a duty to defend and protect its insured. But, there would be a conflict in the event of a state bar violation being submitted.

If someone wants to practice law without having malpractice insurance, that should be a personal issue to be decided on by each individual attorney. There should not be a mandate that requires malpractice insurance in order for state bar membership. This would preclude or prevent lawyers, who do good work for their clients, but who can't afford the cost of insurance, from performing their services.

47. My personal experience was that a former client sued me for cost of his business expense because I had insurance. He specifically told me that.

Also, the cost of insurance increases with years of practice (which is counter-productive since more experience equals fewer mistakes) and is simply un-affordable for myself and many others.

If the Bar mandates insurance then not only will the cost of maintaining a law license increase, but the fees charged to clients will increase. I am able to offer low and reduced rates for clients who do not have enough money for full price lawyers, but I will not be able to offer any discounts if I have to add a huge cost of insurance to my expenses.

And, I am afraid that having mandated insurance will encourage other clients to sue for "cost of defense" since the insurer is always looking at the cases in a financial equation - settlement vs cost of defense. It would telegraph to unscrupulous clients that they can sue their attorneys and collect from the insurer until the attorney cannot afford insurance and is therefore prevented from practicing law.

Please do not institute this rule.

48. I oppose mandatory insurance for all practitioners because it will require my office to subsidize and

cover the myriad incompetents out there. I already pay a fortune in premiums to cover 3 lawyers. I understand the concept of “protecting the public” but (1) some lawyers probably cannot afford to buy insurance, particularly new, hard-to-insure, inexperienced lawyers, and (2) there is already a rule in place that says that one must disclose the existence or nonexistence of current errors and omissions coverage. Some clients can only afford to hire a lawyer who cannot afford insurance; hence the lawyer’s rates are lower because he is uninsured. It is NOT the State Bar’s fault to protect every client out there, at the expense of those attorneys who already have coverage. It’s a terrible idea. I thank God I am not that far from retirement.

49. I write to voice my opposition to the current proposal that all lawyers obtain malpractice insurance as a condition of admission to the Bar. This is an extremely important issue that warrants an in-depth study before it is acted upon.
50. I am opposed to the State Bar making any changes in their requirement for attorneys regarding Legal Malpractice insurance that may include "mandatory" language as a condition of licensing. Furthermore I am strongly opposed to a "Captive Fund" run by the State Bar as an insurance company or entity. I carry legal malpractice insurance and want to have the right to shop for the best insurance carrier at the best/affordable rates. It is my opinion that allowing this "Captive Fund" would create an additional bureaucracy and not allow for the free market to affect quality of services and costs that currently exists. I am opposed to these options begin considered.
51. I see no reason to give insurance companies a state subsidy by requiring attorneys to carry insurance. Not all attorneys practice law representing clients, but carry their license to substantiate their professional credibility. Forcing attorneys to carry liability insurance gives insurance companies a subsidy, protects wealthy lawyers who can easily afford and already carry insurance while doing nothing for members of the bar who either practice on the margins (and can contract with clients regarding malpractice insurance under current bar rules) or for members who do not practice law by representing clients. I oppose state-mandated malpractice insurance for California attorneys.
52. I am at the end of my career [28 years and counting] as a California Attorney. I am semi-retired and my income is limited to Social Security and traffic cases that I receive from several referral entities. I plan to fully retire in 2025, when I turn 75 if that is part of God's plan for my stay on this earth. I have been insured for errors and omissions since the first date that I began my career. If my premiums increase as is contemplated in the "statutorily mandated malpractice insurance" then I will be forced to retire and possibly apply for benefits from public dole resources. Please leave the system as currently exists.
53. Attorneys in California should be required to carry a minimum of malpractice insurance!
54. I have reviewed the proposals under consideration or statutorily mandated malpractice, and I would like to comment. As a proud member of the California State Bar, I want to strongly support a mandate for all licensed attorneys (other than in-house counsel, judges and inactive attorneys) to carry a minimum level of malpractice insurance. Attorneys owe an ethical duty to their clients to competently and ethically provide legal services, and they should be responsible to make clients whole for harm caused by the failure to meet this standard of care. However, I strongly object to the proposal for a public or "captured" insurance pool for all attorneys. I strongly believe that insurance products should continue to be provided by the private market so that attorneys in different areas of practice and different risk levels can find appropriate insurance to meet their needs. Quite simply, California attorneys do not all present the same level of risk in their practices, and it is my understanding that "captured" insurance pools do not effectively take this into account. I (for one) practice in the area of estate planning and income tax planning, a relatively high-risk area given the long statute of limitations and potential for harm to clients if I fail to meet the prevailing standards of care. I maintain a high level of insurance coverage (substantially higher than my peers) to ensure that my clients have adequate redress. If the State adopts a "captured" insurance pool, I will have to endure the additional complications of going into the secondary market to obtain excess coverage (because that is the ethical thing to do for my clients), undoubtedly paying more for more complicated and less complete coverage than I currently pay. I am happy with my current carrier, satisfied that my current (very high) levels of coverage is appropriate to protect the interests of my clients if I fail in my duties to them. I do not want have to

make any change in my practices, except to advise the State Bar of my (enthusiastic) compliance with a mandatory insurance requirement. I certainly do not want to take away any time from my current legal practice to worry about having to obtain and integrate a public "captured" insurance policy and excess coverage policy to ensure that my clients have access to the same (very high) levels of protection that I currently provide through my existing policy. Furthermore, I am very concerned to hear that there has been no economic modelling or actuarial studies completed on the impact of a public "captured" insurance pool. I believe that it would be a great disservice to both attorneys and the public to move to a public "captured" insurance pool without a careful analysis of the economic and non-economic impact to both attorneys and public. Accordingly, I wish to support the proposal to require attorneys (with limited exceptions) to maintain a minimal legal of malpractice insurance, through private insurance, with appropriate reporting to the State Bar to ensure compliance.

55. I am a senior patent attorney. Currently my choice of carriers is limited and the state bar program does not cover PTC- patent, trademark and copyright lawyers. I DO NOT do litigation, only transactional work. What is being proposed to cover us at a reasonable cost. State bureaucracies just tend to bloat with administrators to the detriment of the members. Look at education for example. This drives up costs. Another issue to be considered, is the ability to get insurance at a lower rate for folks who only want to work part time, say 2 or 3 days a week after a certain age. Paying for full time insurance when your work hours and thus income are limited, is extremely costly.

56. I appreciate that your concern is to protect the public. It is undoubtedly necessary to ensure that any wrong committed by an attorney be properly redressed. I would suggest that you approach this issue with great caution, though, in the option that you select to achieve this purpose. Your intentions to protect the public could ultimately backfire and damage the ones who are also there to protect the public, the attorneys. It is expensive to be an ethical attorney in California. It is also time consuming. I have practiced over 32 years here, and find myself working more each year on compliance issues, and paying more each year to be in compliance, than ever before. One of the options proposed, fixed premiums and fixed limits, will harm many attorneys, including me. There is no way to avoid harm to many in the profession by having us pay in essence a portion of the malpractice insurance of others. Today malpractice insurance costs are based on the individual and his/her/their practice. By establishing a fixed premium, those who control their costs now by controlling their errors and practicing in an area of the law that is deemed less riddled by malpractice claims, will witness their premiums skyrocket and their coverage plummet. We will pay for those, who by their own choice as to area of the law and manner of practice, engage in more expensive/more malpractice likely fields and habits. Moreover, those of us who control our costs and are vigilant about how we practice will see our coverage capped/limited. We will incur more costs, over and above the simple jump in premium, as we scramble to obtain excess limit coverage. I truly believe that your motives are noble for the public, but they should be equally so for the practitioners. You will cause many persons great financial hardship by lumping us together in a 'one premium" state. At some point, it is simply too painful to exercise one's profession in California. We could exceed that threshold here. Forgive me for asking, but I really need to know, when was the last time that persons making choices like these really worked as a sole practitioner or small law firm lawyer? I invite you to sit in my office with me and deal on a daily basis with what I do. Perhaps then you would see that most of us in this profession are not millionaires but real persons too who struggle to pay everyone else first and pay ourselves last. I am tired of finding myself working for everyone else, fighting for everyone else and then having to fight for myself with the very agency who is supposed to me on OUR SIDE TOO. Think of the lawyers when you make this decision. It is time to think about us.

57. It's not broke so don't try to fix it. Why this move to change the status quo and throw everyone into a pool? Find some way to deal with those who don't carry insurance. We already have a B&P code requiring we disclose if we carry insurance in our agreements. That is more than enough. Low risk practice areas (like criminal or juvenile) get lower premiums, as they should. Changing the playing field will probably change that. Why do it? Saying I can purchase an excess policy just makes my life more complicated and costly. Are we servicing lawyers, or panning for some optics for proponent's

political ambition?

58. I absolutely oppose the "captive insurance fund model." as an attorney practicing for almost 40 years, i want to continue to be able to choose the best insurance provider and best coverage for me and my practice. The open competitive market is essential to ensure that each and every attorney can get the insurance best suited to her or him. I support requiring attorneys to disclose to their clients (and get written client acknowledgment in the fee agreement) whether or not the attorney has malpractice insurance. I oppose any requirement that attorneys publicly disclose whether or not they carry malpractice insurance, whether published by the state bar or in advertisements, websites, and "all written communication with clients". I believe publishing the insured status of each and every attorney and the amounts of coverage will put attorneys at risk of predators seeking to extort money from attorneys and to maximize the amount they can recover, based on the insurance coverage. I believe an "interactive self-assessment" would only be useful if provided to attorneys to be used on a voluntary, optional, and confidential basis. And while i believe that malpractice insurance is a good thing (for me), i also believe that the state bar needs to recognize that many attorneys have very limited income and lots of expenses. Many attorneys maintain their active status, but do not practice law, and so malpractice insurance is not appropriate for them. I believe the decision to carry malpractice insurance is and should be made by each attorney based on her or his needs, income and assets, and type of law practice.

59. I am a solo practitioner. I have a very limited practice, representing a few clients, mostly employees or former employees, in employment claims, on a contingent fee basis.

As of October, 2018, my practice has generated less than \$10,000.00 in income this year. I am hopeful that some cases settle before the end of the year, but there are no guarantees.

I am very concerned about malpractice premiums, since the private insurance companies are charging premiums that my practice does not support.

I have been in practice since 1980, and have had one malpractice claim against me. It was baseless, and the experience that I had with poor representation by my own malpractice attorneys, and being coerced into agreeing to a settlement, left me knowing that I could do a better job representing myself without insurance. I also believe that if I did not have insurance, I would not have been sued. (I have had fee disputes, which were small claims jurisdiction, and which I resolved amicably). I have had clients complain to the state bar who found no basis for discipline. (sometimes I have helped crazy people, it comes with the territory).

I particularly manage my practice to represent a few individuals so I can devote attention to their problems and handle their matters competently. If the matter is out of my area of expertise, I refer the client to an expert.

I am concerned that a mandatory malpractice insurance requirement would require me to spend more money for malpractice insurance than is either more than I can afford to spend, or results in an unwarranted expense verses benefit- both to myself and to my clients. I am not in a position to pay insurance premiums to subsidize malpractice insurance for other attorneys. I had malpractice insurance in the 1980's when I was taking referrals from the OCBA LRS, but this was a very low cost insurance.

I am concerned that, unlike car insurance, there will not be a variety of policies to choose from with a basic, affordable, minimal coverage policy being offered. I do not need \$5,000,000 in coverage. I am concerned that having insurance coverage will paint a target on my back as any client or former client with a grievance, or an attorney that they contact, will be encouraged to sue me because there is insurance. This happened to me once before. So, in response to the request for input, I would say:

1. Amending rules requiring attorneys to disclose to clients that they do not carry legal malpractice

insurance. My retainer agreement discloses that I do not have malpractice insurance. I do not oppose privately reporting to the State Bar that I do not carry insurance or reporting that I do, the amount of coverage and the insurance company. But not for public disclosure. I do not oppose having the client sign the disclosure of non insurance in the retainer, since I already do that. I do not oppose a "no change" to the current rules.

2. Mandating legal malpractice insurance for attorneys as a condition of licensing, except for in-house counsel and government attorneys. I oppose a mandatory insurance as a condition of practice. I oppose excepting in house and government attorneys, because their premiums would subsidize and lower the overall cost of insurance for everyone. If mandatory insurance is required, I support having a low premium state sponsored insurance program. I am against a mandatory insurance requirement except as already required by statute. If the firm is so big that it is a limited liability entity, it needs to have insurance.

3. Developing a Continuing Legal Education or Practice Management program that provides an interactive self assessment of law practice operations in an effort to examine legal malpractice liability. I am in favor of providing the self assessment as an optional tool. We already have MCLE in this area. This should be covered by the specialty requirements in Ethics and Law practice.

4. Promoting the voluntary purchase of insurance by:- I am in favor of educating attorneys about insurance benefits. I am opposed to educating the public about "the significance of an attorney not having effective coverage..." because this does not serve a public benefit. Corporate clients have the biggest potential claims and will have attorneys who already know about coverage issues. The real concern here is to educate the public about disciplined attorneys, or attorneys who have had significant malpractice claims against them. The real concern is for the Bar to get rid of the bad eggs, not engage in a fear campaign that focuses on telling the public that an attorney is bad because they do not have insurance.

60. I think the idea is a costly intrusion on how many attorneys operate. it will be a significant financial burden on small and solo practitioners, especially on minorities and young people. Large firms will be able to accommodate such a requirement easily, but not solo attorneys. Is CALBAR trying to pick "winners and losers" and shape the practice of law centrally, rather than let the consumer market decide? Don't please.

61. I practice primarily in the area of criminal defense and operate a sole practice. I handle all of my work myself and do not hire any employees or sub-contractors. While I understand the need for E & O Insurance coverage in various other areas of the legal profession, it would be unnecessarily burdensome for my practice. Perhaps for those practitioners engaged in a high volume practice requiring additional staff, or engaged in high risk areas of their practice in personal injury, wills and estate planning, taxation, family law, and others, I would presume those individuals already have in place a policy of coverage.

Any mandatory imposition of E & O coverage is not necessary in my opinion. I have always included a statement of full disclosure in all of my retainer agreements that I do not carry any malpractice Insurance as required by the State Bar of California. My thought is that disclosure is sufficient to protect the public if they are going to make a decision on legal representation based on carrying, or not carrying, any E & O coverage.

62. I think mandated malpractice insurance is a great idea.

I have two caveats:

1. There should be insurance one can obtain at a very reasonable rate per matter for those of us who only practice infrequently and don't have the financial resources to carry it full time. Also a State Bar program (like Medi-Cal for medical) should be available for those under a certain level of income.

2. There must be a better way to litigate malpractice cases which almost never see the light because a)

most lawyers don't want to go against their brethren and b) the decider of fact is usually a lawyer or former lawyer.

I have a website that enables consumers to locate contingency fee practitioners for their litigation matters and almost all of the people who have had a legal malpractice area on my site and those that I know in person have either not been able to find counsel to represent them or have lost cases that are otherwise very legally sound.

Thanks for leading the State Bar to programs that are so necessary for the protection of both our profession and the consumers we protect!

63. I would oppose the state (or bar) run insurance program.

64. All active California State Bar attorneys should be required to (a) carry E&O insurance, or (b) post a bond in this regard. Further, I believe a statement confirming this coverage or bond should be required in all fee contracts. For obvious reasons, E&O coverage benefits both the attorney and the client. An additional benefit to attorneys and clients is that E&O carriers periodically provide articles about practice risk, and offer continuing legal education, sometimes coupled with premium reduction.

I realize that there may be attorneys who perceive they cannot afford the cost of E&O coverage or a bond, but, then they probably shouldn't be offering legal services. The ABA, State Bar, County Bar Associations, and the like, already negotiate with E&O carriers for favorable group rates. E&O coverage language to be included in fee contracts has been available for years.

65. I am writing to you to express my opinion on the above referenced topic. My opinion does not cover the subject matter at large, but rather addresses the parameters of the breath of the potential new requirement. I believe that any new rule must take into account the particular practice of those to which it applies. For example, I spent the majority of my 35+ career as a General Counsel to both privately held and publicly traded entities. I never acquired malpractice insurance and always was covered by each entities' E&O instance policies. Requiring an in-house attorney to obtain insurance, or for that matter, any attorney whose practice is limited to a small number of clients, would create an undue hardship on them. Currently, my practice is limited to advise on solely commercial matters for my own affairs and those of my friends and family. I rarely charge for my time. A lot of my friends are of a similar status. Which brings me to my second point- there should be a minimum revenue number in place under which no mandatory insurance would be required. The financial burden of imposing the mandatory insurance requirements on small practitioners would be wholly impractical.

66. Do not believe insurance should be required for attorneys who want to keep a license to help family and friends and provide free and/or inexpensive services to seniors (like free Healthcare Directives). One shoe does not fit all. The license and required classwork already comes out of my pocket -- insurance would just be another expense for me and a gift to the insurance company.

67. My entire practice, and those of many people with whom I work, consists of court appointed cases. Risk of malpractice suits is low and we (San Francisco Juvenile Dependency Panel) are required to be insured. My coverage is provided by Lawyer's Mutual Insurance for court appointed cases only and is relatively inexpensive. As the State Bar may be aware, juvenile law is not a particularly lucrative practice. I am glad that I am insured and would not practice without E/O coverage, but I fear a statewide requirement and the possible creation of a captive fund would make insurance unaffordable for me.

68. I have only done pro bono work some time. I am now retired but desire to keep my license active. I follow the current notice rule to pro bono clients by putting the required notice in writing. Now I only represent myself and family. I am for all intents and purposes retired. I worked hard to become a lawyer. I want to continue to say I have a license. This requirement would be unaffordable for me and unfair. It would also chill those of us who do pro bono work on occasion and hurt the public at large. This really upsets me as I even pay my pro bono client costs. Leave the rule as is. This only serves to enrich the insurance agencies.



69. There must be compelling evidence that insurance is needed before it is made mandatory. Whether an attorney has insurance should not be accessible to the public except at the election of the attorney. A captive insurance fund model should be rejected, but I would have no objection to the State Bar creating a fund to compete with insurance companies. I favor the Bar developing an education program for self-assessment, but only if doing the assessment counted toward filling MCLE requirements. I would reject any program to subsidize any attorney's premiums.
70. I strenuously oppose requiring Malpractice Insurance. I support advising potential clients that an attorney does or does not have Malpractice Insurance in the Engagement Agreement, which is currently suggested.
71. 1. Malpractice should be required or provided by the bar with the dues.  
 2. Lawyers should be able to buy on the open market.  
 3. Any lawyer that does not buy on the open market should be surcharged dues to pay for a minimum policy.  
 4. Lawyers who currently have companies and policies should be allowed to keep them.  
 5. Lawyers who refuse to get policies should not be fined but should be provided malpractice from an insured or organized state bar fund.  
 6. Should clients be able to waive malpractice insurance and hire lawyers they know are un covered???  
 7. Special coverage should be provided to solo lawyers and senior lawyers or others with limited practices.
72. Comment to 1.a.i. and 1.a.ii. - This will set a precedent to further expand the Bar's reach into areas that have little to do with a lawyer's competence or morality. Severity of Option - Moderate.  
 Comment to 1.b. - This will require longer retainer agreements. Severity of Option - Low.  
 Comment to 1.c. - This will require boiler plate language on all attorney letter head, emails and fax cover pages, etc. that reflects the language needed to comply. Severity of Option - Low.  
 Comment to 1.d. - This is the best option, in my opinion. Options 1.a., 1.b. and 1.c. all admirably seek to expand awareness of whether an attorney has coverage. However, to require an attorney to report the existence or nonexistence of coverage to the bar, so the bar can then make that information public seems like an effort to shame lawyers who do not have insurance. That can have a chilling effect on a lawyer's practice, while having very little to do with the attorney's competence or morality. There are a variety of sound reasons not to purchase coverage (e.g., the attorney has little exposure to liability, the attorney is unable to afford coverage, the attorney is able to pay his or her defense costs without coverage, etc.)  
 Comment to Option 2. This is a terrible option. I have coverage but only by choice. Taking away the choice (for reasons that have nothing to do with the lawyer's competence or morality, etc.) is a dangerous precedent. I note that the US Supreme Court struck down the mandatory insurance provision in Obama Care, and instead interpreted that provision to state a tax penalty could be applied for non-coverage. I'm not promoting penalties for non-coverage here, but I was pleased with the Court's decision because it meant the government could not compel people to purchase insurance. It could only tax them for not purchasing insurance. Severity of Option - High.  
 Alternative - reward attorneys who have malpractice insurance by lowering their bar dues :)  
 Comment to Option 2.a. - This will likely drive up insurance costs and create the opportunity for monopolies and price fixing. Severity of Option - High.  
 Comment to Option 2.b. - This will probably increase bar dues. It's a bad idea if it does because you're then compelling attorneys to subsidize a market. If this option does not increase bar dues or add fees or expenses for attorneys, it would seem more reasonable. Severity of Option - Unknown because it depends on how the market is funded.  
 Comment to Option 2.c. - Best idea because it avoids the issues raised in the comments above. 2  
 Comment to Option 3 - More CLE? The ethics CLEs can cover insurance issues like how to avoid liability in the first place. Severity of Option - Low, but it would create more and more costs for CLE.  
 Comment to 3.a. - I would expect most self-assessment results to be skewed.  
 Comment to 3.b. - same as 3.a.

Comment to 3.c. - Ok.

Comment to Option 4 - Ok.

Thank you for providing an opportunity to provide these comments and for considering them. Thank you, also, for your efforts to improve the Bar in meaningful, cost effective ways.

