WASHINGTON STATE
BAR ASSOCIATION

MANDATORY MALPRACTICE INSURANCE TASK FORCE

AGENDA
February 21, 2018
1:00 p.m. – 4:00 p.m.
Conference Call: 1-866-577-9294; Code: 52824#

AGENDA

1. Call to Order and Preliminary Matters
    a. Approval of January 24, 2018 Minutes
2. WSBA Regulatory Services Department Presentation on Member Demographics - Jean McElroy, Chief Regulatory Counsel, WSBA
3. Oregon State Bar Presentation on Oregon Professional Liability Fund (PLF) - Carol Bernick, Chief Executive Officer, PLF
4. Idaho State Bar Presentation on Professional Liability Insurance - Diane Minnich, Executive Director, Idaho State Bar
5. Review of Recently Submitted Comments to the Task Force & Discussion of Comment Themes

MEETING MATERIALS

A. Draft Meeting Minutes – January 24, 2018 (pp. 96-99)
B. WSBA Membership Statistics – Updated February 9, 2018 (pp. 100-102)
C. Oregon State Bar Statement of the Board of Governors Professional Liability Fund - 1977 Annual Meeting (pp. 103-109)
D. Minimum Financial Responsibility for Lawyers – Revised April 2014 (pp. 110-136)
E. Oregon State Bar Act 9.080 Duties of board of governors; professional liability fund; quorum; status of employees of bar (pp. 137-139)
F. 2016 Oregon Professional Liability Fund Annual Report (pp. 140-155)
G. Supreme Court of Idaho Amended Order on Idaho Bar Commission Rules (pp. 156-159)
H. Idaho State Bar Professional Liability Insurance Coverage Certification (pp. 160-162)
I. Idaho Malpractice Coverage Requirement Frequently Asked Questions (pp.163-165)
J. Comments Submitted to the Task Force (provided to Task Force separately)

A.

Draft Minutes – January 24, 2018

WASHINGTON STATE
BAR ASSOCIATION

DRAFT

MANDATORY MALPRACTICE INSURANCE TASK FORCE

MEETING MINUTES

January 24, 2018

Members present were Chair Hugh Spitzer, John Bachofner, Dan Bridges, Christy Carpenter, Gretchen Gale, P.J. Grabicki (by phone), Lucy Isaki, Mark Johnson (by phone), Rob Karl, Kara Masters, Evan McCauley (by phone), Brad Ogura, Suzanne Pierce, Brooke Pinkham (by phone), Todd Startzel, and Stephanie Wilson. Excused were Annie Yu and Stan Bastian.

Also present were Douglas Ende (WSBA Staff Liaison), Thea Jennings (Office of Disciplinary Counsel Disciplinary Program Administrator), Rachel Konkler (Office of Disciplinary Counsel Legal Administrative Assistant), and Sara Niegowski (WSBA Chief Communications and Outreach Officer).

The meeting was called to order at 1:00 P.M.

A. INTRODUCTION AND PRESENTATION

Welcome and introductions were made around the table, including over the telephone.

Chief Disciplinary Counsel Doug Ende gave a presentation on current trends in malpractice insurance requirements among different jurisdictions, including in Washington State, other U.S. jurisdictions, and non-U.S. jurisdictions. Mr. Ende discussed two U.S. jurisdictions that currently require malpractice insurance, Oregon and Idaho, as well as various regulatory models in other states, including Washington where lawyers are, as part of the annual licensing process, required to disclose to the WSBA whether they maintain malpractice insurance.

B. DISCUSSION RE WSBA REIMBURSEMENT POLICY

Information regarding WSBA Reimbursement Policy was provided and a copy of the WSBA 2017-2018 Expense Report was distributed to the members.

C. REVIEW OF TASK FORCE CHARTER, MISSION AND TIMELINE

The Task Force members reviewed the Charter and discussed their purpose and timeline. They emphasized the need for input from bar members and the public going forward. They also clarified the WSBA's purpose of protecting the public while considering mandatory malpractice insurance for Washington lawyers.

The Task Force members agreed to continue to meet once a month. The members discussed plans to gather more information and research through April, and host up to three guest speakers at each meeting. Starting in May, the Task Force expects to have enough information to begin considering options and to report its recommendations to the WSBA Board of Governors by December 2018.