73. I oppose this change.
1. For many low risk areas of practice, e.g. criminal, immigration, and other defense practices, there will be a significant spike in premiums.
  2. Because limits will be capped to produce an affordable rate (the impetus is to insure attorneys who presently have no insurance), attorneys seeking higher limits will have to increase their limits via an excess insurance carrier. Historically we have seen that whenever a primary carrier denies higher limits and excess must be purchased, the resulting premium is significantly higher than if the primary insurer provided the higher limits. So for this group of attorneys it also quite likely that premiums will increase.
  3. A more subtle issue arises because of the issuance of a single policy. In the current open market there are many policies that offer different levels of coverage, ranging from coverage for disciplinary proceedings, payment of all or substantial defense costs incurred, and a dozen or so more coverage features. The new plan will most likely have a single coverage for all because there is a single premium.
74. I support the requirement to for private attorneys to have legal malpractice insurance as a condition of active membership in the State Bar of California. This was previously not my position. As a former member of the Board of Trustees, I recall a board meeting more than 10 years ago in Anaheim when Shelly Sloan was State Bar President. The proposal to make legal malpractice insurance mandatory was on the agenda. I voted against the proposal. The trustee vote was tied. President Sloan broke the tie by voting against the proposal. The arguments pro and con haven't changed much except that the need for greater public protection now justifies an affirmative vote.
75. I am amazed that professional liability coverage has not been a requirement in California. I believe it absolutely should be necessary to obtain. The devil often resides in the detail, though, so there need to be published limits of coverage, and competition among underwriters.
76. I am opposed to mandatory malpractice insurance. I think it is important to the public that attorneys have malpractice insurance but the practice of law just seems to get more complicated by the day. Adding mandatory malpractice insurance is only another complication.
77. I understand that the CA state bar is considering mandatory malpractice insurance. My specific concerns include the following:
1. Malpractice insurance is not regulated in the way that auto and home-owners insurance are regulated.
  2. Malpractice insurance carriers do not have price controls, cost controls, liability range/limit controls – in the way that auto and home-owners insurance do.
  3. Malpractice insurance carriers can reject anyone — without concern about complaints re discrimination, redlining, disparate treatment of different classes of attorney customers.
  4. The underwriting pool of the entire insurance industry is facing economically perilous times due to extreme weather events, increased projections about floods, fires, and other natural disasters (lumped under the umbrella of climate change). There are serious concerns that the overall insurance model will not work going forward. The underwriting pool for malpractice insurance is ultimately the underwriting pool for the entire insurance industry.
  5. Costs/fees will escalate if insurance is mandatory, not decrease, because we attorneys will be a captive pool of clients duty bound to them without any duties owed us collectively or individually.
  6. The legal industry may change in the near future and lawyers in certain legal specialties may face economic downturns (if only due to the court changes and conservative bending in certain areas). Contingency fee attorneys will face economic constraints that lawyers working for corporations do not face.
  7. Huge organizations, including large law firms, self-insure and so they will not be a source for pooling insurance costs (and lowering overall costs for individual attorneys).

8. Requiring malpractice insurance will not stop individual attorneys from stealing, lying, or intentionally committing other malfeasance.

78. I support the requirement of attorneys carrying malpractice insurance. I pay for it and tell my clients. The playing field should be level, and there should be a minimum requirement just as there is for auto insurance.

79. I oppose this proposal.

There will be a spike in premiums for attorneys practicing in lower risk areas. Attorneys will be forced to obtain separate excess insurance for the amount above the new low mandatory limits. Old policies gave attorneys choices regarding special policy features including whether or not discipline is covered and whether or not defense costs are covered but this new coverage will be one size fits all. **FINALLY, IF AN ATTORNEY HAS A GOOD RECORD (ie NO CLAIMS OR VERY FEW CLAIMS) WITH HIS CURRENT MALPRACTICE CARRIER THAT RECORD WILL BE LOST IF HE OR SHE IS FORCED TO START OVER AGAIN WITH THE NEW PROGRAM.**

80. I would welcome mandatory insurance so long as the State Bar guarantees coverage availability at a reasonable cost. My firm has been abused by more than one carrier over the years. Recently, my carrier for more than 10 years (claim free) recommended that I agree to a policy limit settlement and afterwards promptly cancelled my insurance. The claim was utterly frivolous (as reflected in a subsequent order against the former client). At renewal, I had to resort to a policy with less coverage and higher premiums. I could not obtain a \$1M policy limit which resulted in the dissolution of my LLP (which requires \$1M). I now have a \$1M policy (with an annual premium of \$16,800 for 2 lawyers). However, because I could not get retroactive coverage on my new policy and did not purchase tail coverage on my old policy, I had no coverage for a recent claim that fell within the gap period (equal to the statute of limitations). Ironically (or maybe not), when I produced in discovery the coverage declination letters from both carriers, plaintiff's counsel decided to drop the lawsuit for a "walk away" settlement (of course, I could not thereafter collect my earned fees).

I wonder if disclosure of coverage limits would have yielded the same result? I think the moral to the story is this: If you buy insurance and disclose the coverage limits, surely the plaintiff's bar will come... The higher the limit the more ferocious they will be. I am all for protection of the public, but a little protection for the lawyers would be appreciated. Most, if not every claim I have ever had, emanates from my efforts to collect fees that are due and payable from the client. Literally, these are "shake-down" suits designed to avoid payment of earned fees. In my twenty years of practice, no client has ever obtained a judgment against me or my firm for legal malpractice. Perhaps it is also ironic that my current policy excludes coverage for any claim against me that is preceded by an action to collect fees. Any mandatory insurance required by the bar, should not carry an exclusion arising out of a fee arbitration or collection suit for earned fees.

Please note that my comments reflect my own real-world experience. They do not necessarily reflect the position of my subordinate employed lawyers.

81. I have served a low income and indigent community as a private practice lawyer in my "retirement" years. I by no means had money to pay for legal malpractice insurance for most of the last 5 years (maybe closer to 7-8 years). In that period of time, I would have had to not pay property taxes on my home, pay for prescriptions for my wife and I and defer maintenance to vehicles and home to the detriment of safety and value maintenance.

In that period of time I secured acquittals in criminal matters (or dismissals), have recovered personal property for ex employees of third parties that stole personal effects and business tools, saved businesses (several) from predatory wage and hour scam litigation, helped people negotiate tough situations to avoid having to file bankruptcy, did pro bono work for young couples -- to name a few things. People are broke.

In the old days we had legal clinics funded by the federal and state government. Today that burden falls on us--the working lawyers. The big boat L:A firms cap cases from our area, leaving us with the tough and smaller value cases(Civil and criminal).

I had to disclose once in a request for sanctions (which was denied) that the amount sought was greater than the balance in my business account (which was used against me by several law firms to defend a case so aggressively that I faced forcing clients due to expense payment concerns).

Without MANDATORY pro bono with the big firms in areas like the Inland Empire by the firms that take so much from the market and heavily discounted rate indexed for low income practices (or certainly those years when income is regrettably so low), access to representation would be a new problem.

82. I am a criminal defense attorney. In my 48 years of law practice, I have not been sued by any client. I do not believe that malpractice insurance is appropriate and/or necessary for a criminal defense attorney.

When the People of the State of California file a criminal Complaint, Information and/or Indictment, they have to satisfy statutory provisions of "probable cause" for misdemeanors and/or felonies. And, in most cases, they believe they have sufficient evidence to prove guilt beyond a reasonable doubt.

It is my understanding of current case law that for a criminal defendant to successfully proceed with a claim of malpractice, negligent or otherwise, against their criminal defense attorney, they would first have to obtain the authorization to pursue any such claim from a Superior Court of jurisdiction . . . in a pre-filing petition of some sort.

In order for them to so commence an action against their criminal defense attorney, a client who pled or was found guilty would have to first submit proof in a pre-filing petition that they were in fact innocent of the charge(s) for which there was a judgment of guilty.

83. I currently maintain E&O Insurance and have been covered by Insurance throughout my career since 1981 to the present. I disclose this in my Retainer Agreement as required. I am not interested in then Bar mandating anything further, as all it will do is raise insurance costs for all responsible practitioners. The Bar needs a balanced approach as now exists and no change to the existing status quo is needed.
84. I wrote to President Obama about the flaws in the ACA. You are about to do the same thing. Mandatory Legal Malpractice Insurance for all lawyers will drive new attorneys and small law offices out of business. Like the ACA, you cannot mix lawyers that have prior claims experience with lawyers that have no prior claims experiences as an insurance company cannot set a proper premium. If you look to California Fair Plan and understand how it sets rates then you could be on the right path. The real issue is that it has to be mandatory that attorneys put in their contracts that they do not carry malpractice insurance and cannot collect a fee as a result even if successful in handling the particular case. That way the client makes the choice. Insurance companies will run amok if you pass this law.
85. My question is: Why would malpractice insurance not be required? Insurance is required as a condition to drive in the State of California in order to protect those to whom we owe an arguably lesser duty than we do to our clients who have sought us out for representation and protection. It is only common sense that at the very least some minimal malpractice insurance requirements should be established, perhaps based upon a sliding scale according to area of practice.
86. I have had insurance my entire career but it is a terrible idea. What should happen is clients must sign a form stating the attorney does not have insurance and highlight it in fee agreement. Requiring anything is not a free market solution. It sounds more akin to govt interference.
87. If the state bar imposes mandatory insurance, I would request there be an opt out upon ATTORNEY declaration of available assets beyond minimum insurance limits required. I've been practicing over 50 years. 99% of my practice is voluntary charity work or legal work representing an entity that I am the

owner. Mandatory insurance would be a waste of money for me and offer no protection to the public.

88. I do NOT believe there should be a requirement to have legal malpractice insurance. If one practices personal injury, then the only real concern for an attorney in this field is failing to file a lawsuit timely. If a law firm has a case management system which maintains statutes limitations, then the risk of failing to file timely is minimal. In turn, the risk of being sued is virtually zero. The rates for malpractice insurance are outrageous and small law firms who maintain a case management system should not have to be burdened with an insurance premium of \$8,000 or more per year.

Perhaps, this requirement for insurance would be necessary in the event a firm or attorney has been sued within the last 10 years. It appears there are other practice areas that pose a greater risk of malpractice, such as tax, estate planning, etc... and perhaps these firms should be subject to mandatory malpractice insurance. Perhaps an investigation should be performed by the State Bar to see who has been sued for malpractice, how long that attorney has been practicing, and the area of law the alleged offending attorney engaged in. This would give the state bar an idea as to which areas of practice run the greatest risk before requiring EVERY attorney, regardless of area of practice, to have mandatory insurance.

89. My response to the State Bar's proposal for 'statutorily mandated malpractice insurance' is a firm 'no thank you'. It isn't needed, nor justifiable.

Speaking politically, this mandate would be the much sought after golden goose to the E&O insurance carriers, who are likely the driving force promoting and funding it from behind the scenes. It would force probably tens of thousands of CA attorneys to buy insurance they have never had and never needed. Quite a windfall to the carriers!

Speaking personally, I have spent about 40 years in mostly solo private criminal and civil litigation practice, without malpractice insurance or a claim. A conservative estimate of the premiums I would have paid over that claim free time is probably at least \$150,000. I am certain the majority of attorneys have similar experience.

As to '*protecting the public*' as justification for such a mandate, the public didn't need protection from me or the numerous other claim free attorneys. Why on earth should the Bar financially penalize the overwhelming majority of attorneys, instead of dealing with the few who commit malpractice? If the Bar could somehow demonstrate that a majority of attorneys have claims, and they are all uninsured, then maybe a mandate on all attorneys would be more justifiable.

To try to justify the Bar's proposal, as evidence, it needs to publish the statistics on % of attorneys with claims, and % of that group that are uninsured.

The bottom line is that those attorneys who know they need to protect themselves with insurance, for various reasons, probably already have it, and don't need a 'Mandate'. Neither do the claim free rest of us.

Alternative to an overreaching mandate:

Those with provable damage claims against uncovered attorneys could be handled by a dedicated client recovery fund, even if that meant a small increase in general dues. Attorney discipline with probationary restitution to the fund could follow any such payout from the fund.

Word to the wise: The more the Bar bureaucracy strives to become an strident enforcement arm of a prosecutor's office, and an overtly political activist agency, instead of a professional and supportive guild, the less support it has from attorneys, and the more antipathy.

90. First, some background. I've been licensed in California since 1985. Since 1994, I've been a solo practitioner and have always maintained malpractice insurance. I pay between \$4,000 and \$5,000

annually for insurance. My deductible is \$5,000. Over the past 25 years, I've paid roughly \$120,000 in insurance premiums. I've had one claim brought against me. It was frivolous and settled without trial. I paid the deductible.

In retrospect, I would have saved over \$100,000 had I chosen not to self-insure over the past 25 years. But I'm conservative by nature and risk averse, so I've always elected to be insured. This should remain my choice. This is something I'm required to disclose and do disclose to all clients. Does it matter to them? I don't know. No client has ever asked or commented about that issue at the time of formation of the attorney-client relationship.

I also don't think insurance should be mandated. It should remain elective. Unlike driving an automobile, retaining legal counsel is not inherently risky. Clients should do their homework, obtain referrals and perform due diligence when hiring counsel. If insurance matters, they may inquire and make a choice based on the answer. It's a free market and should remain so.

If there is mandatory insurance, it should be implemented in a way that drives premiums down, not up, based on higher demand for insurance. This only will happen if there's no artificial interference in a free market such as a mandatory minimum.

Any government mandate regarding the amount of insurance or other regulation will only drive up premiums. This will hurt solo practitioners like me and our clients. If the cost of insurance goes up, so will our fees. We will pass this cost onto the consumer like any other business, making legal representation even less affordable than it is now.

For these reasons, I say "NO" to mandatory insurance or further regulation of lawyers. This proposal is a bad idea. Let the free market reign.

91. Would be interested in mandatory malpractice insurance, ONLY if offered at a more affordable rate. Now it is too high!!

92. In regards to the mandatory insurance for attorneys initiative, I must provide your with my strongest objection to this plan.

To require an attorney to pay a minimum rate and get less covered is absolutely absurd. Part of my practice is criminal law. I would be paying 3x the amount I am now and getting 80% less coverage than I currently have.

For a client to allege I have committed malpractice in a criminal case, they must prove their factual innocence. This standard is extremely high and honestly, except for about 2-3 of my clients over my 20+ year career, not one of them was factually innocent.

As for requiring members to report to the state bar that they have insurance is no big deal to me. I have and will always comply with the law the required disclosure in my retainer agreement of whether or not I have malpractice insurance.

Why would any attorney want to pay more for less? I am not in the business of subsidizing other attorneys and their practices due to multiple claims. People are free to choose any attorney they want and in my 20+ years of practice I have never had a client ask me or comment upon the fact that I do or do not have malpractice insurance.

I do not see or understand how this helps or protects the public in anyway. All I see is a money grab.

93. So long as the mandate to have this insurance does not drive up my rates, I'm all for it. But if this requirement limits members to only one insurance company - it will drive rates up due to the lack of

competition and I am against it.

94. I am opposed to any required minimum insurance policy via a captive fund. I maintain insurance in excess of your required minimums and an excess coverage policy would be much more expensive. Plus my coverage is for more than what you would cover. I want to be able to shop for the best coverage at the best price. Also, for attorney's who have coverage in excess of your minimum requirements should not have any further duties.

95. Briefly, I strongly oppose mandating attorneys to carry malpractice insurance. However, I also strongly agree with the disclosure requirements currently under consideration.

Full disclosure lets a potential client know, thus giving the client the option. That provides sufficient protection.

However mandating the insurance has some very dire consequences.

As I am sure you are aware insurance premiums, even for the most modest policy, are astronomically high, and even higher if you are fresh out of law school and starting a new practice. Hence, just one of the dire consequences are new law school grads.

As you may also know that new hires by the traditional law firms, who also provide the insurance, is way down, and that is even among graduates from the ABA schools. The lower hire rates has caused many new grads to strike out on their own at first. This situation is even more exasperated in California, because of the numerous State Bar accredited, but non-ABA schools graduating students, most of whom wouldn't even be granted an interview with a traditional firm.

First starting out, trying to get clients, get an office, pay business and case related bills, and where many are now paying back student loans, is very difficult already. Adding a tremendous burden of requiring malpractice insurance would make it impossible for anyone starting out from making it. I know this all too well from my own experience and of my classmates who graduated from the Santa Barbara College of Law almost twenty years ago. A couple of us got jobs with County Counsel or the DA, but the bulk were never picked up by a traditional firm and either had to go solo or join a very small non-traditional firm. If any of us in the latter category were required to pay for malpractice insurance, none of us could have made it.

The burden of the insurance cost would have been too great to overcome, and forced many of us to leave the practice of law. That would have been tragic in light of the 3 and a half years of intense work, the high cost of law school, and then the intensity (and additional costs) of passing the Bar, all thrown away because they could not also make the added expense of insurance.

Simply, that would be unfair. Whereas, the proposed disclosure requirements to the public protects the consumer, allows the consumer to make a choice, and does not impose an impossible burden upon an attorney.

As I mentioned above, that is just one of the consequences. There are others as well, for example the increase cost of doing business would have to be passed along to the consumer, which would have its own multiple set of negative consequences.

96. This is a terrible idea and I am completely opposed to any model using a captive insurance fund or its equivalent. I want to continue to be able to choose the best insurance on an open, competitive market.

97. Since 1988, California has had an elected insurance commissioner.

This entire process usurps the legal authority entrusted by the People to the State's Insurance commissioner to develop suitable regulations to protect the public against predatory and unfair business

practices - including the unsavory and thoroughly corrupt legalise propagated by the Racketeering State Bar. We need to work at all levels of society to protect the public and enforce the spirit of the law, not exploit it.

If the State's Insurance Commissioner as a representative of the People felt the People need protection against predatory and uninsured litigators, then the California Department of Insurance and Dept. of Professional Licensing should take the lead in developing suitable regulations for disclosure, and Lawyers should not be a special case of professional licensing. What about uninsured structural engineers? Hair Braiders? Funeral Parlor Attendants? Roman Catholic Social Workers? Native Artifact Museum Conservators? Tax Preparers? There is no similar disclosure requirement for them even though professional Liability insurance is not mandatory. In addition, the Little Hoover Commission has made recommendations against this type of corny capitalism in its report on Professional Licensing, and this regulation works against the recommendations of the official nonpartisan body working in the interest of good government and the findings of a special presidential Commission of the Obama Administration.

The total impact of this type of self-serving and toxic act is to further raise the bar to Judicial access in civil courts as additional insurance overhead gets compounded into billable hours, reserving them for the Power Elite who can afford to pay to play, just like the massive fraud of so called "terrorism" exclusion riders, which is a troll tax for the bad acts of the Federal Government. The Judicial Council and State Bar has time and time again proven its inability to police itself. The Legal Profession should not be allowed to self-govern: it needs third party and truly independent oversight - the oversight provided by an elected official such as the Insurance Commissioner. I would go further than third party accountability and urge the wholesale reconstitution of the State Bar itself, as was done in the State of Washington when that state's bar fell to a RICO indictment. Consider these regulations and Overt Act of a Corrupt Enterprise.

These regulations are another form of self-serving "gotcha" disclosure sign laws. We might as well tattoo Proposition 65 warnings on the silver tongued Hastings Esquires teething on their Californian Golden Spoons.

98. I AM AGAINST MANDATORY MALPRACTICE INSURANCE THRU THE STATE BAR.

99. I would request that the bar set this matter for a public hearing in Los Angeles and all other major cities in CA so that we can attend and listen to the pro's and con's of all the proposals. this is a very important matter to all concerned and i have not seen any studies of the various proposals nor a comparison analysis of how any of these proposals work in other states. this matter requires study and public hearings.

100. I am a sole practitioner and have always elected to be insured with higher than average limits. I choose to protect my personal assets. However, I do not believe that State Bar mandated insurance coverage is appropriate.

There are currently many options for malpractice insurance coverage, not just the limits of liability, but tail coverage, whether to have coverage for disciplinary proceedings, payment of defense costs, amount of deductible, prior acts coverage, and other options.

If the State Bar requires us to buy from it or a captive run for the benefit of the State Bar or an insurance company licensees are required to use or some other entity created for insurance issuance which licensees are required to use, what happens to our options? How will premiums be determined? What about the options mentioned above?

While requiring licensed lawyers to be insured and providing an option for low cost insurance to lawyers who cannot afford or wish to lower their premium sounds fine, unless it is an OPTION, it will



result in many lawyers NOT being able to renew licenses because even a lower cost option may be too expensive for the part-time attorney or sole practitioner. Thus, the State Bar will be preventing some attorneys from practicing. This does not seem right.

IF the State Bar is going to make malpractice insurance a requirement of licensing, then there should be an OPEN MARKET by private insurance companies as it currently exists so that lawyers can find the correct pricing and coverage. The insurance market will respond to the need for low cost malpractice insurance without driving attorneys out of business.

Government is not the best avenue for oversight. The State Bar should be concentrating on on its current administration issues, not adding this HUGE additional administrative expense and what will most likely lead to additional fee hikes for license dues each year.

As it stands now, if an attorney is not insured, disclosure must be made in the written fee agreement with the client. Let the client make the decision.

Let the insurance experts continue to provide the insurance to those who choose to be protected with insurance tailored to the particular needs of the attorney/firm. Or, have uninsured attorneys post a bond as is required for auto insurance.

101 I am OK with mandating a minimum amount of malpractice insurance as long as there is recognition that a bigger pool of insureds means more \$ for the carriers, so there are mechanisms in place to protect lawyers from highway robbery premiums. I support requiring lawyers to disclose in writing and in marketing materials (e.g., web sites) whether they do or do not have malpractice, and requiring client fee agreements to disclose coverage levels and allow clients the right to confirm continuing coverage upon request. Where this gets dicey, is setting any minimum coverage level, because risks are vastly different for different lawyers and firms depending on practice area, practice size and type of representation. The megafirms that represent Apple and Samsung in their never-ending intellectual property disputes have more raw financial exposure, but they also have a lot of internal checks and balances to reduce risk. A solo doing PI cases or family law has a lot lower raw financial exposure most of the time, but there are no backups or checks and balances in place to minimize the risk of error like there are in a larger firm. The legal industry in California, reflecting the economy of California, is huge and complex compared to a lot of other states, where one person might do a little estate planning, a little divorce work, a few dog bite cases, and a few social security disability claims.

102 Please do NOT make insurance mandatory. I am retired but keep my license active in case former clients have a question. The idea that I would either have to buy insurance in order to help them or not be able to help them because the insurance is too expensive, would not be helpful to clients.

103 As a solo practitioner and a single mother of a child with special needs, I cannot afford malpractice insurance. If California chooses to make it mandatory, I will not be able to practice law and my constitutional right to pursuit of happiness will be denied. Big law firms will hold a monopoly over the practice of law which may violate the Sherman Act. I would like an opportunity to speak on this issue further if possible. Please let me know how I can stay informed about this topic because it has the potential to impact adversely.

104 My comments are with regard to:  
F. Whether it should be mandatory that California attorneys carry legal malpractice insurance.