D. WORK PLAN

The Task Force discussed the information it will need in order to make a recommendation to the Board of Governors, and which experts it will need to contact to collect this information. This information includes but is not limited to:

- Evidence of current problems for consumers in the insurance market,
- Public perception of malpractice insurance coverage for lawyers,
- Demographics of Washington State Bar Association members,
- Possible correlations between grievances against lawyers and lack of insurance coverage,
- Trends in coverage limits,
- Reasons why some lawyers do not purchase malpractice insurance, and
- The array of possible options for addressing problems identified by the Task Force.

The Task Force discussed putting together a panel of industry professionals who would be able to offer insight on current malpractice insurance models, as well as tapping into other resources such as studies and surveys. The Task Force would like to hear from representatives from the Oregon, Idaho, Illinois, and Nevada bar associations or regulatory entities, from ALPS, and also from an insurance underwriter and an insurance broker. A representative from the WSBA's Regulatory Service Department will be invited to attend the next meeting in February. Staff will reach out to other potential guest speakers to present to the Task Force.

Finally, the Task Force discussed communications strategies regarding how to best elicit comments from both bar members and the public. Prior to the next meeting, staff will categorize the comments the Task Force has received thus far, as well as continue to collect additional feedback from members for the Task Force's consideration.

E. COMMENTS SUBMITTED TO THE TASK FORCE

The Task Force discussed the written comments received from WSBA members, which had been compiled and distributed to the Task Force in advance of the meeting. A number of Task Force members noted that some of the comments had influenced their perspective on the issue and would be taken into account as the work of the Task Force progressed.

F. ADJOURNMENT

There being no further business, the meeting adjourned at 3:30 P.M.

B.
WSBA Membership Statistics – Updated February 9, 2018

WSBA Member* Licensing Counts 2/9/18 10:49:17 AM GMT-08:00

Member Type	In WA State	All
Attorney - Active	25,893	32,081
Attorney - Emeritus	108	112
Attorney - Honorary	345	390
Attorney - Inactive	2,395	5,544
Judicial	620	642
LLLT - Active	25	25
LLLT - Inactive	2	2
LPO - Active	790	801
LPO - Inactive	159	172
	30,337	39,769

Misc Counts	
All License Types **	40,023
All WSBA Members	39,769
Members in Washington	30,337
Members in western Washington	10,212
Members in King County	6,418
Members in eastern Washington	1,650
Active Attorneys in western Washington	7,841
Active Attorneys in King County	5,211
Active Attorneys in eastern Washington	1,188
New/Young Lawyers	6,585
MCLE Reporting Group 1	10,651
MCLE Reporting Group 2	11,143
MCLE Reporting Group 3	10,640
Foreign Law Consultant	20
House Counsel	224
Indigent Representative	10

By District	All	Active
0	2,803	2,021
1	2,854	2,345
2	1,945	1,550
3	2,034	1,707
4	1,330	1,113
5	3,099	2,499
6	3,171	2,652
7N	5,218	4,425
7S	6,907	5,654
8	2,131	1,799
9	4,750	4,007
10	2,771	2,309
	39,013	32,081

By Section ***	All	Previous Year
Administrative Law	245	279
Alternative Dispute Resolution	320	384
Animal Law	98	118
Antitrust, Consumer Protection and Unfair Business Practice	193	212
Business Law	1,149	1,386
Cannabis Law	29	
Civil Rights Law	149	202
Construction Law	467	528
Corporate Counsel	1,011	1,165
Creditor Debtor Rights	464	550
Criminal Law	359	540
Elder Law	599	710
Environmental and Land Use Law	734	841
Family Law	999	1,297
Health Law	365	415
Indian Law	281	337
Intellectual Property	802	992
International Practice	206	278
Juvenile Law	182	218
Labor and Employment Law	923	1,052
Legal Assistance to Military Personnel	83	100
Lesbian, Gay, Bisexual, Transgender (LGBT) Law	100	137
Litigation	961	1,192
Low Bono	90	132
Real Property Probate and Trust	2,159	2,403
Senior Lawyers	227	300
Solo and Small Practice	837	1,039
Taxation	600	667
World Peace Through Law	89	116

*** Per WSBA Bylaws 'Members' include active attorney, emeritus pro-bono, honorary, inactive attorney, judicial, limited license legal technician (LLLT), and limited practice officer (LPO) license types.**