As a retired attorney who maintains active status, it would be an unnecessary and intolerable burden for me and others in my situation to be required to maintain malpractice insurance, and, most importantly, deprive many people of services I currently provide on a regular basis for free.

I do not offer legal services for compensation but, on a selective basis, I do provide relatively

straightforward legal services on a pro bono basis for non-profit organizations, friends, friends of friends, others in need and, of course, family members. As an affordable housing lawyer and founding chair of Chrysalis (a non-profit serving the homeless for 33 years), I have a broad array of non-profit connections and am regularly called upon to help.

If I were required to obtain legal malpractice insurance, I would be forced to go on inactive status and cease providing legal advice to anyone.

I expect that would be the most likely result for the vast majority of retired attorneys. That would be a terrible, predictable and unnecessary result.

I also expect that the same lawyers who flaunt the Bar's requirements to maintain active status while still providing legal services will continue to fail to maintain malpractice insurance. Once again, those who wish to do the right thing will be punished for doing so.

- 105 I'm of the opinion that attorneys should not be forced to carry malpractice insurance, but that if they choose not to have it, they should indicate such clearly on their Retainer Agreements and the clients should initial that section acknowledging that they understand it and are OK with it. Other than my comment above, I think that everything involving malpractice insurance should remain as is, status quo, unchanged.
- 106 NO MANDATORY MALPRACTICE!!!!!! I have been an attorney for over 25 years and have only been sued by a client once. That was 15 years ago. They did not prevail. Not in favor at all.
- 107 I am a sole practitioner Pro Bono attorney specializing in defending Tenants in the City of Los Angeles and the surrounding area. If you require Mandatory Legal Malpractice Insurance, I will no longer be able to practice law (ie, be an attorney) and my clients (ie, needy Tenants) will suffer. If you are trying to weed out bad attorneys, then encourage more clients to file complaints against their attorney and take their complaints seriously.
- 108 The requirement of legal liability insurance is an impediment to those practitioners limiting their practice and therefore their legal income in contemplation of retirement, slowing down workload, or doing more than one type of employment. It would seem fair only with graduated rates related to exposure and malpractice history. Otherwise mandatory malpractice insurance is unfair.
- 109 I am the former President of the Beverly Hills Bar, former Treasurer of the Mexican American Bar Association, former chair of the Conference of California Bar Associations, I have held numerous posts with the American Bar Association and a former officer and Trustee of the Los Angeles County Bar Association. I am writing as an individual to comment as to the ambiguous proposal of the State Bar that is presently up for comment. I wish to refer you to the excellent comments of Kenneth C. Feldman's article in the Daily Journal published on October 26, 2018. I agree with his observations, his questions and the lack of clarity as to the State Bar's posting. I would also like to remind you that this issue was raised by the State Bar back in the period of 1986 – 1988. In the end, the requirement for mandatory insurance was defeated. I and many fellow bar leaders opposed this proposal due to the following reasons:
1. There has been no factual findings as to the need for mandatory insurance.
  2. It appears to be a "gift" to insurance companies.
  3. It would have racial and economic discriminatory effect.
  4. It would have an unfair impact as to young attorneys, who are already overburdened with loans.
  5. It would have the effect that the underserved population will be getting less, not more, legal representation.
- At a minimum, the State Bar should review the numerous documents and communications that was sent to it on the very same issue about thirty years ago. The situation that was raised in opposition is just as critical and relevant then, as now.
- 110 Competition in the insurance marketplace has already produced competitive rates, rates that reward good attorneys. The concept of a captive program with a uniform rate is a subsidy to reward poor

attorneys and those without insurance. In short, it is a tax on competent attorneys who both already buy insurance and who practice good law. Give the mentioned rate of \$6,000/year, it also appears that this program could be a back-door attempt to either fund the IOLTA through excess premiums.

- 111 For 32 years, I have been practicing elder law and estate planning and probate for small estates. Except for the few years when I worked in litigation with a small firm, I have had a solo practice and never carried malpractice insurance. Most of the time, I have worked part time and I have never made a lot of money practicing law. I serve low to moderate income clients and I do not charge high fees. I feel I have been serving an under-appreciated community.

Whenever I have considered the issue, I have come to the conclusion that the cost of insurance would be prohibitive given the small amount of income. While I understand that the idea behind mandatory malpractice insurance is that it would theoretically protect the CLIENT and the INJURED PARTIES more than the attorney, the nature of estate planning is such that any “injuries” are often not discovered until many, many years after the taking of the causative legal action (e.g., the injury to heirs caused by problems in drafting of wills or trusts is not detected until the client’s death at the earliest and maybe for many decades after the drafting). Insurance for people like me would have to be maintained for my entire life with some kind of tail coverage, assuming I could even get or afford such insurance.

I urge the State Bar NOT to make legal assistance unaffordable for moderate-wealth clients by imposing requirements that would make it impossible for solo practitioners with moderate to small businesses to exist.

- 112 I strongly oppose the requirement of mandatory malpractice insurance. It's just another example that shows the State Bar is not here to serve attorneys, but to penalize them.

- 113 I commend the Working Group on its efforts to date to evaluate the attorney malpractice insurance requirements for practitioners in our state. I am a California attorney in good standing, bar number 182639. I write today in opposition to the idea of making malpractice insurance for all California attorneys mandatory (noting the current exclusion of in-house and government attorneys). Please consider the following points in your overall analysis:
- There are many California attorneys who maintain their bar credentials who are not engaged in the active practice of law, yet benefit financially from their certification status. I fall into this category as an expert in Discovery. I have worked with counsel here in California and around the world providing guidance and consultation on the application of best practices, particularly in electronic discovery. I am a frequent speaker on the subject and have provided CLE seminars addressing ethical practices consistent with our Formal Opinion 2015-193, as well as on best practices for preservation of evidence, discovery processes, etc. I am employed by a provider of services to lawyers, and adjunct to our services we explicitly perform our services with the contractual provision that we are not providing legal services but our operating under the direction and control of the counsel who contract for our services. Being a bar certified attorney provides legitimacy to my position and benefits me financially as well as hundreds of other similarly situated California attorneys. To require us to obtain malpractice insurance would impose an undue burden. And since we are not representing clients, the requirement to maintain malpractice insurance would not provide any protection to the consumer public. As a point of fact, many of the companies that employ people like me do carry errors and omissions policies, but these business would not fall under the jurisdiction of the bar generally.
  - There is another class of California attorneys who benefit from their bar certification but are not actively engaged in practice, to wit, contract attorney reviewers. This is a growing class of attorneys who work for managed document review or legal staffing organizations. They work exclusively under the direction and control of counsel, normally with a contractual disclaimer to the practice of law. Contract document review reflects a shift in the practice of law, not only here in California but across the nation. The traditional practice of (primarily first and second year) law firm attorneys performing document review at associate rates are virtually gone. They have been replaced by specialists who do document review. The attorneys performing the review vary in their motivations: control of their hours,

semi-retirement, not interested in law firm partnership, can't find other attorney work, etc. The law firms and corporations that hire these attorneys do so with the explicit understanding and disclosures that they are not engaged in the practice of law and the employing attorneys are responsible for their work product. These contract attorneys are some of the lowest paid attorneys both in California and across the globe. Importantly, their bar certification does result in a higher pay rate than those who have not passed the bar and are simply JD's. To require contract attorneys to maintain malpractice insurance would impose a significant and undue burden which might be seen as an illegal taking and would do nothing to protect the consumer public. Any malpractice adjunct to the contract attorney work product would fall upon the supervising attorney who is employed by a law firm or corporation.

· If mandatory malpractice insurance requirement, it should carve out exceptions for California attorneys in the classes described above. I suggest that there should be some statutory amount of revenue derived from the actual practice of law to mandate an insurance requirement, e.g. over \$40,000 per year. I do support a requirement to disclose to clients whether or not an attorney has malpractice insurance. I hope that my comments are helpful. I remain available to discuss them in greater detail at the board's request.

114 I generally think it is a great idea to mandate all attorneys carry professional malpractice insurance. I am one of those who bought my professional insurance policy at start of my first year of practice. It has always puzzled me how it is not mandatory and why. I am not so sure if a mandated plan to cover everyone is such a great idea however. Ironically, when it comes to Healthcare, I am an advocate of a Single Payer system, and availability of supplemental private insurance for anyone who wishes to have more than what is a basic right to good healthcare, and elective medical procedures. But, when it comes to professional malpractice for attorneys, I think it is practically a bad idea to lump all risks together in a single insuring body. There are so many different areas of law and associated risks so wide ranging and varied that it just makes no sense. In the least, I would make a plan available as a catch all for those who do not wish to buy more coverage, but would not mandate its use. In any case, I hope the outcome is one that helps all attorneys and of course the public we serve.

115 I don't believe attorneys should be required to have malpractice (or "errors and omissions") insurance in order to hold a license to practice law. This would be patently unfair to attorneys like me who practice part-time. I have practiced law for 23 years - never a complaint from a client - but these days I spend no more than 20% of my time in my law practice. I have 2 active clients, both of whom are aware I do not carry insurance. My practice is a niche transactional practice - I do no litigation. One of the ways I am able to keep my rate affordable, especially for my nonprofit client, is by not having to pay malpractice premiums. The cost of insurance would inevitably be borne by the client, thereby reducing access to affordable representation. In my case, I might even close up shop altogether (depending on the cost). If a requirement is passed, I'd request an exemption for part-time attorneys or those who have practiced for 10 or 15 years with no complaints.

116 Any quasi-governmental organization is less efficient in determining price than the free market! Econ 101

117 Wasn't aware of a problem w/legal malpractice insurance in CA or why a study group was mandated, etc. Tried to research this but only get directed to the info. about what is being proposed. Please direct me to the underlying issues, data or whatever that caused this to be a concern on the part of the legislature or State Bar. Is the public complaining? Is there empirical data suggesting better legal outcomes if all lawyers carry E&O insurance? I actually think they should, but mandating it sounds like an oppressive one size fits all approach. E.g., many law practice areas carry such a low risk of malpractice claims that carrying E&O makes little business sense. This is true in other professions as well, engineering, medicine—where arguably a mistake in even a low risk practice area can typically be more costly—and E&O is not mandated. If the goal is to insure more attorneys at a lower cost to all then fine. I don't know many attorneys who would have a problem with that. But if the mandate occurs and, e.g., the premium on my 500/500k coverage goes up even more then it won't make sense. I am not in a position, nor should I be, to underwrite those who currently choose not to carry E&O; and, I like so many am skeptical that the government can mandate market conditions without negatively disrupting

prices. Sounds like another way to unnecessarily expand the government and fill cubicles in Sacramento. Just being honest. The problem as respects quality of legal work in CA is too many borderline qualified lawyers from too many borderline qualified schools, but rather than tackle that problem head on (sigh..) the legislature/Bar gives us this sort of proposed "action."

118 Strongly oppose mandatory malpractice insurance as a requirement for licensing. Many people would like to maintain their license while not actively practicing, looking for a job, doing part time work, etc and the cost is already high between bar dues and MCLE requirements. Getting into this profession is already prohibitively expensive.

119 I do not favor the captive market plan, which would provide a minimum amount of insurance and require those of us who care to then pay and additional premium to get fuller coverage.

The amount of coverage someone carries is a personal decision, based on a variety of factors including how many clients they have, the nature/type of those clients, the nature or content of work, the length of time the attorney provides legal services, and the area of law in which the attorney practices.

The risk involves some of these same factors, along with how long the attorney has practiced, the attorney's common sense, the attorney's willingness to work hard or desire to be lazy, the ability to focus and balance work and clients and stress.

Insurance carriers and underwriters ask for pertinent information and balance these types of factors. How realistic is it to expect a single, "captive market" to do the same thing for all attorneys in the state? Doesn't CA have more attorneys than several states combined?

The attorneys I know already disclose in their fee agreements that they have malpractice insurance. Listing the amount and type doesn't contribute positively to the attorney-client relationship. Personally, going bare is a risk I am not willing to take, but it has nothing to do with my own assessment of my competence. It is because I am risk adverse.

Practicing law is a privilege, but it is already extremely expensive. If you make it more so, you will drive competent attorneys out... attorneys who are willing to do pro bono work, who care about the quality of their work, but do not work for large firms and don't charge the highest rates.

Instead of focusing on who has insurance, who doesn't, how much insurance they have, how much they should have, where they got it, whether they disclosed it to their clients &/or the public at large, why doesn't the Bar put more effort, time, and money into pursuing incompetent, unethical attorneys?

Focus on competence of the attorneys who are licensed. Push MCLE back up to 36 units every 3 years. Create practical components. Encourage mentoring instead of expensing it out of the practice of law, from the big firms down to the solos.

120 The current malpractice laws are appropriate. I currently do not carry malpractice insurance. All my fee agreements, which are signed by me and my clients, disclose my lack of malpractice insurance. I have practiced for more than 30 years and have never had a malpractice claim. For practitioners like myself, mandatory malpractice insurance would be an injustice and an unnecessary cost.

Some practice areas need more consumer protection than others. Criminal and personal injury practice areas are more risky than my areas, transactional business and real estate, for example. The malpractice laws should not be overbroad and should specifically target problem areas. It does not make sense to treat all attorneys the same irrespective of practice and risk to consumers.

Thank you for your hard work and dedication to improving our profession.

121	If E & O insurance is required, special consideration must be given to lawyers who have a limited practice, say a gross income of \$50,000 or less per year. Otherwise, the cost of insurance may force such attorneys to abandon practice, even though they may be representing socially or environmentally important non-profits at drastically reduced fees, or no fee. Disclosure to clients that the attorney has no insurance, as now, is not a problem.
122	<p>Receipt of this email from Ahern is the first I have heard of this issue.</p> <p>I have mixed feelings about mandating that attorneys purchase malpractice insurance. For myself, I am covered. I work for a firm that pays for my malpractice insurance, so its easy for me. But, I know a lot of attorneys who are sole practitioners barely getting by. If it was required that they purchase malpractice insurance, they may not be able to afford it. This might push them out of business. On the other hand, it's not fair to a client to have an attorney mess up their case and then have no recourse against the attorney because they have no insurance.</p> <p>Perhaps as a compromise attorneys could be required to disclose whether they carry malpractice insurance or not to a client. That way, at least the client would know up front if the attorney they are hiring is uninsured. Is that an option that has been considered?</p> <p>Assuming that the decision has already been made to mandate malpractice insurance, then it needs to be as affordable as possible. Not all attorneys make a large income. Mandating a policy that is more expensive than what an attorney or a firm is used to paying will put people out of business. Perhaps there could be a minimum type of coverage, similar to liability insurance for a vehicle, that is required. Many attorneys may decide to carry more than the minimum, but it would not be required to do so.</p>
123	Many solo attorneys would be put out of business. I've practiced solo for over 20 years. No problem to require disclosure, but don't mandate malpractice insurance. I would need to look for work for someone else and not be able to keep my solo practice going.
124	The current system is working fine and there is no need to change it.
125	I am retired but keep my license to practice active. I have NO need for malpractice insurance and will not purchase any.
126	I am in favor of mandatory insurance as it protects clients, but I would like to see that it is only offered through the open market. I do not wish to buy my insurance through a state program only. If the state wants to offer a program, that's fine. But I like my carrier and the services they provide so I do not want to buy my insurance through a state program. In addition, if I were forced to buy the state program, and then added insurance in the open market, it would cost me time and effort and likely complicate any malpractice suit.
127	Currently, there are many lawyers, for example, newly opened solo practitioners or newly admitted attorneys whose work volume and income is not economically make sense to purchase the malpractice insurance. However, keeping the general public from mistakes of any lawyer regardless of income or experience is also important. I noticed California Notary Public carries surety bonds just in case for such an occasion. It is extremely affordable compare to average malpractice insurance, and can be used to protect general public from lawyer's mistake. I think it is definitely another option to consider.
128	I believe that if it is decided that malpractice insurance is mandatory for all California attorneys, it should continue to be through an "open market" rather than a "state captive". California has more than 250,000 licensed attorneys with diverse areas of practice and is the largest lawyers market in the country, making this an extremely complex undertaking and thus an "apples to oranges" issue in terms of comparison with Oregon and Idaho. In addition, many firms, and especially large firms, would bear the cost of this program. Since larger firms with many lawyers carry very high limits, this would drive the cost of purchasing insurance since the large firms would need to purchase the minimum limit through the state run captive and then purchase higher/excess limits in the "open market" through an independent broker. The open market system is the only fair and affordable option for sole practitioners such as myself.

129	<p>I have been a sole practitioner since 1982 with my own law practice. I practice labor and employment law on behalf of employees, primarily. My annual gross income is less than \$100,000 in most years. The highest so far was \$390,000. That was before the tax cut for the rich. I have carried malpractice insurance, now up 1,000,000/1,000,000, and have always paid about \$5,500 with a \$10,000 deductible. In some years I must finance this cost. I have never been sued for malpractice. So far, I have paid about \$198,000 to sleep better.</p> <p>I think that for an attorney to not carry malpractice insurance is unreasonable and a danger for clients. If an attorney can truly follow through with self-insurance, that is fine with me, but I am skeptical of the enforcement of that promise. I support the proposed enforcement mechanisms with the following strict caveats:</p> <ol style="list-style-type: none"> <li>1. If low cost (like mine) malpractice insurance is not available, but insurance is a condition of being allowed to practice law, poor and middle income people will suffer, since they cannot afford high-priced hourly attorneys, and many sole practitioner contingency lawyers will go out of business.</li> <li>2. Pushing lawyers into large corporate entities or out of business is not a good idea. The pooling of lawyers in hundred lawyer or thousand lawyer firms is bad for working people and the poor. The Law in America is only served by people who can assert their rights.</li> <li>3. Government protects a few rights some of the time, and fails to protect most rights all of the time. The public, consumers, workers, elderly, children, immigrants, and insured people either have legal protection when they need it, or they suffer terribly.</li> <li>4. In many California communities the well-being of residents is of concern to only for a few, maybe only one, idealistic sole practitioner or small law firm. Capitalism has many flaws, but the historical presence of small legal firms and sole practitioners has helped shape a human face for it. The Bay Area and L.A. Basin would survive very well without the biggest ten or twenty law firms in the State, but would be much worse off without the tens of thousands of sole practitioners in those cities.</li> <li>5. Admittedly, not everyone takes good care of their clients. Not everyone carries insurance or notifies clients when they unable to do a good job. Regulation and enforcement has always been needed. But, do not put sole practitioners and small law firms out of business. There is no one to take their place.</li> <li>6. The big firms will tell you they take care of many important low fee cases. That is true as far as it goes. They take care of some. They can not be relied to take care of all, because that would be in conflict with their interest.</li> <li>7. The big firms will lobby for lower insurance cost. Remember this: the thousands of California lawyers in small firms and in sole practice bring the human touch to the law. If you think the same is true of the lawyers in the mega-firms, ask the high-paid people who quit.</li> </ol>
130	<p>I am not confident a Bar-sponsored or administered insurance program would be an improvement over the free market. I favor keeping the present free market. I am a sole practitioner and fear small offices like mine would be lost in the bureaucracy of a state-run program. An educational component to provide information to attorneys might be beneficial. The cost of doing business in California keeps rising and businesses are already starting to move out of state. I maintain insurance that satisfies the requirements of my clients, many of whom require proof of insurance as a condition of retention. We do not need another mandatory program in California.</p>
131	<p>I endorse the concept of mandatory professional liability insurance for attorneys. However, a "state captive" system is likely to drive up the cost of such policies, which currently are fairly competitive.</p>

Moreover, many ancillary benefits attach to my coverage at present including complementary risk-management information, CLE programs, and consultations with qualified defense counsel regarding potential claims. It is uncertain whether these benefits would be available under a state-run program. As a solo practitioner who is conscious of keeping overhead costs to a minimum, the prospect of higher premiums could be a factor in tipping the scales in favor of early retirement or limiting my practice to lower-risk areas than civil litigation.

132 Mandating insurance will cause a lot of solo attorneys to drop out of being a lawyer. The public now file suites which are baseless but have to be defended no matter what. I went from having \$5,000 in premiums to \$23K because of 4 baseless suits. I could not afford that and I have had to go bare when that is not what I really want. I cannot afford that type of premium. I do a lot of volunteer work for the Courts, and I would have to stop my practice and the helping of the courts.

133 I am a California attorney. I strongly believe that California attorneys must continue to have the right to purchase malpractice insurance on the open market. Accordingly, I support the Open Market Model. It would be fine for attorneys to have the option to purchase insurance from a state-run fund, but it should be an option. Thank you for your consideration.

134 I have been in practice since 1984. I have always had legal malpractice insurance except while I was briefly working in-house. I have never had an insurance company pay a claim on my behalf or retain legal counsel to defend me. The same can be said for my firm. I favor mandating legal malpractice insurance for attorneys as a condition of licensing, except for in-house counsel and government attorneys. It is unfair for some victims of malpractice to have no recourse because their lawyer was uninsured. It is unfair that I spend \$9,000 per year per lawyer in my firm to maintain insurance coverage and then compete with lawyers who do not bother to get coverage. I believe that the cost of insurance would come down if every attorney was insured. I favor the option of an insurance fund, established by statute, which would provide minimum insurance coverage for all attorneys ("Captive Insurance Fund Model"). I would elect to purchase additional coverage on the private market. I favor the option of having the Captive Fund run by an entity created expressly for this purpose. I believe that the State Bar should not have any responsibility for this function because it has demonstrated year after year that it is inept and incompetent.

135 Make it mandatory. Attorneys should have insurance. One problem might be that a cottage industry could erupt for legal compensation claims, but so be it. It would be in the best interest of the public for all practicing lawyers to have insurance. It may also reduce premiums for attorneys who currently do have insurance. It might reduce profits for carriers, but so be it. It would be in the best interest of the public for all practicing lawyers to have insurance.

136 All CA attorneys should carry a minimum level of professional malpractice insurance. There is no justifiable reason for someone not to carry this level pf protection and places CA attorney business on an even playing field.

137 Requiring malpractice insurance from attorneys would unnecessarily raise the cost of legal services, tie up the courts with more pro-se litigants, encourage frivolous litigation, and put attorneys at the mercy of insurance companies.

(A) A new admittee to the State Bar generally has debt from law school, perhaps from college, and expenses. Requiring him to purchase malpractice insurance would simply add another cost – which would be passed on to the consumer. Generally, the type of consumer hiring a new admittee has a lower income. Requiring the purchase of malpractice insurance mans that the attorney must charge more for something that does not necessarily benefit the client.

That potential client may conclude that with the attorney charging too much, she must in pro per file a complaint or respond to a lawsuit. The extra cost that pro per litigants add to the court system does not need elaboration here.

(B) A rogue client who wishes to squeeze money out of his attorney can now threaten a malpractice



lawsuit, under the impression — correct or not — that the deep-pocketed insurance company will want to settle immediately. The attorney who otherwise would not have bought malpractice insurance — preferring to pay out of pocket the legitimate claims and litigate against the frivolous ones — now faces the threat of losing insurance and his license if he does not settle.

(C) If insurance companies know that attorney must purchase insurance, then they can hold attorneys hostage to requirements unfair requirements, which the attorneys must satisfy on pain of losing their license.

The State Bar should stop treating consumers of legal services as incompetents unable to protect their own interests. Instead, it should let consumers determine whether they wish to pay for an attorney's malpractice insurance.

138 I am all for mandatory malpractice insurance. We all have to have car insurance. Our clients should be protected.

139 The California State Bar already has major control over attorneys practicing in California and they charge a very high membership fee to practice in California, compared to any other state. If an attorney wants to take on the liability of not having insurance, I think it should be their choice - just like contractors, doctors, or any other occupation.

California professionals have to deal with competition in their field who do not have all the different insurance, payroll taxes, worker's compensation, etc. This makes doing business in California extremely difficult and less profitable than in other states.

Yes, I could move to another state, but I was born and raised in California - this is my home State - why should I be forced to move out of a State that I love just because the state is strangling my ability to make a living? Errors and Omissions insurance is outrageously expensive, along with all the other costs of doing business in California. This is just one more requirement that would be detrimental to those who cannot afford it.

140 I have concerns about the lack of actuarial analysis of the effect of the proposed "Captive Fund" provision. It does not appear that ramifications of this proposal have been thought through at all. Because there has been no rigorous actuarial analysis commissioned, the impact on insured lawyers is impossible to assess. In particular, it is likely that excess insurance if desired will significantly increase the premiums required over the existing situation for the same level of insurance. It would seem appropriate that the actuarial analysis be conducted before running blindly down a path that will have significant costs for many practitioners and particularly those that already carry E&O coverage.

Also problematic it the likely one size fits all nature of coverage likely provide under such a provision. Different practices and different practitioners have different exposure profiles and it is manifestly unlikely that a one size fits all product will appropriately address these differences.

141 To become a licensed attorney in California, you need to:

- go to college,
- go to law school,
- pass the MPRE with a minimum score of 86,
- apply to take the California bar exam,
- study for and pass the bar exam (the CA bar exam is the toughest in the U.S.),
- apply to the California bar,
- pass the character and fitness exam,
- be fingerprinted, and
- be sworn in.

To maintain your license to practice law in California, you need to complete at least 25 hours of CLE

each reporting period, pay a fee of about \$400 per year (in comparison, NY is \$375 every 2 years), and adhere to the rules of professional conduct. You also need to remain current on your civil obligations, such as student loans, child support/alimony, taxes, etc.

Adding a mandatory malpractice insurance requirement will put an additional burden on independent attorneys who are neither employed by law firms nor employed as in-house counsel. It will disproportionately affect middle-class and newly-admitted attorneys, and the costs will be passed on to thinly-resourced clients who are in need of legal assistance.

This additional burden on independent attorneys will decrease the number of independent attorneys in California and therefore decrease the public's access to effective, affordable legal services.

142 I do not want to change the current requirements for attorney malpractice insurance. I do not want mandatory insurance required for all attorneys. A professional education element regarding liability would be acceptable.

It makes legal services more expensive for average consumers.

It simply enriches insurance company's already high profit margins. The insurance industry would ruin an attorney's reputation by settling a very questionable case because it is so much less expensive than vigorously defending their insured.

It would encourage unhappy litigants to seek insurance funds any time the outcome is not to their liking. It would build in a high level of caution in all attorneys to accept cases based on fear of being sued by an unhappy client who had a case that was legitimately contentious and complex. Clients would be priced out of having their legitimate day in court by limiting representing attorneys, attorney competition and higher fees.

The professional liability litigation would waste further our over burdened State Court System on frivolous litigation.

143 I presume (without knowing much of anything about insurance markets) that by having a "state captive" E&O policy provider coverage limits would be at a bare minimum (\$250k per occurrence / \$250k aggregate), and with eroding limits ( defense fees being paid from coverage limits, until zeroed out ); and that additional coverage could be had through 'open markets' to provide secondary supplemental coverage.

I'd expect that open market carriers would like that – as it removes liability up to the amounts of the state captive policy limits; and that the open market carriers would hate it – as a fair sized chunk of their customers would fall within that lower coverage category, and the carriers will lose that revenue. If that's correct, then the risk taken on by the open market carriers will be INCREASED, as they have less unused policy premium dollars to pay for higher dollar claims. That means that the premiums for that supplemental coverage will increase as well.

So, the tail that wags the dog is: What will the minimum coverage of the state captive plan be? If it's high enough so that the majority of claims fall within it, the supplemental coverage losses (and premiums) would be lower. But there is no information about that state captive plan – and thus no way to intelligently comment upon it.

The one asks: Is it credible to believe that the State can run an insurance program that will cost less and provide the same coverage for what I'd expect are the largest percentage of claims ? Others may disagree, but I've not seen many state-run programs that beat the private marketplace.

The counter argument to that is that since E&O coverage isn't mandatory, lots of attorneys have NONE, exposing their clients to risk.

The State Bar wants to protect those uninsured clients?

At the expense of a practitioner?

As the "cost of doing business?"

Which costs will simply get passed on to those same consumers...who can barely afford a lawyer now.

And we're talking mandating E&O coverage for "Door Law" not "Big Law" (because, Big Law has coverage as a matter of business practicalities). No one wins here.

Mandating that attorneys with NO coverage should be required; then the consumer can make an informed choice of accepting the risks of an uninsured attorney. The market will drive those who have no coverage to the minimums, just to stay in business.

That makes sense.

Require that "every" communication, email letter, bz card, advertisement, etc do so – that's just nuts.

Mandate the advisory be in a representation agreement – yes. Do that.

144 I've been practicing law in multiple states for many decades, and have carried liability insurance only a few of those years because it became too costly. My clients are informed on the retainer fee agreement that I do not carry insurance, and they sign the retainer. The exception to that would be where the initial consultation did not end with a retainer. Through the years I have heard from attorneys that the insurer becomes the problem, not the solution. In my situation, I must remain an active member of the bar association in order to be a trustee on two or more trusts without also having to become a professional trustee. When I have associated with other attorneys as an independent contractor, neither my insurance nor theirs would bind the other. As I wind down my practice toward retirement, and as my estate planning clients are becoming fewer, I keep my practice open to assist the surviving family members and trust beneficiaries. To require insurance would likely result in my closing my doors earlier than planned.. My preference is to continue the notice as currently required, and definitely not require public disclosure of the lack of insurance. Attorneys may have enemies who would use the information to posture themselves in mediation or even to retaliate because non-clients sometimes sue, too. Finally, a mandatory requirement results in too much power in the insurer.

145 I have reviewed the publication entitled 702 September 2018, and have the following comments.

1. Although I do believe that it is critical to disclose to clients whether or not an attorney or firm carries insurance, I encourage the Board not to change the current rule. I do not see the practical utility in requiring a written consent instead of merely disclosing it in the engagement letter or retainer agreement. The majority of the clients looking to save money by hiring an uninsured lawyer either cannot secure alternate representation or don't care about insurer liability. The process of properly explaining the terms of the engagement to a client is already longer than the client will ordinarily tolerate. This requires good attorneys to spend more time and effort explaining the engagement fully to clients, and incentivizes simply glossing over material terms of the representation. In any situation where the risk of getting caught is low.

It is possible that requiring attorneys to disclose in every communication that they do not have insurance would encourage attorneys to buy insurance because of the social stigma among other attorneys on the topic, but again the actual risk of getting caught is exceedingly low unless the State Bar audits attorney insurance coverage. Unless the number of claims against uninsured and insolvent attorneys would be significantly decreased by consumers switching from uninsured to insured attorneys, the marginal utility of such an action is essentially zero except for the insurance companies. I believe that the costs of enforcement would be better spent subsidizing the representation of lower income individuals.

2. Mandating legal malpractice coverage would be potentially beneficial, but not for the reasons contemplated by the Board. Realistically, the only benefit would be to push a small number of attorneys out of business. These attorneys, who would disproportionately represent people with lower income. However, unless the State Bar audits coverage, the risk of being caught will remain relatively low, and those funds would be better allocated toward indigent or low income representation.

Accordingly, I encourage the Board to leave the rule mandating insurance only for law corporations or partnerships.

3. I would encourage a CLE granting credit for using the self-assessment tool through an online portal, but limiting the information gathered by the bar to anonymous statistical data that is not associated with the attorneys taking the self-assessment tool.

146 It makes sense that attorneys handling matters for clients should have the means of recompense if the attorney does not perform to standard. It also seems clear that certain areas of law have more liability issues than others. Younger attorneys may less afford to develop a law practice if operations are prohibitive. There should be moderation of premiums so that some attorneys in certain practice areas are not unfairly required to compensate for more risky areas of practice. Also, the seasoned bar should has a small measure of deferential treatment in favor of the newer practitioners, but not to the point where competition becomes a problem. It does not make sense to overcompensate one or another group in a competitive market.

A major concern is that there are no restrictions on the unlawful practice of law. Law school is a major expense and MCLE requirements are substantial. Insurance should be a part of running a business, but non-attorney advocates who practice law without a license and do not fall under attorney rules will gain an advantage. A suggestion would be a private right of suit against non-licensed attorneys, at least to obtain an injunction to stop unlawful legal services. Most clients do not know how to pursue negligence actions against non-attorneys and often know the services are underfunded and there would be no recovery. In the alternative, prosecuting agencies do not make the unlawful practice of law a priority and only await the egregious cases to appear. Otherwise, non-licensed attorneys can run under the radar and cause problems for clients, and yet not suffer the overhead of attorney requirements. Those of us that chose to play by the rules should benefit from the rules, but that is not often the case. Please consider.

147 I strongly support mandatory malpractice insurance. However, it should be sold on the open market with competition between providers, brokers, etc. A "captive" model won't best serve California's attorneys or their clients.

148 Mandatory malpractice insurance in order to practice is a bad idea. Such a mandate is an open license to uncontrolled increases by the insurance industry knowing that insurance has to be purchased in order to continue earning a living as an attorney. This would have an adverse effect on attorneys, especially solo and small firm attorneys serving low income and under served communities where the additional cost would affect their personal life or and lead to closing such resources to those communities. It is likely these are the attorneys most likely to not carry malpractice insurance now.

There is already a mandated insurance requirement for attorneys practicing in corporations and LLP form. A study to determine the number of uninsured attorneys and how many attorneys are insured needs to be made. Adding costs for overlapping insurance coverage is economically inefficient without a bona fide and independent qualified analysis of the benefit.

A Bar run insurance program of any kind should be avoided. Further, the Bar isn't capable of running such a program without increasing dues to cover the costs that are sure to be incurred. The Bar has previously shown itself to be incapable of managing its own business affairs.

149	<p>The information and background documents provided for this rule proposal will not produce informed comments because they do not provide enough information. A proposed rule requiring an attorney carry errors and omissions' insurance is of particular importance to me, as an attorney. The who, what, when and why of any such rule is necessary to provide comments on such a rule. Even the identities of the working group would be important in providing comments. With approximately 170,000 attorneys practicing in California, one lucky captive insurer could be swimming in over \$600 million dollars in premiums every year. Undoubtedly, attorneys as a group present a low risk and thus a high return for insurers. There are no disclosures concerning the personal interests of individuals on the working group. Assuming a universal requirement on carrying E&amp;O insurance is for the good of the public, then the next question that must be asked is whether the current market of E&amp;O insurance available is sufficient. The request for comments does not indicate whether legislating the language of mandatory E&amp;O coverage is being considered. I am aware of no form of mandatory insurance where the policy language, or the policyholders' liability, is not determined by the legislature. The tentative public survey appears to be self fulfilling for the purposes of the working group recommending mandatory E&amp;O insurance. Question 3 is the obvious choice for the opening question. If yes, the follow-up question should be whether E&amp;O insurance had an impact on that decision. The working group should provide additional information to the public and extend the period for public comment.</p>
150	<p>My small law practice of 2 litigators consists largely of private attorney general CEQA and Coastal Act enforcement litigation, or Public Records Act and Brown Act cases, i.e., enforcing important public rights on behalf of clients who cannot afford more than severely fee-capped retainers.</p> <p>I will not be able to afford to continue to operate a law firm (salaries, rent etc.) if I have to buy malpractice insurance. I know because I tried to purchase it. Thankfully I never needed it thus far.</p> <p>The disclosure requirement works well as is. Please do not require malpractice insurance. Large and medium sized firms have it anyways, so they don't need a new mandate. This new rule would only hurt those who don't have it because they cannot afford it.</p>
151	<p>Do it with a captive market, but make sure that the cost of the insurance is dirt cheap. Also have a dirt cheap financing plan run by the Bar for the payments of the insured. No one makes money off of it. Take all the profit out of the insurance.</p>
152	<p>I am an attorney with 50 years of practice and no claim ever presented. I have not had malpractice insurance for approximately 40 of those years. I do transactional business and real estate matters. Each of these things would add up to huge cost of malpractice insurance. I am disabled and have a small practice. I disclose to all potential clients, in writing, on my fee agreement, that I do not have malpractice insurance. I have no objection to disclosure requirements. I have no objection to having the client sign a separate letter that they have been advised of this. I have a huge objection to requiring insurance. Sounds like the insurance companies have a very strong lobby. If you were to require insurance, you would put me out of business. It is just that simple. I cannot afford insurance. The costs of maintaining a practice are high enough already. My fees are lower than average for Orange County. I represent primarily mom and pop operations who can barely afford the fees. No way can I raise the fee amount to cover the cost of insurance.</p>
153	<p>I am a sole practitioner who has been practicing for over 40 years. Though you appear to want public comment on a proposal regarding attorney's being required to carry malpractice insurance, as best as I can tell, there is no specific proposal on which to comment. All I see are general categories or topics. Also, the fact that you are not receiving responses, even from consumer groups, indicates that the absence or existence of attorney malpractice insurance is not really an issue. It seems to be a solution looking for a problem.</p> <p>Despite these issues, there are a few observations I would like to convey. I believe there should be a requirement that attorney's be required to carry some malpractice insurance but that minimum amount should not exceed \$25,000.00. My concern with a higher minimum requirement is that it will drive</p>

many solo and small firm practitioners out of business, particularly those that try to serve those who have difficulty paying for attorneys. Requiring any amount over \$25,000.00 would also seem to favor the larger firms that can afford to pay for such insurance.

Though this information should be made available to the State Bar for the Bar's informational purposes, it should not be made available to the public. The only person to whom this should be made available is the attorney's client. There certainly should not be any requirement that information regarding malpractice insurance be included in any communications with a client or on an attorney's web site or advertising. Other people do not need to know an attorney's finances, practices and procedures. Nor should an attorney have to provide a client's written acknowledgment regarding the amount of insurance carried by an attorney. If there is no attorney malpractice insurance requirement, the attorney should be required to disclose that to the client so the client has that information and can ask follow up questions the client may then have.

As for who should provide such insurance, I believe that the Open Market Model is the best at this time. Absent information about the cost of other options, it seems the Open Market Model provides attorney's the best and most reasonably price insurance options. A captive insurance market provides no guaranty that it will be run better than the current system or will cost less and provides no incentive to minimize costs since there would be no competition.

With respect to providing an interactive self-assessment program, I am totally against this, not just because of the cost. I would say that almost every attorney with whom I discuss malpractice insurance, knows the benefits and pitfalls regarding having or not having such insurance. This would seem to be just one more bureaucratic requirement that would serve little purpose and with great cost. Again, such a requirement would seem to be to the detriment of solo and small practitioners.

If the State Bar is interested in making reasonably sure attorneys have the requisite information regarding malpractice insurance, it can provide MCLE classes on the subject and/or require that each attorney have 1 MCLE credit each reporting period on this subject.

154 I just read the recent LA Daily Journal article by Ken Feldman and am concerned about the possibility of any new State Bar mandatory insurance requirement. I am an in-house counsel, but occasionally do a small amount of side legal work for friends or others on low value matters. If I have to maintain malpractice insurance (even at \$6,000/year) to do casual work like that, I probably just won't. The result is less legal help available to middle-class people because their matters could not be justified economically if they had to pay a law firm today's legal rates. I would recommend that no change occur in this area without a very open and transparent process following full public input from affected attorneys and others.

155 Of the several options under consideration in its statutorily mandated malpractice insurance study: Option 1.d. No change to current disclosure rule; Option 2. c. No mandatory insurance requirement(except for limited liability partnership or law corporations, as presently required by statute); Option 3. c. Provide the self-assessment as an optional tool, but not require it; and , Option 4. a. Educating lawyers about the benefits of insurance (including risk assessment and claims handling functions; CLE provided; etc..), would be the options that would not negatively impact my practice and my clients, friends, relatives and in general people who need my legal help.

I am a sole practitioner. I handle personal injury and immigration cases. I have been in law practice since I passed the bar in 1994. I maintained a small law office in Los Angeles until I decided to slow down in February 2016 and closed said office. I continued working on my files at home since March, 2016. I did not sign up new personal injury clients and finished working on the remaining ones in July, 2017. I have been working on four immigration cases, one being pro-bono, the other three at affordable rate.

My legal malpractice insurance expired in December 2017. I did not and could not renew said insurance because I do not have the income or funds anymore to defray the premium expense (about \$650 per month). At any rate, I have practiced law for about 23 years now. There has not been any complaint against me. There has not been any claim against me or against the malpractice insurance which I previously had. I have exercised due care and diligence in my practice.

I still have clients who call me for legal advice or ask me for help to be referred to other attorneys that I know. I keep my license active because of these and also because of the remaining immigration clients I have. Additionally, I want to have the option to handle pro-bono clients and other clients in dire need of my professional help. I cannot do these if am required to get a malpractice insurance since I do not have the income or funds anymore to pay for the premium. Also by cancelling my license because I do not have malpractice insurance will put to naught the efforts and expense that I had undergone and /or incurred in passing the tough California bar exam and in getting my license.

156 I have been in practice for 30 years. Sole practitioner, exclusively criminal defense. I have a small practice, don't advertise and only accept cases when I think I can make a difference. If a client already has an attorney I rarely agree to take over the case. My case load is usually less than ten cases. I have never had a malpractice policy. If malpractice insurance becomes mandatory, it will most likely cause me to close shop, at the very least cause me to discontinue my subscription to the Daily Journal which I renew six months at a time. I enjoy my practice and want to continue the work that I love. Please share my concerns with your colleagues. Your decision will impact many of the small, solo practitioners like me.

157 I was inspired to write this letter by the article by attorney Kenneth Feldman in the Oct. 26, 2018 edition of the Los Angeles Daily Journal.

Although, as a certified family law specialist, I maintain errors and omissions coverage, I am opposed to any plan that would make coverage in California mandatory. First of all, existing law makes it mandatory for those who do not have insurance to disclose this fact in their fee agreements. A potential client, therefore, already has the ability to avoid an attorney who is uncovered. Many referral panels also require proof of insurance for a lawyer to be a member of that panel.

Second, it is reasonable to assume that the cost of coverage will go up if the insurance industry knows that lawyers have no choice but to acquire insurance. At the present time, by contrast, lawyers keep the cost of insurance within reason because they always can choose, after weighing the risks and benefits, not to have insurance. This applies in particular to private criminal defense attorneys, who, though faced with lower premiums, are at virtually no risk of malpractice unless a convicted client of theirs can show actual innocence.

This would all change, however, especially if the "captive carrier model" is adopted. And, if Mr. Feldman is to be believed, there has been little or no notice that the "captive carries model" is under consideration.

Oregon, which receives prominent mention in the Feldman article, is apparently one of only two mandatory insurance states. There is probably good reason for that. Meanwhile, I worry about those attorneys just starting out or those who are not as successful as others. Mandatory insurance, which -- again referring to the Daily Journal article -- could cost \$6,000.00 under a California bar-run captive carrier approach, would put some out of business; force others to close down sole proprietorships and join larger firms; and force yet others to abandon any dream of being a sole practitioner. I know that when I opened up my practice in 1995, I did not, by choice, have insurance. But at that time, I had smaller cases with less possibility for significant error that would cause damages

On the other hand, those without insurance are not necessarily judgment proof. They may be able to

afford defense counsel or represent themselves. They may have wages that can be garnished or real estate holdings against which abstracts of judgment may be recorded. They may end up paying more than a case is worth because of the risk of a huge verdict that won't be covered by insurance. The public in such instances benefits.

In the final analysis, therefore, many people already have insurance because they want it or other factors (like panel memberships) require them to have it; don't need insurance; have clients who may be knowingly engaging their services even though they are aware that there is no insurance; or have the ability to pay a judgment in spite of a lack of insurance. The proposal, therefore, would benefit relatively few, while burdening many lawyers.

158 I am a State Bar certified specialist in Legal Malpractice Law and my practice over the last 36 years has involved both the defense and prosecution of attorneys in legal malpractice and malicious prosecution cases. Over the course of my practice in this specialized field I have first hand knowledge of whether attorneys in these cases have purchased insurance. Since 1997 I have represented former clients of attorneys in legal malpractice actions. Over this 21 year period the trend I have observed is that the majority of attorneys, unless they practice in a mid-size or large firm DO NOT purchase insurance. In addition, although they are required to inform their client they did not have insurance under our Rules of Professional Conduct, the vast majority of these attorneys who are not insured do not disclose their uninsured status. As a result the client is faced with the dilemma of filing a lawsuit against the attorney where collectibility is a major impediment.

To protect the public from attorneys who do not purchase insurance and fail to comply with the Rules of Professional Conduct on insurance disclosure I urge the Malpractice Working Group to develop a rule mandating purchase of a minimum limits policy (eg \$100,000 per limit, \$300,000 aggregate). I believe our Professional Rule should be changed to require attorneys to provide their insurance coverage information to their client. Many attorneys refuse to provide it prelitigation and only disclose it when they are served the Form Interrogatory 4.1 after the lawsuit is filed.

I understand the State of Oregon Bar has created a captive State Bar run insurance program which requires Oregon attorneys to purchase from this entity. I do not support a similar program in California and would prefer to see an open market which offers various prices and limits to attorneys.

159 I came to this link to you via a lobbyist for mandatory insurance—a legal malpractice insurer—that spammed my state bar listed email address. I object to any mandate to buy insurance. Disclosure surely is sufficient. Clients may choose whether to proceed. Many highly qualified and experienced practitioners would be unable to practice if they had to pay the exorbitant insurance rates, especially practitioners who are solo practice and/or work part-time. Raising billing rates to cover the increased cost just is not feasible. Doing business in CA is already too expensive. Middle class clients—small businesses— cannot afford to pay large firm rates. Subsequent comment: Upon obtaining more information, and after consulting with people who do not have time to contact you by the end of the comment period, I will speak for many: we object to a mandatory malpractice insurance policy, and to any mandatory disclosure policy. It would require fee increases and decrease access to justice for people of modest means. Mandatory disclosure is unnecessary, and public disclosure would make all attorneys a target. Attorneys already pay into a fund every year to compensate claims for alleged bad actor attorneys.

160 Although I am still an active member of the bar, I am 74, retired and no longer practice. I should not be required to carry malpractice insurance.

161 As a now largely retired criminal defense attorney, who still takes several appointed appeals annually and serves pro bono as counsel to a CA-based wildlife protection organization, I write to firmly oppose mandatory malpractice insurance for attorneys in similar circumstances unless its cost would be truly modest.



1. Criminal defendants who feel wronged by counsel face staggeringly long odds in pursuing civil liability against counsel, given the high bar set by Strickland v. WA to reach even the predicate finding of ineffective assistance from counsel. Insurance payouts from this sector would be vanish

2. Even before the reductions in crimes and punishments due to changes in criminal law, most solo and small criminal practices in rural areas such as mine were generating only modest incomes that did not allow purchase of malpractice insurance, especially in a state where other practice-related costs are quite high regardless of location. That economic problem has only become more acute.

3. Unless malpractice insurance were available at well under \$100/month, I would probably feel compelled to convert to inactive status long before being that became desirable or necessary. Total retirement from the profession would be an economic and emotional hardship, and would keep me from giving pro bono legal services where I feel they are needed.

162 i am a sole practitioner. If legal malpractice insurance is mandated, i very well may not be able to stay in business, because, i will not likely be able to afford such insurance. i take great caution, to make sure that I have fail-safe procedures in our law firm so that malpractice does not occur. i hope that legal malpractice insurance remains optional, and not be mandated.

163 I think mandatory malpractice insurance is a bad idea.

First, many attorneys practice in areas where the likelihood of a malpractice claim is minimal. I fit in that category. I have a fairly specialized practice. I am competent. I am conscientious about calendaring and meeting deadlines, etc. After many years at mega-firms, from 1992 to 2009, I was in a two-attorney partnership for 17 years. We always had coverage. We spent an enormous amount of time each year researching carriers and completing applications. Since 2009, I have had a solo practice. I decided that I did not need coverage because the fact of the matter is that my area of practice, the nature of the cases I handle and my client base make it a virtual certainty that I would not be subjected to a claim. This year, 2018, is the first year that I have had coverage as a solo practitioner as it is now mandated by the Idaho Bar. Basically, I am paying a significant premium to cover other attorneys' poor work. In addition, I am in a semi-retired mode and the premiums are disproportionate to my earnings.

Second, the premiums are highly variably regardless of the area of practice or claims, that is, the economy and insurers' return on investment may cause premiums to fluctuate more than 100% in a year. I recall that in about 2000, our premiums tripled, not because of any problems in our practice or an upsurge in claims generally. The increase was due almost solely to the dot-com crash and the huge decline in ROI for insurance companies.

Third, I think we need to give clients' more credit. I disclose, in large, bold face type that I do not have malpractice insurance. Clients can decide whether to retain my services.

Finally, insurance does not cure inept lawyering. Mandatory insurance basically makes the smart, honest, hardworking attorneys pay premiums to cover for the dim-witted, lazy attorneys' errors. Note that I don't include the dishonest attorneys in that latter group (of which there are legions in California) because malpractice insurance coverage may well not cover their transgressions.

In short, I think mandated disclosure is a fine rule. Mandatory insurance is not.

164 I have been a member of the California StTe Bar for over 40 years and have never had a malpractice claim against me. Mandatory E & O coverage would financially destroy my practice. I quit malpractice insurance because I could no longer pay the escalating premiums.

165 There are a couple of reasons why the proposed rule in mandating malpractice insurance is a poor idea. The first reason is that the proposal allows attorneys to shift accountability and responsibility for their actions off to their insurers. Secondly, it fosters increased litigation and adversarial relationship

between counsel and their clientele and in turn increased claims and payouts. Thirdly, it will cause increase in premiums because of increased claims, payouts, and forced purchase of malpractice products. Lastly, for those attorneys who are part time or earning less from the practice of law, mandating such an expense would be prohibitive. As such I strongly argue against such a proposal.

166 I, like the vast majority of solo and small office practitioners are **STRONGLY OPPOSED** to the Bar association once again trying to mandate malpractice insurance. This is a move by the insurance industry to once again bleed Attorneys for overpriced and worthless insurance policies. It is also a move by large firm controlling the Bar Association to eliminate small firms and thereby increase their inflated profits. When I started out in practice – I have Mal Insurance for many years. Without so much as a whisper of a claim – the insurance rates rose dramatically every year – much faster than my income. Greedy insurance companies came up with ridiculous excuses for hyper inflated rates ( I was the Entertainment Attorney in San Diego and under their outlandish theory – I could be sued by Madonna any day) In any case – the greed of the insurance industry and the large firms wishing to destroy the smaller practices soon made it impossible to afford Mal Insurance. The quotes were literally 50% of my before taxes income some years. The result is that more than 50% of California Attorneys do NOT have Mal Insurance. This is once again an attempt to put us all out of business. Proceeding down this path will result in very substantial reaction by the rest of us. I will work diligently to remove any of these pawns at the State Bar who wish to invoke this self-serving travesty.

167 I am informed that you are soliciting the opinions of members of the California State Bar regarding a proposal to require members to purchase malpractice insurance. If you are soliciting such opinions, please mark me down as opposed. Currently, members are required to either have malpractice insurance or disclose to prospective clients that they do not have such insurance. The current rule allows attorneys and clients to adjust their respective risks according to their respective needs. The proposed rule would deny attorneys and clients this ability and thereby abridge their respective rights to contract freely. The proposed rule will also increase the cost and availability of legal representation, because the cost of compulsory insurance will be passed along to clients, some of whom will find the additional cost prohibitive.

168 I am opposed to mandating professional liability insurance. It is an improper meddling in freedom of economic activity, and would be an over-reach of the nanny-state variety.

169 1. Amending rules requiring attorneys to disclose to clients that they do not carry legal malpractice insurance. Options being considered:

- a. Requiring attorneys to disclose to the State Bar whether they have legal malpractice insurance, potentially including the amount of coverage and the type of policy (i.e., claims-made or occurrence-based) and;
  - i. Making this information available to the public (as a private criminal defense attorney the would encourage criminal clients to sue-so I am adamantly opposed); or
  - ii. Limiting this information to aggregate analysis by the State Bar (I'm opposed to advising the bar whether I do/not have insurance— it would bother me that the bar might use that to determine whether or not to file disciplinary charges);
- b. Requiring written client acknowledgment of an attorney's disclosure that they do not have legal malpractice insurance (I am not opposed to that—I think it should be part of the fee agreement);
- c. Requiring attorneys to disclose on all written communication with clients, on their websites, and on all advertising, that they do not have malpractice insurance (I'm opposed for the reasons stated above) ; or.
- d. No change to current disclosure rule (I agree with this)

2. Mandating legal malpractice insurance for attorneys as a condition of licensing, except for in-house counsel and government attorneys. Options being considered (I'm opposed I should not be treated any differently than a public defender):

- a. Insurance to be obtained in the private insurance market (“Open Market Model”) (I'm opposed— esdprecially since this consideration conditions license on be able to obtain such insurance—whether one can afford it or is denied for some reason)
- b. Insurance fund, established by statute, would provide minimum insurance coverage for all attorneys

("Captive Insurance Fund Model"); additional coverage could be purchased on the private market (I'm not opposed if this means bar dues automatically provide attorneys with minimum insurance—but if it is additional cost and license conditional on obtaining it, i'm opposed-especially since public defenders would be excused) ;

i. A Captive Fund could be run by the State Bar, a private insurance company, or an entity created expressly for this purpose.

c. No mandatory insurance requirement (except for limited liability partnerships or law corporations, as presently required by statute) (I'm opposed-especially since public defenders would be excused . 3.

Developing a Continuing Legal Education or Practice Management program that provides an interactive selfassessment of law practice operations in an effort to examine legal malpractice liability. Options being considered:

a. Require all attorneys to complete the self-assessment (i'm not opposed-if it is for everyone and part of minimum legal education requirements);

b. Require uninsured attorneys to complete the self-assessment (i'm opposed-especially since public defenders would be excused); or

c. Provide the self-assessment as an optional tool, but not require it. (I'm not opposed)

4. Promoting the voluntary purchase of insurance by (no comment):

a. Educating lawyers about the benefits of insurance (including risk assessment and claims handling functions; CLE provided; etc.); and/or

b. Educating the public about the significance of an attorney not having effective coverage (including claims-made"tail" policies).

170 I am an insurance broker in Southern California that has specialized in lawyers professional liability insurance for over 28 years. My wife and I are the principals of Lawyers Pacific Insurance Brokerage, Inc. Our agency is an independent agency with access to over 40 markets writing legal malpractice insurance in California. We have had the good fortune of providing errors and omissions insurance to California law firms ranging from one attorney firms to firms of over one hundred attorneys.

### **The availability of insurance**

There are currently over 40 markets writing lawyers professional liability for California attorneys. In the time I have been placing this line of insurance, I have never seen more options available to California Attorneys. Some of the programs that are available are:

Intellectual Property Law Firms programs

New Admittee programs

Part Time Attorneys programs

Employed Lawyers programs

Independent Contract Attorneys program

Criminal Defense Attorneys programs

Insurance Defense Attorneys programs

Arbitration / Mediation Attorneys programs

Immigration Attorneys programs

Small Firms programs

Medium Firms programs

Large Law Firm programs

Hard-To-Place programs

### **The distribution of legal malpractice insurance**

The current distribution system of Open Market is the best model and the fairest model. California Attorneys / Firms require a wide range of insurance coverage options (i.e., limits, deductibles, coverage for firms with claims activity, multi-state law firms, international practice firms, coverage for Entertainment firms, Intellectual Property firms, Defense firms, Maritime Law, Class Action firms, etc.).

In light of the vast coverage differences requirements and the various carrier underwriting guidelines, the Open Model provides the most diverse and competitive options. There is no “one-size-fits-all, quick fix” for legal malpractice insurance for California Attorneys. Any one coverage option that is suitable for some law firms disenfranchises other law firms and puts them at risk of no coverage.

### **The cost of legal malpractice insurance**

At a recent meeting at the ABA Standing Committee of Lawyers Professional Liability, I asked that if the State Bar mandated malpractice insurance and if it was patterned after the Captive Model (Oregon), what would the cost be? One of the Panel Speakers said \$6,000 per attorney. In a follow up email, I discovered that the \$6,000 would be for limits of liability of \$100K/\$300K.

That insurance premium is too expensive. This would penalize the conscientious attorneys that currently carry legal malpractice insurance. This would severely impact sole practitioners, medium law firms and larger law firms by increasing their premium while greatly reducing their coverage.

The beneficiaries of a \$6,000 premium would be high risk (hard-to-place) attorneys, such as attorneys in high risk areas of practice (entertainment, securities, intellectual property, etc.,) and attorneys with claims activity. The other possible beneficiary in a Captive Model Mandatory Malpractice environment would be the State Bar Association which could stand to collect hundreds of millions of dollars in premium.

I conducted a search of my current 1-attorney clients (solos) that have a 100K/300K limit. The deductibles and the prior acts coverage vary. Of the 79 records: The premiums range from \$500 for a Strong Start Program first-year attorney to a one attorney firm that is paying \$7,300 (used to be a three attorney firm, so is carrying prior acts coverage for three attorneys).

The total premium for the 79 solo firm attorneys is \$194,576 or an average of \$2,462.99 per attorney for 100/300 limits.

Of the 79 attorneys only four are with a non-admitted carrier (Surplus Lines). The carriers providing insurance for the 79 attorneys are Arch, Axis, Freedom Specialty, Hanover, Lawyers Mutual, Lloyd’s of London, Scottsdale, StarStone, Wesco and Westport.

### **The need for more comprehensive study**

The discussion of legal malpractice as it relates to the insurance needs of the California Attorneys is not an easy discussion. There are no quick fix answers. There does not seem to be enough data to determine that a problems exists. There does not appear to be a solution for attorneys that cannot afford legal malpractice insurance. Monitoring compliance of mandatory malpractice insurance would be an administrative nightmare. What if coverage could not be obtained? What if coverage is cancelled due to nonpayment of premium or any other reason? Having legal malpractice insurance does not guarantee coverage for the client. It seems that the responsible course of action is to conduct a comprehensive study and gather adequate data before implementing any drastic changes.

### **Education**

Perhaps education is the key. I think that the State Bar Association could best protect the public by establishing a Campaign of Education. This could include:

1. Information to the General Public regarding the availability of legal malpractice insurance for attorneys
  - a. When the client is engaging an attorney, maybe the client should be required to initial the disclosure of “no malpractice insurance” on the engagement letter if the attorney does not have malpractice insurance.
2. Education for the Attorneys

	<p>a. When an attorney does not have malpractice insurance, they could participate in continuing legal education to help them to understand the importance of insurance and to provide the attorneys with information of how to implement risk management measures to reduce the likelihood of malpractice claims.</p> <p>3. Enlist the help of Insurance Carriers</p> <p>a. Perhaps the California Department of Insurance could require that all admitted carriers underwriting legal malpractice provide discounts for Pro Bono / Low Bono attorneys, certain areas of practice law firms (such as immigration law, criminal defense firms) and attorneys that earn less than a certain income.</p>
171	I am opposed to mandatory malpractice insurance for attorneys and believe that requiring attorney to state whether they have malpractice insurance (or not) will increase malpractice claims.
172	<p>As a practicing member of the Cal Bar since 1972 I wasn't to comment on the malpractice insurance proposal. I am a one man firm doing mostly family law and general civil work and looking to retire. I currently carry malpractice insurance and have done so since I started private practice in 1977. I started with Lawyers Mutual when the company was first formed however I went to a cheaper carrier several years ago. As a result I have I had a malpractice claim about 25 years ago that ultimately had nothing to do with anything I did but it still cost me a \$5,000 deductible to deal with the matter. Here is my perspective:</p> <ul style="list-style-type: none"> <li>• It seems like there are fewer carriers in the market and the cost of insurance is continually increasing. I don't know why carriers are dropping out of the market. I suspect that the cost of covering major big bucks claims is being spread around the small low exposure attorneys such as myself. I can buy auto insurance and homeowners insurance for far less than my malpractice premium.</li> <li>• The cost to a large majority of small scale practicing attorneys it too high where their field of practice has a very low probability of a claim and any possible damages would be low. This drives up the cost of providing legal services and contributes to the high cost of legal services making it cost prohibitive for many people to obtain legal representation that they should have.</li> <li>• The proposal that all attorneys carry malpractice insurance would be a windfall for insurance carriers and probably would not reduce premiums. There are many areas of practice that should not require malpractice insurance but others should. A blanket requirement would only benefit the insurance industry.</li> <li>• Requiring coverage for certain kinds of cases that a small general practitioner might handle might keep premium costs down.</li> <li>• I am not very familiar with coverage ranges but my insurance is at the low end of the range and is still a few hundred thousand higher than any claim I can imagine.</li> <li>• It seems to me that the State Bar should do a lot of research and analysis about the reality of legitimate malpractice claims and examine the realistic need for coverage in various areas of practice.</li> <li>• An attorney's premiums should be based on claims made history and filtered by legitimate claims.</li> <li>• Although mandatory disclosure of coverage in certain high risk areas of practice may be appropriate, I don't think it should be required across the board. I don't favor any change in current disclosure rules without a lot more research. Blanket requirements, even with some of the suggested limitations doesn't seem appropriate. I have no idea of the necessity since my experience and knowledge is extremely limited. However, I am concerned that lobbying from carriers and others who stand to profit from mandatory coverage will be an inappropriate influence.</li> </ul>
173	Keep the st bar and all government entities out of this. The system works and its competitive.
174	Simply put, there needs to be a meaningful choice is carriers and pricing for legal malpractice insurance. Unfortunately, by have a seemingly State run operation it pushes out competition and at the same time increases the pricing due to the lack of competition in the marketplace, i.e., mandating malpractice insurance and a State Bar run captive carrier. This runs contrary to capitalism. Similar to auto insurance which is required people still drive without insurance but there is no State run operation requiring it. Does not comport with fair market trade in this area of insurance coverage.
175	I have been in practice since January of 1992. I have had malpractice insurance since the beginning and

	<p>would not consider going without it. I admit that my costs have been reasonable, never more than \$4,500 per annum. I believe that malpractice insurance should be mandatory for these reasons</p> <ol style="list-style-type: none"> <li>1. It appears that malpractice often takes place with attorneys who are in crisis and not managing any part of their practice well. Their clients then have little chance of recovering the full amount of their damages from the attorney who has little in the way of assets.</li> <li>2. Having insurance is taking responsibility for those errors that we may make. None of us is perfect.</li> <li>3. The malpractice carriers I have had over the years have offered advice and help when I had questions about some issue that might lead to a complaint by a client. They aren't really watchdogs but they do try to keep their attorney clients out of trouble.</li> <li>4. Mandating insurance would enhance the reputation of the Bar and attorneys. The public will see us taking responsibility for our actions.</li> </ol>
176	Our firm opposes mandatory insurance. We have found that being other than self-insured simply attracts more litigation. We have only been sued when we try to collect on past due amounts - and our firm has never, in 34 years, lost a legal malpractice action (again - they're only brought because we are trying to collect on unpaid fees).
177	So many attorneys, like me, don't actively practice or do so on a very limited basis but wish their license remain active. This imposes needless significant costs to those individuals.
178	<p>KEEP IT AS IT IS.</p> <p>Most attorneys don't need insurance. Their practice doesn't require insurance. Attorneys, who require insurance, do have insurance. These attorneys need to have insurance for their line of work. There is no need to burden everyone, just because a few need it. Insurance companies are the only one that will benefit from this. They collect huge and escalating fees. When there is a claim, they settle the claim without any investigation because it is cheaper for them. Worse, a member with a law suit would have his insurance premium thru the roof, driving him out of business. If insurance become mandatory, the lawsuits against attorneys would multiply many folds. How is the public served when attorneys can't practice law because they can't afford mandatory insurance imposed by state bar?</p> <p>KEEP IT AS IT IS.</p>
179	<p>I have been claim free since I started practice 20 years ago.</p> <p>I have concerns about trying to replace the coverage system with a captive insurance company, as this is likely to lower the quality of insurance and increase costs.</p> <p>Additionally, if the state bar does open up its own carrier, the concern would be cost overruns. There would need to be protections to make sure that the bar as a whole would not be subject to these costs.</p> <p>Likely a better approach would be to have a set of carriers which are all specially admitted, with additional restrictions in place against leaving the market and strong capital requirements. This would allow competition among vetted, high quality companies, with bar oversight.</p> <p>Another option could be for attorneys to "opt-out" of mandatory insurance requirements by posting a bond instead. This could be implemented similar to how the DMV allows for this instead of traditional insurance.</p> <p>Although the concerns about mandatory coverage are laudable, it is important to make sure that this process is undertaken in a fiscally appropriate manner.</p>
180	Many small firms can't afford the high cost of the premiums to cover malpractice issues, which can be about \$1K a month or more. If I had to pay that amount of insurance, I would have no choice but to lay off my secretary as this and the high cost of health care are making it very difficult for firms like mine to stay open. The "alternative option" would be to allow small firms to pool their resources and purchase an affordable insurance at \$250/month or so.
181	Based in case authority, inter alia, criminal defense attorneys cannot be sued for malpractice unless

	their convicted client is able to show a judicial officer prior to fully commencing an action against their criminal defense attorney that in fact their client (the defendant in the criminal action) was "innocent" of the charged alleged crimes. A criminal defense attorney's exercise of his/her discretion typically is not a basis to challenge a defense attorney. I have not had professional responsibility insurance for almost 5 decades and have never been sued or threatened to be sued. PLI (malpractice insurance) is unnecessary for an attorney exclusively practicing criminal defense.
182	I do not believe that the State Bar should mandate malpractice insurance. I have been in practice for well over 30 years, have always maintained malpractice coverage, but believe that this should not be an area that should be mandated by the State Bar. Part of our ability to obtain affordable coverage is to have various insurance companies willing to insure attorneys. It is likely that once the State Bar becomes involved and there is no free market for coverage, that premiums will be driven up from what is available now.
183	Please note that I am in favor of the Oregon system of mandatory professional liability insurance.
184	I am a semi -retired licensed attorney, with a small select client list. Mandatory insurance should not be required and will only result in fees continuing to rise when it common knowledge access to the court system by retaining an attorney is already beyond the financial reach of the vast majority of individuals and small companies. Skyrocketing costs for court services alone deny many access, let alone the fees which in turn will rise if the attorney, no matter what size practice, is forced to carry insurance. Mandatory notification of the status of an attorney's coverage to a prospective client is sufficient to allow that person the choice of retaining the attorney.
185	Mandating malpractice insurance will absolutely drive up the cost of hiring an attorney and therefore negatively impact access to justice for countless people. I serve mostly working people, many of whom seek the protection of bankruptcy filing. I often take pains to make that affordable for them. My ability to do so would be crippled if mandatory insurance were added to my overhead. They would suffer more, and that would be thanks to the justice system which made their lawyer more expensive. Having practiced for 35 years, I still worry that some day I may need to retain a lawyer - which I frankly view it as unaffordable. Please don't make it more so.
186	As a semi-retired old guy working from a home office as an Arbitrator and Mediator (where liability exposure is almost non-existent) and with very minimal legal work for a client of more than 40 years, I question the impact of the captive insurance proposal on the coverage I now have and premiums I now incur. I'm not in a position to analyze that impact, but hope it will be considered since there are many others in a similar position.
187	As a practitioner of many years, I strongly support a requirement that all lawyers are required to have E&O insurance. We are licensed, servants of the public. We make mistakes. The public should not be harmed when a lawyer errs.
188	I think it is a good idea. I would suggest looking at the Oregon model. They have one carrier for all attorneys for up to a \$100,000. All attorneys pay the same amount. It's a very good system.
189	While I have always been insured for professional liability, I do not favor State Bar mandated insurance. I have not seen this topic run through local bar associations for discussion and feel it should be. If I am required to change from my present carrier, LMIC, I am sure there will be litigation to challenge such state bar action and I would be likely to participate.. Another alternative for me, after more than 50 years of practice, would be to go inactive!
190	Big city, big law firm clients sue their attorneys all the time. They say malpractice, but it is really about the amount of the fees. Small city, small law firms, out of caution, would overly limit the class of clients they would accept to avoid strike suits. Result: Insurance and strike suit lawyers would have more work. The public would have less choice.
191	I am a sole practitioner. There have been times where income was slight. Malpractice insurance was not affordable. I live in a small city and people are not litigious as they are in larger cities. We are not generally dealing with very large numbers and if we are careful we have no problems. I have had no problems. Also, the first year of a policy only covers a Mistake made that year. This means the first one, two or even three years of a policy provides a little coverage. Full disclosure to clients, yes;

mandatory insurance, no.

192 I am 83 and have been a member of the State Bar since 1985 ( # 118383). I have no record of malpractice or Bar sanctions.

In approximately 1999, my law firm dissolved and I began teaching in universities, community colleges and speaking. I maintained active membership because these institutions require active bar membership.

I do not favor 702 for California Bar members like myself who are educators and have no adverse complaints on their Bar record. I am not aware of any malpractice cases against educators in this situation. Educators who do not comply with university requirements are terminated and depending on the severity may be subject to civil or criminal suits. In any case, such policies wouldn't cover intentional acts.

If 702 passes, educators in my situation will lose much needed income in their retirement. I believe there should be an exception. First because malpractice insurance is illogical in this situation. Second I and retirees who want to teach depend upon teaching income and finally, the State Bar will lose income by this measure.

Therefore, I propose an exception for retired attorneys who rely upon Bar membership to engage in teaching or pro-bono work not involving "clients" as that term is defined.

193 I am an older lawyer whose practice is diminishing for a number of reasons but, primarily, because I am transitioning into retirement. I do only small collection cases that generally do not involve more than \$15,000.00. I am paid on a contingency basis. My client knows that I do not carry insurance and that this is the reason I can afford to continue to do this work. My margin is small and insurance premiums would make it very difficult to continue in practice. If there is going to be an insurance requirement, attention must be paid to those of us who are part time and are not making a lot of money. If this cannot be done then I would strenuously object to the insurance requirement.

194 1. An audit of the court files in Santa Clara County show that a few group of lawyers in high asset divorce cases were sued not only for malpractice, but fraud and unfair business practices.

2. In interviews with current and former clients of several local divorce lawyers, our team found:

A. Few people knew they could sue their lawyers practice.

B. Litigants who sought to sue a lawyer in Santa Clara were regularly turned away in an effort to deter such filings.

C. Lawyers engaging in the most significant misconduct are typically able to afford malpractice insurance, which substantially adds to the costs of representation.

D. Lawyers who do not carry malpractice insurance typically do not based on economic realities of a practice that typically resolves or settles cases.

3. Malpractice carriers have not addressed the issues of sexual harassment and abuse of clients that is regularly reported and arises from a small group of lawyers in Santa Clara County's family law community.

Malpractice insurance should be extended to all family law lawyers as a form of self insurance. No family law litigant should be subject to discounted justice simply because they could not afford a lawyer able to pay high malpractice costs.

Malpractice insurance should not be extended to lawyers acting as privately compensated temporary judges such that litigants who pay these temporary judges are protected from fraud, abuse of power



and abuse of process.

Any lawyer who has been sued for malpractice, regardless of the outcome, should have their Bar Profile designated with the lawsuit so that members of the public can make informed decisions prior to the retention of such lawyer.

Attached is the list from 1998 to 2018, published by the Santa Clara County court's Settlement Conference Officer, Sharon Roper. Our audit shows that cases involving retired judge Biafore, attorney James Cox, attorney Nat Hales, attorney Ricard Roggia and Catherine Gallagher appointed pursuant to CCP 639 and CCP 638, do not appear to be published on this list in cases involving divorce lawyers Lynne Yates Carter, Bradford Baugh, Hector Moreno, Catherine Bectel and Donelle Morgan, these appointments are required to be disclosed pursuant to CRC 2.834 and in not being disclosed are secreted from the public by lawyers known for carrying malpractice insurance. (see attachment prepared by Sharon L. Roper)

- 195 The current system is an adequate balance between disclosing the malpractice insurance status of an attorney to the attorney's clients. As a sole practitioner with a small practice I am able to provide more economical services to clients because I keep costs down. A requirement of malpractice insurance would require me to stop practicing or raise my fees and possibly make my services unaffordable to the lower income clients that do not qualify for free legal services.
- 196 The operation of a state malpractice insurance somewhat like The State Compensation Insurance Fund (SCIF) in workers compensation seems quite viable, AS LONG AS THERE IS LEFT ROOM FOR COMPETITION and it does not become a monopoly.
- 197 I object to the mandatory liability requirement for both practical and policy reasons. While it is unclear to me what benefits this would bring to clients and to the Bar it is likewise unclear how the expected outcomes can be determined to outweigh the costs of implementation for every stakeholder, including the universe of clients. The universal mandate would place a new burden on the Bar to monitor and enforce compliance. Embracing these costs must be supported by assessment of the present costs of dealing with evils of the current policy. Without the base of such new costs, the Bar should consider the anticipated and unanticipated costs and consequences to the public and the individual attorneys.
1. To begin with, there is no indication that this approach would result in improvements of quality of legal services. It should be considered that attorneys who go 'bare' and advise their clients may well be more cautious and more apprehensive of the threats of having their assets on the line then relying on the malpractice carrier to cover their errors.
  2. There is no question that all such Bar costs and the insurance policy costs should be expected to be passed on to consumers. However, the elasticity of legal services market has its limits. This proposal might have negative impact on the availability and affordability of legal service to low income and, especially, the middle class clientele.
  3. For many such clients, the affordability of legal services would force them to increasingly rely on questionable self-help or to use the various on-line and on-site paralegal support services. However, these options are not subject to any insurance malpractice requirements mandated for their regulated competition,
  4. The Mandate implementation would have a disparate impact upon different classes of attorney, the most obvious of which are differences between large firms and sole practitioners. Even between small firms, and between sole practitioners the costs of coverage would differ substantially depending on such factors as their buying power and the size of their clientele. The hidden discriminatory effect of efforts to compliance due to age may be unintended but it should be studied. and recognized that someone, like me with only a handful of clients at the winding up stage of my professional life or upon a recent graduate setting up his practice would impose proportionately prohibitive costs of compliance as compared to well established practitioners.
  5. Mandatory insurance in any of its forms may thus bring unintended consequences, as many attorneys

may forfeit their right to practice due to forgetfulness or inadvertent failure caused by staff or outside bookkeepers or inability to pay for coverage installments due to health reasons. What happens then? See my main concern (point 1) with the Bar costs of monitoring and enforcing compliance enforcement actions which I expect to avalanche. Regardless of how the Bar structures the consequences it will need to catch and adjudicate penalties and remedial actions.

6. Alternatively, those attorneys that carefully select their cases and reduce the extent of their practice might be tempted to accept work outside of their established competence and thus create more reasons to anticipate a rise in malpractice claims and an increase in Bar investigator's and Bar Court workload and, of course, the actual harm to their clients.

Conclusion: It is unclear what benefits the Mandatory Insurance would bring nor how to measure them against the known harm generated by the current framework that needs to be addressed. However, it would not promote or enhance our mandate to increase public access to and improve the quality of legal services. Instead, it might lead to a unexpected and disproportionate burden upon licensees, expose many to forfeiture of their license solely for financial reasons, while imposing new burdens upon the Bar that is expected to snowball almost immediately. This, in turn, is expected to result in a spike of our annual Bar fees and the vicious circle of good intentions by good people coming back to undermine their core purpose will be set. The current practice should be continued.

P.S. I accept but do not analyze the Mandatory proposal in the context of the Bar having authority to impose this broad change, but others might see it as exceeding the Bar statutory authority and challenge its propriety by judicial review.

198 I am an attorney in good standing in CA, who has been retired from my former practice for a few years. I do mediation with the Superior Court on a voluntary basis. It would be a hardship to have to pay malpractice Insurance where I do not need it, since I represent no clients. But it would be an affront should I be virtually forced to buy malpractice insurance to avoid having to give up my license. I am proud of being an attorney. I should not have to apologize and tell people I went inactive just because some attorneys are not adequately covered against their own malpractice.

199 The proposal that all licensed attorneys have malpractice insurance primarily benefits the insurance industry. There are thousands of solo practitioners with a small practice, and their clients are usually not mega corporations where the litigation at stake could be valued at millions of dollars with a high hourly rate for such attorneys.

As a solo practitioner myself, the value of almost all of my cases is less than \$1,000,000, usually about \$500,000 or less for real property cases, and general civil action disputes of \$100,000 or less.

In 2010, the last year I paid for malpractice insurance, I had a policy that cost me \$10,187 for the year, covering \$500,000/\$1,000,000/\$5,000 deductible. So if a claim was lodged I would have to pay the insurance company \$5,000 up front to defend me.

A small practice such as mine does not have \$10,000 to buy the insurance - I had to pay it with an installment contract. By the same token, I do not have a \$5,000 cushion in my bank account to pay the deductible.

Moreover, for the small value of the cases I have I will defend myself for any malpractice claims. I have been practicing 18 years and there never has been a malpractice action filed against me. There was one filed against me by a client-defendant as a defense, but it never went anywhere. The client settled with me and paid their bill.

The cost of malpractice insurance does not justify making it mandatory for the reasons set forth above. It makes the Bar acting as an agent for insurance companies, and it requires small solo practitioners who face minimal exposure to unnecessarily spend thousands of dollars per year.

The purpose, of course, is to protect the public not from bad lawyers because the Bar roots them out, but from a single negligent incident that the small practitioner can make right with his client in most cases because of the small amount at stake.

If malpractice insurance was mandatory I would have paid \$90,000 over the past 9 years, and there have been no claims filed against me. I believe I am entitled to make that choice for myself and not be forced to invest in insurance companies without any benefit.

I believe the cost vs. benefit analysis supports my contention that the small, solo practitioner, should not be required to purchase malpractice insurance.

200 I oppose mandatory malpractice insurance. it adds another burden on practitioners without protecting the public. Many kinds of practice do not financially impact clients nor do they result in financially compensated damages..criminal defendants for example must be found legally innocent before they could sue for malpractice ....and it is very rare that an attorney whose errors resulted in the conviction of an innocent would not have already contributed many hours of time, in kind contribution exceeding any likely recovery from insurance. Also the cost if insurance would deter solo practice..fees tied for example to years in practice and based on presumed income could lead to inflated fees and discourage representing lower income people.

201 Malpractice Insurance is far too expensive. From my own research, it increases 100% every year after your first year, regardless of your income level. For a solo practitioner, this is just not practical.

202 I am a solo, AV-rated lawyer, having retired from the Attorney General's Office in 2004. Since that time I practiced law for several years as a part-time pursuit, the remainder of my time spent in pro bono and volunteer activities. During that time I always maintained malpractice insurance. But in 2016 I closed my last case and no longer represent clients. I still have tail insurance but no current malpractice coverage for the simple reason I have no clients who could benefit from that coverage.

I currently engage in a number of volunteer activities including serving as a judge pro tem several days each month, serving on bar projects, including one developing an answer to pro per litigants at the appellate level, a joint project of the court of appeal and the county bar association. I also serve as an arbitrator for the Better Business Bureau and Financial Industry Regulatory Authority, both of which provide small honoraria for actual hearings, an amount far less than premiums for even the smallest coverage.

Because the California Bar rule requiring arbitrators who were licensed to practice to maintain active bar membership—although many arbitrators are not and never have been lawyers—I maintain a current bar license. I also maintain my license and stay current on MCLE requirements, because in my view it makes me more useful in my current volunteer, pro bono activities. Requiring me to maintain malpractice insurance would serve only the insurance carrier's bottom line. I have no malpractice exposure for the simple reason I do not practice law. Insurance provides a solution to a problem that does not exist.

But requiring insurance would have one real effect for me. I would likely withdraw my services from both BBB and FINRA and become an inactive attorney. Whether I would drop out from my remaining activities is currently unknown but is likely. Denying those organizations my services does not appear a desirable goal. This strikes me as a fundamental defect of a one-size-fits-all approach. Malpractice insurance, however desirable for a lawyer lacking the financial means to respond to a claim, is not arguably necessary for those with no representing clients.

Concerning the proposal to announce on correspondence and websites that an attorney does not carry malpractice insurance strikes me as an attempt to shame lawyers into purchasing insurance. I assume many other lawyers have pointed out the failings of this ill thought out proposal, but please add my name to the list. Likewise, the same applies to the proposal to make non-coverage public record.

The proposals in ¶¶ 3. and 4. strike me as ones that conceivably could have a positive effect, especially one alerting my colleagues to risky practices and proper preventative measures.

203 I do not see a need to make any changes to the current rules and regulations regarding malpractice insurance coverage in California. I have always maintained malpractice insurance, both as a member of a law firm and as a sole practitioner. I inform my clients that I have malpractice insurance as well as the type and coverage amount. I view malpractice insurance as a protection for both me and my clients.

However, I also believe that it is up to an individual attorney and his or her clients to determine if malpractice insurance is important to them or not. I do not think that the California State Bar should mandate malpractice insurance coverage, nor do I think that the California State Bar should be in the business of forming a captive malpractice insurance company or otherwise offering insurance coverage. If malpractice insurance is required for licensing in California, that requirement will cause a number of attorneys to quit the practice of law and will exacerbate the already limited availability of legal services to clients of modest and no means.

204 If malpractice insurance is mandated, I suggest that exceptions be considered (1) for attorneys serving as outside counsel (technically not in-house) for legal entities they own or control and (2) for attorneys with advisory roles in small startup companies whose practices do not involve interaction with courts.

205 I practice part time, am very experienced and considered one of the smartest and best attorneys around, according to referral attorneys and clients. I will not be able to continue, if mandated insurance is implemented. I offer excellent services for a reasonable fee. My clients can not afford the big firm fees that I would have to charge. I offer large firm quality services (I regularly communicate with the founder of an international firm that refers me clients who can't afford the firm's sky-high fees, and I more than keep up with MCLE and all legal and regulatory developments) in a narrowly focused practice area. I don't make enough money to afford insurance, but I am more than competent. I choose to work part-time.

One of the best attorneys around recently closed his practice when his malpractice premium went from \$4K to \$16K. He'd never had a claim, and was scrupulous about client selection and matter selection. He had partially retired, so didn't make enough money or do enough business to afford the outrageous premium.

We object to mandatory insurance and disclosure.

206 My response to the State Bar's proposal for 'statutorily mandated malpractice insurance' is a firm 'no thank you'. It isn't needed, nor justifiable.

Speaking politically, this mandate would be the much sought after golden goose to the E&O insurance carriers, who are likely the driving force promoting and funding it from behind the scenes. It would force probably tens of thousands of CA attorneys to buy insurance they have never had and never needed. Quite a windfall to the carriers!

Speaking personally, I have spent about 40 years in mostly solo private criminal and civil litigation practice, without malpractice insurance or a claim. A conservative estimate of the premiums I would have paid over that claim free time is probably at least \$150,000. I am certain the majority of attorneys have similar experience.

As to 'protecting the public' as justification for such a mandate, the public didn't need protection from

me or the numerous other claim free attorneys. Why on earth should the Bar financially penalize the overwhelming majority of attorneys, instead of dealing with the few who commit malpractice? If the Bar could somehow demonstrate that a majority of attorneys have claims, and they are all uninsured, then maybe a mandate on all attorneys would be more justifiable. To try to justify the Bar's proposal, as evidence, it needs to publish the statistics on % of attorneys with claims, and % of that group that are uninsured.

The bottom line is that those attorneys who know they need to protect themselves with insurance, for various reasons, probably already have it, and don't need a 'Mandate'. Neither do the claim free rest of us.

Alternative to an overreaching mandate:

Those with provable damage claims against uncovered attorneys could be handled by a dedicated client recovery fund, even if that meant a small increase in general dues. Attorney discipline with probationary restitution to the fund could follow any such payout from the fund.

Word to the wise: The more the Bar bureaucracy strives to become a strident enforcement arm of a prosecutor's office, and an overtly political activist agency, instead of a professional and supportive guild, the less support it has from attorneys, and the more antipathy.

207 I am 75 years old and have been active since 1971. Requiring mandatory insurance would effectively put me out of business. I assist friends and serve as a FINRA arbitrator. Each requires an active license. I have not carried insurance since about 1975. I do not need it. Please do not require me to purchase it.

208 Insurance is for the benefit of the insured - not of the client. It is inappropriate for the Bar to assume that every lawyer will commit malpractice. If that is what it assumes, it should focus its efforts on improving the certification process - not on generating business for insurance companies. The present rule, which requires the attorney to inform the client that s/he does not have coverage, is perfectly adequate to protect the client's interest.

209 As an attorney who spends 90% of my time managing and servicing a non-profit, I will not be able to maintain my ability to practice law, should legal malpractice insurance become mandated at anything more than a nominal amount. Even a standard moonlighting policy has become too expensive to justify, yet I am not willing to give up my license to practice.

I would support some mandatory minimums, as we see in the auto insurance field, but it must be very low cost and tied to the amount earned through the practice of law, NOT the total amount of annual income.

I would also support a requirement of written acknowledgement by any client regarding information regarding coverage, including the limits of such coverage. I would recommend that the state bar actually proffer required language (and translated into languages other than English) for such an acknowledgement, as many lawyers would not adequately inform clients, nor do so in a language they understand.

I would also support a rule that the neglect to get the written acknowledgement from a client will be a per se rule violation resulting in automatic censure.

210 My California State Bar license is ACTIVE. I am currently retired but am seeking to be employed. I don't think an attorney should have to be insured if s/he is not providing services to clients nor to anyone else.

211 Annual dues are too much already. Requiring mandatory insurance to practice law would be additional burden. Solo practitioners would suffer the brunt of this additional albatross on lawyers. I will start considering early retirement.

212 Issue 1: Disclosure to Clients and State Bar regarding Legal Malpractice Insurance: I support attorneys

being required to disclose to the State Bar whether and what type of malpractice insurance an attorney has. This will enable the State Bar to conduct better research and develop better statistical information and is not burdensome on the attorney. I do not support this information being made available to the public. If made available to the public, only the information regarding whether an attorney has or doesn't have insurance should be made available. It doesn't make sense for clients to have to compare attorneys' malpractice policies and would make the process of finding an attorney more complicated. I support written client acknowledgment of an attorney's disclosure regarding not having malpractice insurance. It already should be in the engagement letter/retainer agreement and the client should be signing those documents. I do not support disclosure of malpractice insurance on all written communications, including websites and advertising, because this would be overbroad, burdensome, and would probably be annoying to the general public. This is something to be discussed during the client engagement process, not during advertising.

Issue 2: Mandating Legal Malpractice Insurance: I do not support mandating legal malpractice insurance for attorneys, except for the current rules applicable to LLPs and law corporations. This should be addressed as a free market issue. Attorneys who do not have malpractice insurance should be required to disclose and clients will make their decision as to whether or not to hire said attorney. Additionally, mandating insurance would cause premiums to increase for most lawyers because the insurance companies would have a captive audience compelled to purchase. With insurance premiums already so high, there is no good cause to take action that would further tax attorneys. If, however, insurance is mandated, insurance should be obtained in the private insurance market, to increase competition among insurers. A captive insurance fund model would simply increase premiums to unsustainable amounts and decrease competition. I do not support a captive insurance fund model.

Issue 3: CLE re Law Practice Operations and Malpractice Liability/Insurance: I support mandating that all attorneys take such CLE and complete a self-assessment of this nature. There are many attorneys who are unaware of how to buy malpractice, how to protect their practice, etc. This would be a high value added benefit to attorneys to offer this type of CLE and assessment. Taking such a self-assessment and CLE should be a part of an attorneys ongoing CLE obligations so it should not be more burdensome than attorneys already have with regard to CLE requirements because it should supplant or replace an existing CLE requirement. We should keep all the ethics and bias and competence CLEs. This should be another similar requirement for attorneys of 1 unit. The total 25 hours should not be increased. This would be a benefit to many attorneys I believe.

Issue 4: Promoting Voluntary Purchase of Insurance: I support both educating lawyers about the benefits of insurance, including providing training regarding how to buy insurance or providing a forum or vehicle to make purchasing insurance easier. I also support requiring transparency from insurance companies regarding cost of policies. Currently, there is little transparency in this market. Attorneys often buy insurance based on word of mouth. Attorneys usually buy from brokers who can charge hefty brokerage fees. Making this process more transparent and streamlined would benefit attorneys and encourage voluntary purchase of insurance. I support educating the public about the importance of their attorney having effective coverage as I believe clients assume all attorneys have malpractice insurance. Questions from clients will encourage attorneys to purchase malpractice insurance.

213 I have been working in the professional realm of the insurance industry for nearly 15 years, and as a wholesale broker licensed in California since 2008. My focus during that time has been on finding coverage for law firms both in California and nationally- though the vast majority of my business is inside the state. While I do believe the public would be better served by requiring all attorneys to carry some sort of professional liability insurance, I would like to stress to the Malpractice Insurance Working Group my concerns about their consideration of creating a captive towards that end. In my opinion it is not only unwise, it is also unnecessary.

I currently work with more than 40 different insurance companies that offer California attorneys professional liability in one form or another- and, I should note, there are several others in the state that I do not work with. While there are some similarities between the coverage these carriers offer, every one of their policies may or may not offer a wide range of other coverages, an important fact when you consider every law firm has different exposures, concerns and priorities. And as would be expected, they want to spend their insurance dollars where these priorities are addressed, for their firm- not for another. Is an Entertainment attorney in Los Angeles going to have the same liability concerns as an Estate/Trust lawyer in Fresno? An IP attorney in San Jose? A land-use attorney in Lake Tahoe?

As an insurance broker, it's my responsibility to find the policy that best fits a particular firm's needs, and I can say that as it stands, the plethora of choices in the California marketplace is serving law firms well. Having options means that a law firm can find coverage that makes sense for them, though it might not make sense for another firm. And, because there are so many choices for California law firms, not only do they have a better chance of finding appropriate coverage, but they also find themselves in a position to find coverage that's affordable as well. The competition amongst carriers in the California LPL market is fierce, demonstrated by the fact that prices have been dropping on LPL policies for several years.

Further, finding coverage for a law firm is not like finding coverage for your car. It's not a commodity. Law firms and the underwriters that cover them often establish strong working relationships that last for years and sometimes decades. They build partnerships that are beneficial to both parties: the underwriters get a stronger understanding and appreciation of who it is they're covering, and what they can do to serve them better and keep their business; and the firms get a partner and champion who's not only got a more personal stake in the game, but who is more willing to think outside the box when unique situations arise. And they always arise eventually.

Were the state to move to a captive model, I expect all this would change. One company, one form, means some law firms are going to miss out on coverage they now enjoy. It also means they're going to be paying for coverage they don't need. No more tailoring a policy to the uniqueness of the firm in question. No more competition amongst the options, because there are no options. And no chance that any kind of a partnerships develop between the insurer and the insured- here's your invoice, send us a check, and if something unusual comes up, I hope it's already clearly covered or you're on your own. The needs of the law industry, especially in California, are far too sophisticated for that.

I strongly but respectfully suggest that the Group recommend against establishing a captive for lawyers professional liability in California. Thank you for your consideration.

214 With the exception of the requirement to pay annual dues, and, comply with MCLE requirements, I don't favor any act or policy of the State Bar of California (or other government entity) which forces some sort of compliance on attorneys. I operate a small practice which, by its nature, has a low risk of malpractice claims. Also, I operate on a very tight budget, and, mandating me to make monthly E & O insurance premiums would be a financial burden on me. I would hope that the State Bar would maintain its position of allowing attorneys and firms to voluntary purchase E & O insurance as they see fit.

215 I believe that the fact whether an attorney does or does not have malpractice should be disclosed to any potential; client in writing as a term within the attorney-client retainer contract. However, I do NOT agree that the malpractice liability limits be disclosed until formal discovery in a potential malpractice legal action. We can learn from the tort liability practices in personal injury litigation. Having to broadly announce legal malpractice liability limits prior to commencement of of formal litigation invites questionable claimant that hope to score a successful settlement by intimidation of further protracted litigation as opposed to favorable facts upon the merits.

216 I am absolutely and firmly opposed to the proposal regarding mandatory malpractice insurance.

217 There should be an income threshold requirement. For example, an attorney making under \$40K a year

	should not have a requirement to maintain malpractice insurance.
218	<p>I favor requiring all attorneys to have insurance, and thus, believe that it is appropriate for any lawyer, public or private, who does not have insurance, should be required to notify their clients on the retainer agreement, and in writing at any time insurance which previously existed may lapse.</p> <p>I also believe physicians should be required to have malpractice insurance, and notify their patients that they do not, if that is the case.</p> <p>This comment form is not well constructed. The options should be spelled out, and a space for comment made available for each.</p> <p>I do believe the best form of insurance is one that is available as a base insurance made available through an insurance pool for all lawyers.</p>
219	<p>This proposal is a bad idea for multiple reasons. The current rule works fine, i.e., you are trying to fix what isn't broken. Forcing lawyers to carry malpractice insurance would be extreme over-regulation (and I say this as an attorney who has had malpractice insurance for many years). The various options in the proposal, including a requirement that lawyers purchase their malpractice insurance from a single provider, makes no sense and would accomplish nothing besides eliminating competition and increasing premiums.</p> <p>If you are really concerned about whether California attorneys carry malpractice insurance, spend some money and effort in educating the public about its right not to retain an attorney who lacks such insurance.</p> <p>Although it is popular to talk about how the State Bar's primary mission is to protect the public from attorneys, there is at least an equal need to protect attorneys from certain of their own clients, i.e., the ones who refuse to pay their bills and file frivolous against their attorneys. Such suits will no doubt increase if all lawyers are required to carry malpractice insurance, especially if the coverage amount is \$500,000, as has been proposed.</p> <p>Most lawyers I know carry malpractice insurance for our own protection. That is a powerful enough motivator. We surely don't need a State Bar rule forcing us to do so.</p> <p>In short, this proposal should be rejected in its entirety.</p>
220	<p>For a semi-retired attorney, the cost of malpractice insurance is FAR TOO HIGH. Even though i have no claims on my record, and years of coverage, the cost for a minimal 100k policy is about 5% of gross income and 15% of net income.</p> <p>I can no longer afford the insurance if the costs go any higher. This year's premium has already increased by 16.5% in one year, without any claims, ever. That increase is due to the expectation that the demand for insurance will grow due to forced coverage.</p> <p>When the insurance is mandatory, there will be no incentive for insurance companies to keep the cost down.</p> <p>WE NEED an income based limit on premiums or an income based exception to the requirements for insurance.</p> <p>Please also require the Insurance Companies to offer lower premium policies. a solo practitioner should have not have pay more than \$4,000 per year for insurance.</p>
221	<p>There is no need for Mandatory Insurance. This is not constitutional. Seems as if the insurance companies are trying to make money off attorneys.</p>



222	<p>Briefly:</p> <ul style="list-style-type: none"> <li>- We need to either require all to have it or not so require.</li> <li>- Anything in the middle can muddy waters and confuse consumers/clients unnecessarily;</li> <li>- We already have required disclosure in our retainer agreements with clients so that if we choose to NOT require all to have it, I would be against any additional change.</li> <li>- In OR the rule is ALL attorneys must have it and I think this protects the public best a brings costs down for all.</li> </ul>
223	<p>1. The goal of promoting access to justice should be the primary focus: Sole practitioners and nonprofit attorneys often work with small business clients, startups and others who are not large consumers of legal help, but still have important matters needing professional attention. Often, the rates charged and hours devoted to these matters leaves a small margin of profit, if any. Mandatory malpractice insurance would force these attorneys to raise rates to a level that makes their services less affordable and, therefore, less accessible to many in need of legal assistance.</p> <p>2. Extend and actively promote the public comment period. I just learned of this proposal through a colleague, and the comment deadline is today. This issue was not nearly well publicized enough for the bar to move forward as if it has received sufficient exposure and input. 3. Generally, malpractice insurance is quite costly and should not be mandatory unless the rates are greatly reduced to be affordable for all, not just big law firms and highly profitable boutique firms.</p> <p>4. If mandated: there should be a threshold measured by gross revenues before sole practitioners and consultants to nonprofits and startups would be required to obtain insurance. There should also be many options for carriers, which is not the current state of the insurance industry. Also, there should be options to pay over time rather than lump sums, and zero percent financing.</p> <p>5. Insurance information should remain a client disclosure matter, not published anywhere and restricted to the written engagement agreement. It should not become a marketing tool for the unscrupulous or a new scam for the lawless operators out there.</p> <p>These are my very brief comments on a highly complex subject. I strongly urge you to extend and better publicize this comment period.</p>
224	<p>I am not in favor of mandatory malpractice insurance. Our firm notifies clients in our Letter of Engagement of our insurance status and each client is told to please advise of any questions or comments they have prior to countersigning. We do not proceed without the countersigned Letter. No one has ever made a claim against our practice. I am especially concerned about linking insurance coverage to the license to practice. That will be a difficult economic decision for many attorneys. I strongly encourage a no vote to any of these proposals.</p>
225	<p>For solo practitioners (as am I), mal-practice insurance is a huge burden. I must calculate that expense into the fees I charge everyone client as against the risk of going without mal-practice insurance. The State Bar and the State of California policies regarding "independent paralegals" such as "We The People" and numerous others have been devastating to the Solo Practitioner. There is no enforcement against organizations such as We The People and other "Paralegal Document Preparers" who suffer no legal liability as they advise persons without any liability. Most of these independent "paralegals" have no consideration for mal-practice insurance as they claim that they do not practice law. This is very devastating to Solo Practitioners who must carry professional practice insurance and compete for a client base that is using "independent paralegals" in person and on-line for much reduced prices (as they operate without liability and cross over into the unauthorized practice of law without consequence).</p>

The State Courts now provide multiple millions of dollars of legal services that were once provided by attorneys. This cuts out a substantial portion of potential clients available for the sole practitioner.

Professional practice insurance is a valuable asset and tool for the solo practitioner. The solo practitioner is still a valuable asset to serve the communities in which we practice. I use the State Bar insurance sponsored carrier at this time and I am well pleased. I propose that we encourage and environment that allows strong competition for professional practice insurance carriers to operate in California so as to keep premiums competitive.

226 Requiring malpractice insurance for all attorneys would be extremely unfair. I have handled numerous FDCPA cases in which the maximum recovery for the client is \$2,000.00 (including the Rosenthal claim). The last time I got a quote for insurance, I was quoted approximately \$10,000. This means I would have to screw up five cases a year just to "break even" on what would be required insurance.

Further, I have practiced criminal law in the past. Due to the case law, it is extremely difficult to commit malpractice on a criminal case. I have yet to meet a criminal defense attorney who carries malpractice insurance, as it would be an unnecessary added expense.

The current requirement to inform clients on the retainer agreement whether the attorney carries malpractice insurance is enough to inform the clients. It gives them the information they need to decide whether to stick with that attorney, or find another attorney who carries malpractice insurance.

This requirement would unfairly burden the sole practitioners and those who practice in areas where malpractice insurance is unnecessary. This would especially impact consumer attorneys who are assisting low income clients.

227 Mandating malpractice coverage has its negatives. It is no secret that the existence of malpractice insurance can be an incentive for costly, frivolous and vexatious litigation on the part of clients disappointed with the outcome of a particular matter, even in the absence of any malpractice.

Attorneys who elect not to carry malpractice insurance -- or to have coverage less than any state bar level as may be established -- should (as now) simply be required to notify each client of that fact in writing (by certified mail or other verifiable means, e.g., a signed retention agreement containing notice of lack of malpractice insurance).

It should also be required of the client to acknowledge by a date certain the receipt of such notification (if not contained in a signed retention agreement), as a pre-condition to establishing an attorney-client relationship and/or a pre-condition to file a malpractice claim.

Clients who fail or refuse to timely signed acknowledgement of an attorney's notice of non-coverage should be barred from filing any malpractice claim based in whole or in part on any alleged act of malpractice occurring prior to returning the signed acknowledgement that the attorney lacks malpractice insurance.

Likewise, non-covered attorneys should not be permitted to bill for work performed prior to client's acknowledgement of attorney's non-coverage, except as to 'emergency' work performed to preserve client's rights, e.g., a filing to avoid a statute of limitations deadline; appearance at a criminal court arraignment, etc.

Finally, if mandatory minimum malpractice coverage is required, cost must be state-bar regulated (perhaps by practice areas) and not be so high as to discourage pro-bono work or exclude new attorneys

	from practice, many of whom carry immense student debt and who should be permitted to practice of law at a level of risk they can tolerate given the nature of their practice.
228	Current rule should remain unchanged. I am working a few sporadic weeks a year as a private arbitrator, otherwise retired, but of course I am still required to keep up my license per bar rules. Don't have classic "clients" per se, but it sounds like an insurance rule would apply to me anyway. It can get pretty expensive for someone who does not fit the normal criteria for having clients.
229	As far as this measure seeks to require attorney's to carry malpractice insurance, I disagree with that portion. As a newly practicing attorney that started my own firm, I would have been unable to start my firm if I would have been required to carry insurance. I believe the fear of client complaints to the State Bar are sufficient to cause the majority of us to be careful about what we do. And the current requirement of disclosure is sufficient to provide clients with notice. Additional requirements would be overly burdensome on attorneys who practice on their own.
230	<p>Mandatory insurance would raise the cost of legal services, and discourage pro bono work by small firms/solo practitioners. Attorneys who do not make a lot of money, but enjoy practicing and offer excellent legal services, likely would have to stop practicing.</p> <p>Any attorney without malpractice insurance has made an informed choice about the risk in the context of his practice. Attorneys generally are among the more intelligent in the population.</p> <p>Forcing disclosure would make an attorney a target. There's already a lot of frivolous litigation, and this likely would increase meritless claims, looking to cash in on an insurance settlement. A single claim would increase premiums, whether or not it has merit, making it financially unfeasible for an attorney to continue to work in his chosen profession.</p> <p>A mandate would favor big firms. CA has a lot of solo practitioners. A large percentage of the public cannot afford big firm fees.</p> <p>Business insurance, home owners insurance, health insurance, income, etc., is a private matter. Malpractice insurance should be a private matter and a personal choice. What's next? Mandated disclosure of annual income, charitable contributions, height and weight, ethnicity, race, sexual preference?</p> <p>What if an attorney doesn't have fire insurance, and his files are burned or his cloud files are hacked and he doesn't have insurance for data loss? It's ease to imagine areas where micromanagement could aim to indemnify a particular population. Is that next?</p> <p>This is a move by insurance companies looking for money.</p> <p>If an attorney wants to risk losing everything by not buying malpractice insurance, that's his choice. He probably doesn't take matters for which he is not expertly competent. That's true public protection.</p>
231	<p>1. I strongly support maintaining open market pricing; strongly support mandatory insurance</p> <p>2. I don't believe either mandatory or voluntary self-assessment is useful. As with most human behavior, some will overestimate their abilities while others will be self-deprecating.</p> <p>3. There has been almost no publicity or information around the retitled California Lawyers Association. Initially I heard it was a hack into the State Bar Association. Does the CLA itself make the rules around insurance coverage? If it is a voluntary organization, how will it enforce mandates for insurance?</p>
232	We support mandatory malpractice insurance for attorneys. Often you come across clients who had terrible attorney experiences - malpractice occurred - but, the attorney disclosed they do not have

insurance. They have no skin in the game. Being subject to higher premiums if they err will make attorneys more accountable to their clients.

233 I do not believe that mandating malpractice insurance is necessary or beneficial. It is sufficient that retainer agreements contain a disclosure. Moreover, carrying insurance - in some instances - actually causes meritless malpractice actions when insurance is viewed as a recoverable "deep pocket." Finally, as insurance is prohibitively expensive, requiring its purchase would cause small firms (such as mine) to terminate support staff to be able to afford it.

I would be in favor of option 1(a)(ii), or d.

I am not opposed to requiring attorneys to disclose to the bar if they carry insurance or not, provided that disclosure remains private and is never used in the future to compel non-covered attorneys to acquire insurance.

I am opposed to requiring insurance as a requirement to practice law. I am opposed to options 2a and b and have no issue with 2c. I also believe that mandating additional disclosures on websites would be compelled speech in violation of the First Amendment.

I have no issue with any of the options under 3, again provided that it not be mandatory. (I have no issue with 3c)

Finally, I have no issue with option 4 provided that any such "education" of the public is truthful and not slanted in such a way that potential clients refuse to hire attorneys without coverage.

234 I am opposed to mandatory professional legal malpractice insurance.

I support no changes, though I do not oppose Promoting the voluntary purchase of insurance by: Educating lawyers about the benefits of insurance (including risk assessment and claims handling functions; CLE provided; etc.).

I believe premiums are too high, particularly for solo practitioners, and those who practice in certain areas such as intellectual property. It is very difficult and expensive for an attorney who has been or is in government or in-house and who then practices part or full time as a private practitioner (not government or in-house) to obtain and maintain insurance.

Further, would the heirs of an attorney, or beneficiaries of an attorney's trust or estate need to maintain insurance for some period of time following the death or incapacity of attorney?

I believe the client disclosure requirements are adequate, if not buried amongst other text.

I also believe, though I do not have empirical evidence, that maintaining insurance sometimes encourages baseless malpractice claims, and that not having insurance might discourage baseless or very weak claims, especially when a client or former client is merely upset or disgruntled with an attorney.

I believe that mandating insurance would reduce pro bono work, and might reduce access to justice as the costs of insurance might discourage the practice of law in California.

Whether or not insurance is mandated I think there should be greater competition for providers / insurers / underwriters, and as long as the costs associated with a State Captive Insurance Fund Model is not a cost passed along to all licensed attorneys I am not opposed to a Captive Insurance Fund Model in conjunction with an Open Market.

235	<p>Simply put, there needs to be a meaningful choice is carriers and pricing for legal malpractice insurance. Unfortunately, by have a seemingly State run operation it pushes out competition and at the same time increases the pricing due to the lack of competition in the marketplace, i.e., mandating malpractice insurance and a State Bar run captive carrier.</p> <p>This runs contrary to capitalism. Similar to auto insurance which is required people still drive without insurance but there is no State run operation requiring it.</p> <p>Does not comport with fair market trade in this area of insurance cover</p>
236	<p>California attorneys should be required to have and maintain professional liability insurance. Disclosure of the absence of such insurance is not a sufficient protection for the public, even with the more extensive disclosures that are among the options being considered by the State Bar. In addition focusing potential clients on the presence or absence of insurance coverage at the time of retention is a distraction at a point when the client should be focusing on the quality of the proposed representation and personal "fit" with counsel. Compliance with disclosure requirements is also likely to be more difficult to enforce than compliance with a requirement to have and prove the existence of insurance coverage.</p> <p>As for the means. I support leaving the choice of insurers to individual attorneys and law firms while also providing a captive/risk retention group program available as an alternative on a state or regional basis. I have substantial experience advising a captive/risk retention group insurer, and believe the model provides an opportunity to take the profit element out of the process or minimize it, thereby providing a cost effective alternative in tandem with the requirement of maintaining insurance coverage. Such a program can also be used for risk management, education, and anonymous data collection to better understand where and how the delivery of legal services can be improved.</p>
237	<p>AGAINST:</p> <p>Because limits will be capped to produce an affordable rate (the impetus is to insure attorneys who presently have no insurance), attorneys seeking higher limits will have to increase their limits via an excess insurance carrier. Historically, whenever a primary carrier denies higher limits and excess must be purchased, the resulting premium is significantly higher than if the primary insurer provided the higher limits. So for this group of attorneys, like me, it also quite likely that premiums will increase. A more subtle issue arises because of the issuance of a single policy. In the current open market there are many policies that offer different levels of coverage, ranging from coverage for disciplinary proceedings, payment of all or substantial defense costs incurred, and a dozen or so more coverage features. The new plan will most likely have a single coverage for all because there is a single premium.</p>
238	<p>I am a semi-retired real estate attorney with a small solo practice. A requirement to purchase malpractice insurance would likely require me to hasten going inactive or to retire completely.</p>
239	<p>The private markets work fine. There is no need for a government system.</p>
240	<p>I am opposed to the imposition of mandatory malpractice insurance. I am unaware of a study regarding the financial impact that mandatory insurance will have on practitioners. I can envision affordability issues. An otherwise competent attorney may be deterred from practicing law.</p> <p>I also believe that it is sufficient that attorneys disclose in their retainer agreements whether that attorney has insurance so that the client can make his or her own decision about employing that attorney.</p>
241	<p>If the bar mandates such insurance, and establishes a captive carrier, I will leave the practice of law. This is too big a burden on solo practitioners.</p>
242	<p>AGAINST.</p>

The ramifications of this have not been thought through. Two issues come to d: #1  
Because limits will be capped to produce an affordable rate (the impetus is to insure attorneys who presently have no insurance), attorneys seeking higher limits will have to increase their limits via an excess insurance carrier. Historically we have seen that whenever a primary carrier denies higher limits and excess must be purchased, the resulting premium is significantly higher than if the primary insurer provided the higher limits. So for this group of attorneys it also quite likely that premiums will increase. #2

A more subtle issue arises because of the issuance of a single policy. In the current open market there are many policies that offer different levels of coverage, ranging from coverage for disciplinary proceedings, payment of all or substantial defense costs incurred, and a dozen or so more coverage features. The new plan will most likely have a single coverage for all because there is a single premium.

243 I have carried malpractice insurance since 1982. But I am concerned that making it mandatory may raise rates. It costs enough as is. As anyone researched the effect on existing rates the proposed rule will have?

244 TO change and further restrict attorneys to carry malpractice insurance and disclose to clients seem unwarranted and in violation of privacy rights. No regulatory agency asks that you disclose to other drivers whether you carry car insurance before driving, or health insurance before making an appointment with a doctor, or likewise for other insurance coverage we likely all have. I carry malpractice insurance as an attorney, but don't feel it is my client's business to know this at first retention, unless asked. It carries with it a negative connotation that we should not have to bring into a conversation with a potential or new client when first being retained. This is a personal protection and a forced disclosure would be in violation of my privacy rights.

245 Another needless government regulation???  
Hell no!!!

246 I object to this proposal for several reasons:  
1. Although licensed and active, I do not practice law for a living. Therefore, I fail to see how having legal malpractice insurance is necessary for lawyers like myself.  
2. I do not believe philosophically that the State Bar should be regulating risk of malpractice. Its role should be limited to admissions and discipline.  
3. I have not been presented with any evidence that demonstrates that there is a problem to be solved. In other words, unless there is substantial evidence showing that clients have been hurt by not being able to collect on malpractice judgments against attorneys, there is no need for this rule. I would submit that the evidence would have to be compelling to mandate malpractice coverage.  
4. This proposed rule does not deal with attorneys who cannot afford coverage.  
5. This proposed rule implies that the private insurance market will be replaced by a captive State Bar carrier. This is economic nonsense as market-driven premiums provide the most efficient cost and risk sharing mechanisms.

247 I oppose mandatory malpractice coverage and also oppose mandatory client disclosure. After 37 years of practice I see no advantage to this requirement.

248 My comments on the options Under Consideration:

1. Amending rules requiring attorneys to disclose to clients that they do not carry legal malpractice insurance.

PLEASE MAKE no change to current disclosure rule.

PLEASE absolutely do NOT require attorneys to disclose to the State Bar whether they have legal malpractice insurance, potentially including the amount of coverage and the type of policy (i.e., claims-made or occurrence-based).

This information should NOT be made available to the public. Think Yelp and other misleading services that have adopted a pay-for-play mentality. Think defamation that can be avoided.

For solos and small practices, the business of law practice is difficult enough. A rule that requires public disclosure of amounts of coverage is a lightning rod for plaintiff bar against any attorney (including other plaintiff bar attorneys!).

It is a small step from disclosure to mandate of insurance to minimums of coverage. Every practice is different, and every engagement is unique. No one-size-fits-all limit is appropriate.

Also, from a competition perspective, a solo or small office will never carry the same policy limits as a Big law firm. It is completely unfair to blanket all attorneys with the same rules. To have no rule (other than one in place) simplifies matters for all. The client will have the disclosure that attorney has not malpractice insurance (which is usually manifested with the engagement agreement).

2.Mandating legal malpractice insurance for attorneys as a condition of licensing, except for in-house counsel and government attorneys.

The open market model is the only way to make sure we get fair and competitive pricing and service for insurance coverage.

If the open market model is abandoned, the market's invisible hand will spank concerned.

Government regulation and interference tends to lead to higher pricing via monopolistic behavior, tends to drive out competitors, and tends to lead to less incentive for better service (think utility, e.g., PG&E, with no embellishment required).

Please, no captive state-run insurer.

Please, no mandated insurance. The consumer marketplace will root out the uninsured. Further, the consuming public should have some responsibility for its choice of providers. We must stop being a nanny-state!

249 As a sole practitioner, I have insurance. I believe that it doesn't make me do my job better and I believe it's a terrible expense. I hope that don't make it mandatory, I made the choice to have the protection, but the real question is making sure that we do the right thing for our clients.

250 I have serious reservations about the mandatory professional liability insurance proposal. There are many low-income attorneys providing virtually pro-bono legal assistance who cannot afford malpractice insurance. There are many non-profit legal aid type organizations that provide services not generally available to low and moderate income persons which subsist on marginal budgets and which would likely be unable to cover the costs of such insurance. The financial burden would be substantial and potentially devastating. Has a study been done to determine if legal aid society type programs have experienced malpractice claims, and the nature of the claims, and the actual damages alleged and/or collected by an aggrieved client? My intuition suggests that there have been a statistically meaningless number of such claims, so that there is no "risk" and no need for imposing such a burden upon non-profits.

251 I have practiced law since 1977 both as a government attorney (Navy JAG Corps, Deputy County Counsel--San Diego) and in private practice.

For the last 20 years, I have practiced about 90% immigration law. For that period of time, I have had the same malpractice insurer, originally recommended through the American Immigration Lawyer's

Association. The policy I have is geared toward my specialty in Immigration law. It permits me more favorable rates than general attorney malpractice insurance.

I oppose any option that would remove my ability to continue this insurance coverage and mandate a specific carrier in its stead. While I certainly agree that all attorneys should carry malpractice insurance, I disagree with being required to obtain that insurance through a particular company mandated by the State. I prefer to be able to choose my carrier (Lloyds of London through Complete Equity Markets, Inc.) so long as I carry the State-required policy limits.

252 I write to express my concern with the recommendations of the Malpractice Insurance Working Group. By way of background, I am and have been insured by the same company for my career. Specifically, I've addressed each of my concerns below in the order set forth in the Agenda Item 702 September 2018 linked above.

1. I have no problem with requiring attorneys to disclose to clients that they do not carry professional liability insurance, but sub-item 1.c. is overly burdensome to both client and attorney, and is not required. Once a client has received disclosure of the lack of professional liability insurance, and acknowledged receipt of the disclosure in writing, that meets the goals of ensuring that a client is aware of the lack of insurance and the possible consequences thereof. Requiring an attorney to disclose it on every piece of correspondence and on their website and marketing is a punitive measure in no way designed to protect the public. It's essentially a public shaming of those attorneys who chose not to, or cannot afford to carry professional liability insurance.

2. Mandating that all attorneys carry malpractice insurance as a condition of licensure is going to have a chilling effect on access to legal services for the poor. Contrary to what the Group may believe, most attorneys who do not carry malpractice insurance do so for economic reasons. They simply cannot afford the excessively-high premiums (I currently pay what I consider to be a significant percentage of my gross income for insurance against which I have never personally made a claim). By mandating that all attorneys carry insurance, many attorneys who service the poorest clients will be forced out, or will run without it risking loss of their license. I see this as an untenable proposal, and one that will level a crushing blow to poor and indigent clients.

Further, the proposal to require use of a captive insurance company is ridiculous. I for one would have to seriously consider whether I continue to practice law in California if you force me to buy insurance through the State Bar. I'm in the process of becoming dual-licensed in the State of Texas and I would retire my license here if this proposal is adopted.

3. I feel that the proposal of Continuing Education and Self-Assessment for all attorneys would be a very weltool.

4. Again, my experience with attorneys who do not have malpractice insurance is that it is not for lack of understanding of the benefits of such insurance, rather, it is a purely economic decision - do I pay my rent, or do I pay excessive premiums.

I hope that the State Bar will not implement the more radical of the Working Group's proposal, and that common sense will be brought to this decision.

253 I am vehemently opposed to mandating insurance coverage for all non-government attorneys. I've seen too much fraud by insurance companies, and imposing insurance as a requirement for continued licensure affords insurance carriers too much leverage. Our dues are high enough as it is, our mandated continuing legal education is expensive, and maintaining a law library with Westlaw access is not cheap thrill. Due to physical limitations, I am only a freelance litigator. I do not accept my own cases. I primarily assist certain attorneys who work on a contingency fee basis. I am covered by their



	malpractice policies. I would not want to raise my hourly rate simply to pay for insurance coverage that I will never need. Why line the pockets of insurance companies?
254	I am a sole practitioner and do not currently purchase professional liability insurance. I would be interested in purchasing liability insurance if the cost was lower. If the State Bar decides to mandate liability insurance, it must also provide a low cost, low coverage limits option for attorneys like me. If that entails a single payor feature, so be it.
255	<p>I am a private practitioner, having practiced law for more than 40 years. I have a few referral or old time clients with family law problems. Some of my legal work is pro bono. I inform my clients that I do not have malpractice insurance as was the first step to the State Bar mandating insurance. I have never been rejected as their attorney because of it. I have never been sued for malpractice.</p> <p>I will be put out of practice if required to buy malpractice insurance as its cost (minimum \$500 a month) is too high to justify.</p> <p>I already have to purchase the right for some stranger to take my fingerprints by computer, again. (I am also a licensed Notary Public so I know the drill). I will wait for that deadline to see if this new requirement passes. But, please, please stop thinking of new stuff the attorneys must purchase for the benefit of, well, no one. Not all of us are rich!</p>
256	<p>We are currently required to disclose. This protects the public. Mandating insurance harms the public as practitioners who have smaller practices, or who provide low cost legal services will be driven to raise fees or out of business.</p> <p>The State Bar should not be in the business of raising fees for the public or driving attorneys out of busin</p>
257	<p>1. I believe malpractice insurance should be mandatory</p> <p>I believe attorneys should be permitted to purchase insurance on the open market.</p>
258	Young and retiring attorneys cannot afford liability insurance. I am in the process of retiring after 36 years as a California attorney. I plan to do occasional legal transactions such as reviewing contracts, forming corporation and advising on senior issues. Several of my long term clients may want me to give occasional advice. I have never purchased malpractice insurance and have never needed it in my whole career. To require all attorneys to purchase liability insurance is unfair and cost prohibitive. I therefore object to such a mandate. If you mandate such a thing, you should place restrictions on insurance companies so that young and retiring members are unnecessarily burdened to where they must stop the practice of law altogether. Many will leave the State if you institute such a mandate...
259	I think the State Bar should make malpractice insurance mandatory for all private practice attorneys. I favor the Open Market Model. Clients, especially consumer and unsophisticated individuals, deserve a source of recovery if the work done for them did not satisfy the legal standard for competent representation and damage resulted.
260	I do not believe that any changes are required. I have always carried malpractice insurance. I disclose that to my clients. I do not need to be mandated to carry insurance, nor to I feel it is appropriate to have such information available to the public.
261	<p>I oppose mandatory and or compulsory professional insurance coverage.</p> <p>The profiteers will be privately owned and controlled insurance compas.</p> <p>Current insurance is expensive and not adequate. I pay \$4,000.00 per year for \$100,000.00 of coverage. It has a deductible off the coverage amount and is reduced by a cost to defend.</p>
262	I think the rules should remain the same. Mandatory insurance will bar lots of lawyers from the field or cause lots of lawyers to lie about whether they have insurance.
263	I have practiced law in San Francisco for over 50 years. I have never been sued for malpractice. Many years ago, when I was in a partnership, we had malpractice insurance with expensive premiums. No claims were ever made against us.

I oppose requiring attorneys to have malpractice insurance. It costs enough to practice law!

I do not oppose my continuing to disclose in my Attorney Client Fee Agreements that I do not carry malpractice insurance.

If, arguendo, malpractice insurance were to be required, I would oppose disclosing coverage amounts, as unscrupulous individuals could try and target high policy limits lawyers.

264 Although I remain an active member of the State Bar I am, at 75, essentially retired. The exception is for some pro bono work, predominately for my church. If I were required to have malpractice insurance, I would have to cease pro bono work, other than for organizations that have their own malpractice coverage to ensure me. I would hope that if mandatory coverage is adopted, an exception would be made for attorneys who no longer work for income.

265 I oppose mandatory malpractice insurance

266 I don't know when the State Bar is going to stop making practice of law difficult for lawyers. Every rule that comes out of the State Bar is against attorneys and supposedly in favor of the public. As of a few days ago, we are not mandated to deposit all retainers in our trust account and withdraw the funds that we have earned each month. For a small law firm, this has created an accounting nightmare. As if we were not working hard enough, you go and create a rule that benefits you (I will get into that soon) and makes our jobs more difficult. This rule doesn't protect the clients; it creates an income revenue for you, the State Bar. The clients do not get the interest. You do.

In over 27 years of practice, I have never had a single bar complaint by a client. I take care of my clients and resolve all disputes with them, if any, as efficiently and fairly as possible. I have not taken a penny that belonged to a client. Yet, you have treated me and many good lawyers as if we are bad people and we need to be watched by you. There are a few bad apples, but you have come up with a rule that treats us all as if all of us are bad. Again, you guys never come up with rules that make our lives easier. You come up with rules that make our lives more miserable.

Now, you want to force all of us to have malpractice insurance policy. Just so you know, my office has always had malpractice insurance. So, I am not against this rule because I don't want to pay to get insurance. I am against it because yet again, you come up with rules that make our lives miserable and it does not help us. My office, due to our success, can afford malpractice insurance. But, what about all the other attorneys who are barely getting by and can't afford to get insurance? You are going to put them out of business. These are hard working people and all you want to do is make their lives more miserable. Don't you think that they would have malpractice insurance if they could afford it? You don't think that they would rather sleep better at nights knowing that they have insurance?

Stop coming up with rule after rule that just makes the practice of law more difficult and costly. You are not doing our clients any favor. You are making us raise our fees even more and have less people who can afford us. That will only lead to less access to lawyers for the public. Just because you are part of a bureaucracy, it does not mean that you have to keep coming up with new rules. We have enough rules. Leave us alone and go after the few bad apples. The rest of us practice law for 40 or 50 years and we do it with integrity and honor. We don't need to be watched like children who might misbehave.

267 Mandatory E&O coverage would spell the ruin of my firm and many many other small firms like mine. E&O insurance is prohibitively expensive and would not serve any useful purpose.

Instead of reducing rates the more time you have practiced the rates go up and up. There is no correlation between the layer's practice and abilities and the insurance coverage.

Why would having E&O benefit a client? So they can sue on a whim?

	Mandatory E&O in this state would spell the end of the small law practice.
268	I oppose the move to mandate malpractice insurance. Many members practice in fields that do not carry a significant risk of loss against which we should be required to insure ourselves. I believe that, if the Bar mandates malpractice insurance, many members will be forced to leave the Bar, and therefore the practice of law in CA. It should be left to individual members to weigh the risks, and decide for themselves whether they decide to insure themselves against a potential loss.
269	<p>I no longer have malpractice insurance. I normally disclose this fact to clients and always do when a written agreement is required. Most of my clients are businesses. I have never had a private sector business client ask me if I had malpractice insurance.</p> <p>In 49 years of practice, I had one claim [covered by insurance] and one claim not. The former arose before a maniacal federal court judge [Manny Real] in LA, who was up for impeachment before the Congress last time I looked. The latter arose when my paralegal failed to calendar statutes and deadlines, despite my written memo to her instructing her to do so. I paid the latter claim from my own pocket. The client lost nothing. The payment was less than two years' premiums for the insurance. This is an overblown issue; a solution looking for a problem.</p>
270	It is my opinion that all attorneys licensed and/or in private practice should be required to carry malpractice insurance. It is my opinion that it is mostly the attorneys more likely to commit malpractice that do not carry insurance.
271	I strongly oppose mandatory insurance for attorneys. There is no proof that requiring mandatory insurance reduces malpractice. All it would do is eliminate solo practitioners. From my 30 plus years of experience it is the larger firms that commit the greatest amount of malpractice.
272	I am opposed to a mandatory malpractice insurance requirement. The present practice of requiring the attorney to inform client when no coverage exists is sufficient.
273	While I have always had legal malpractice, I do not believe it would be a good idea to have mandatory legal malpractice. I believe that it would result in malpractice insurance becoming much more expensive, especially if there is not an open market.
274	I am mostly retired, but wish to maintain my license. I work as a pro tem judge, arbitrator and mediator. Occasionally I do work for existing clients. I carried malpractice when I had an active practice, but certainly do not want to incur the expense of mandatory coverage.
275	<p>Mandatory malpractice insurance will ensure that I will not be able to practice law. I am a solo practitioner in family law and have many low income clients. I do not have enough cases to subsidize the low rate cases. I cannot raise my rates to cover the additional costs. Mandatory malpractice insurance will cause many attorneys to leave the practice of law, which will limit the access of low income people to competent attorneys whose only issue is being unable to obtain malpractice insurance. The reason we are affordable is because we do not have the overhead of a large firm which can spread out the premiums over a larger number of clients.</p> <p>Please do not force mandatory malpractice insurance on solo practitioners.</p>
276	<p>Mandating insurance would have a terrible effect on lawyers who do not practice law full time, who have modest incomes, new attorneys, and/or lawyers who have non-legal careers.</p> <p>The cost of insurance is massive. Mandating insurance will not lower policy costs. Forcing coverage would make it extremely difficult and perhaps impossible for too many attorneys to remain active. I urge the Bar to not adopt any measure compelling coverage.</p>
277	Keep E & O insurance (malpractice insurance) for lawyers PRIVATE. The State Bar has enough problems administering for the California attorneys it oversees. There is, in my forty-two years of experience, really no need for a captive carrier to insured attorneys in California. There are those of us who comply -- there will always be those who do not. My practice, defending insureds of title insurance companies, will not be impacted by the proposed change. However, having representing title insurers for substantially all of my legal career, I know the difference between "good" insurance, "bad"

	insurance, and insurance companies that simply collect premiums and deny claims. E & O for lawyers is no different. Let us attorneys choose who we want to insurer our practices -- not be compelled to use a private company who was chosen by the State Bar.
278	I am in favor of leaving all of the current California State Bar rules regarding malpractice insurance as they are. I do not believe that any changes are necessary.
279	I think the Rule should remain the same. Insurance SHOULD NOT BE REQUIRED, but disclosed to any client.
280	The current available malpractice coverage is too expensive. I cannot afford any malpractice coverage. Additionally, because we are required to disclose in the fee agreement the existence of malpractice coverage, unscrupulous clients may use that to take advantage of attorneys. I had a prior client sue me for malpractice for the insurance, because the insurer always makes the decision of settlement on a cost/risk analysis, regardless of the merits of the case. In fact, my case was completely without merit but the amount of settlement was less than the cost of defense so he obtained a nuisance settlement from my insurer, who then refused to renew my policy. My former client - at the time he sued me, actually told me that the reason he sued me was because I had insurance coverage. So I am against mandated coverage without a significant oversight and regulation on the insurers who increase the cost based on years of practice (which is also backwards) and some cap on the amount of premiums the insurers can charge. Also, I provide to many of my clients who cannot afford the regular prevailing hourly rate for attorneys my services on a discounted basis depending on their ability to pay. I can only do this because I have limited my overhead by not having malpractice insurance and disclosing the absence of malpractice insurance in my fee agreements. To mandate the insurance without providing for the attorney like me who cannot afford it, or force me to pass the cost on to clients who cannot afford it, will ultimately put me out of business. The disclosure requirement is sufficient to protect the public.
281	- Malpractice insurance should not be mandatory.
282	I am absolutely opposed to mandating malpractice insurance. And I am ADAMANTLY opposed to a State Bar run captive carrier. The Bar association should NOT be in the business of insurance. Stick to what you're mandated to do. This will only increase costs and bureaucracy. Attorneys are fully capable of governing their own businesses without the constant intervention of the Bar Association. Let free markets control.
283	really bad idea why single out lawyers and not other professions also having government organize an insurance pool would result in the creation of yet another bureaucracy with burdens administrative costs
284	Being an attorney, especially a new attorney, is SO expensive. There is no tier system for Bar dues and there are many new attorneys, like me, who a year out of school still haven't been able to find a job. So, to add any more expense on top of the enormous cost of living in Los Angeles, networking fees and Bar Associations to hopefully find a job, and student loan debt, now you want to add mandatory malpractice insurance? I already can't get by and the fact that the California Bar does not transfer to other states severely limits where I can even look for a job. Please don't bankrupt me! If I represent a couple of small clients, it's literally just to get some experience so that hopefully I'll be more marketable and be able to get a job soon.
285	mandatory malpractice insurance should be required only if the facts clearly demonstrate that more than a de minimis number of clients are harmed by the existing voluntary program.  if mandatory malpractice insurance is required, I support an OPEN MARKET model, NOT a model with coverage provided only through a bar or state program.  my experience with the current state bar affiliated program was not good. It was clear that for a solo practitioner, the vendor was uninterested and thoroughly bureaucratic in response. I received good service by an interested and knowledgeable person with a broker who is affiliated with a local bar

	association.
286	<p>Support Open Market Model.</p> <p>Oppose Captive Insurance Fund Model.</p> <p>I now have insurance at a high level with a tail provision which I would lose if the State Bar creates a captive market, a hardship for me. If the State Bar creates a captive model, it will have a monopoly which will destroy the private insurance brokers.</p>
287	<p>I think the present arrangement works as well as can be expected. A lawyer who does not carry malpractice insurance must notify a client before he takes on professional responsibility. It is the client's choice whether to proceed or not. There are a number of carriers writing this kind of insurance, and that means competition that would be lacking in a single or "captive" carrier situation. This may be beyond the scope of the question: Policy terms should be looked at. There is a built-in conflict of interest between the carrier and the assured. The lawyer's may be interested in establishing that he or she was not negligent, i.e. not at fault. From the carrier's viewpoint, the lawyer is wrong, i.e., at fault, if the lawyer costs the carrier money. The carrier's right to pay the amount of an available settlement and have no further obligation to its lawyer-client should be eliminated. If the client wants to let the case go to a verdict, that should be the lawyer's right.</p>
288	<p>I believe that insurance should not be mandatory, because many modest practices routinely deal with amounts-in-controversy that simply don't require insurance.</p>
289	<p>As an attorney practicing for 28 years I have never had malpractice insurance and I have never needed malpractice insurance. As such, I think the Bar should have never required the disclosure of whether an attorney has malpractice insurance in the first place and I am strongly opposed to requiring attorneys to have it now. If you institute this requirement, it will increase the cost of legal services to consumers, and it will eliminate what low cost attorneys there are. Further, it will drive many attorneys out of the California market, especially sole practice attorneys like me. This rule will disproportionately target sole practitioners and small firms. It will also make it more difficult for me to continue doing the pro bono work that I do. Please reconsider this ill advised proposal.</p>
290	<p>Everyone knows mandatory requirements to buy any insurance drives up premiums and reduces benefits.</p> <p>This especially difficult for sole practitioners. The difference between one person buying a policy and 2 persons sharing a policy are dramatically prejudicial to the sole practitioner.</p> <p>In addition, all the additional requirement for hiring employees and now another mandatory requirement reduces employment opportunities and will ultimately just drive people to retire causing rural areas to lack adequate legal representation.</p> <p>The state bar will have to figure out a way to fill this gap. Unaccredited law schools are being phased out and now steps are being taken to make legal unavailable for many citizens.</p> <p>The consequences for all the changes the state bar had proposed over the years will reduce the amount of lawyers in this state. The city will likely have little effect but the outlying areas will suffer the most.</p> <p>Many small town lawyers make an average living and simply should not be burdened with the additional rate hike that will be forthcoming.</p> <p>Just my 2 cents</p>
291	<p>Insurance is irrelevant to a person's honesty, integrity, and skill as an attorney. I am "of Counsel" to a firm. I am insured for services performed under its banner. I also help people who do not qualify for the several public service legal programs. By keeping my costs low, I can provide services at a low rate. Considering how difficult it is for people without substantial means to obtain counsel, the Bar should consider the effect of increasing the costs of practice by over \$10,000 per year on its purported</p>

goal of providing access to justice to people of moderate incomes. My retainer agreement discloses that I do not carry malpractice insurance and that the client is advised to seek review of my retainer agreement by independent counsel. I review the retainer agreement with a potential client before he/she/it executes same.

I am 60. I have no specialty. I am working toward a specialty in appeals. But, I provide some litigation services and some transaction services. Now, I can help an entrepreneur organize and operate an new business for \$120 per hour. The last quote I received for \$1/\$2 million coverage with a \$10,000 deductible was \$12,000. That policy excluded any liability for securities liability even for helping the company file the standard exempt offering forms. The additional premium itself would only raise the hourly rate \$10/hour. However, there is also additional administrative a record keeping requirement for being able to fill out the underwriting application. I do not think I could charge less than \$140/hr. That is a 17% increase. Perhaps more people should use Legal Zoom or Rocket Lawyer. Small business owners have been thrilled to obtain an experienced litigator for less than \$150.00. My normal rate is \$300/hr for people or businesses with means. I do not target that market segment for my personal practice. I am against mandatory E&O insurance. The insurance industry has too much clout as it is. I think a separately signed disclosure form is dumb. The client is signing the retainer agreement with its mandatory disclosure language. Captive insurance will make the State Bar a business, not a regulator. Bad faith abounds in insurance. Representing attorneys against the State Bar insurance will be a cottage industry. Regulate professional conduct: prohibit bad conduct; provide guidance for good. Stay out of the business side.