**** All license types include active attorney, emeritus pro-bono, foreign law consultant, honorary, house counsel, inactive attorney, indigent representative, judicial, LPO, and LLLT.**

***** The values in the All column are reset to zero at the beginning of the WSBA fiscal year (Oct 1). The Previous Year column is the total from the last day of the fiscal year (Sep 30). WSBA staff with complimentary membership are not included in the counts.**

By State and Province	
Alabama	24
Alaska	202
Alberta	8
Arizona	320
Arkansas	16
Armed Forces Americas	3
Armed Forces Europe, Middle Eas	26
Armed Forces Pacific	19
British Columbia	92
California	1,682
Colorado	238
Connecticut	51
Delaware	4
District of Columbia	331
Florida	244
Georgia	85
Guam	17
Hawaii	135
Idaho	403
Illinois	153
Indiana	34
Iowa	30
Kansas	31
Kentucky	22
Louisiana	48
Maine	12
Maryland	115
Massachusetts	82
Michigan	67
Minnesota	98
Mississippi	4
Missouri	64
Montana	171
Nebraska	17
Nevada	135
New Hampshire	8
New Jersey	66
New Mexico	59
New York	239
North Carolina	74
North Dakota	9
Northern Mariana Islands	7
Nova Scotia	1
Ohio	67
Oklahoma	25
Ontario	12
Oregon	2,619
Pennsylvania	74
Puerto Rico	3
Quebec	1
Rhode Island	12
Saskatchewan	1
South Carolina	27
South Dakota	6
Tennessee	51
Texas	326
Utah	163
Vermont	19
Virginia	277
Virgin Islands	1
Washington	30,337
West Virginia	7
Wisconsin	44
Wyoming	20

By WA County	
Adams	8
Asotin	20
Benton	147
Chelan	111
Clallam	74
Clark	339
Columbia	1
Cowlitz	80
Douglas	15
Ferry	7
Franklin	24
Garfield	1
Grant	67
Grays Harbor	50
Island	71
Jefferson	48
King	6,418
Kitsap	299
Kittitas	31
Klickitat	7
Lewis	51
Lincoln	6
Mason	46
Okanogan	52
Pacific	10
Pend Oreille	11
Pierce	962
San Juan	40
Skagit	137
Skamania	11
Snohomish	746
Spokane	819
Stevens	26
Thurston	563
Wahkiakum	4
Walla Walla	49
Whatcom	263
Whitman	37
Yakima	211

By Admit Yr	
1940	3
1941	2
1942	1
1944	1
1945	1
1946	2
1947	6
1948	8
1949	19
1950	16
1951	28
1952	27
1953	26
1954	29
1955	20
1956	40
1957	34
1958	40
1959	41
1960	33
1961	29
1962	35
1963	34
1964	42
1965	59
1966	63
1967	67
1968	96
1969	106
1970	117
1971	124
1972	193
1973	292
1974	280
1975	345
1976	421
1977	415
1978	472
1979	508
1980	524
1981	555
1982	534
1983	574
1984	652
1985	463
1986	711
1987	623
1988	593
1989	626
1990	763
1991	759
1992	755
1993	793
1994	814
1995	831
1996	767
1997	865
1998	814
1999	853
2000	869
2001	936
2002	1,010
2003	1,039
2004	1,050
2005	1,069
2006	1,104
2007	1,182
2008	1,097
2009	1,005
2010	1,093
2011	1,068
2012	1,108
2013	1,249
2014	1,379
2015	1,651
2016	1,326
2017	1,398
2018	190

WSBA Member* Demographics Report 2/9/18 10:50:43 AM GMT-08:00

By Years Licensed	
Under 6	8,452
6 to 10	5,622
11 to 15	5,503
16 to 20	4,499
21 to 25	4,061
26 to 30	3,480
31 to 35	2,978
36 to 40	2,463
41 and Over	2,711
Total:	**39,769**

By Firm Size	
Solo	5,947
Solo in Shared Office or	1,730
Government/ Public Secto	5,173
In House Counsel	3,021
2-5 Lawyers in Firm	4,999
6-10 Lawyers in Firm	2,149
11-20 Lawyers in Firm	1,543
21-35 Lawyers in Firm	955
36-50 Lawyers in Firm	709
51-100 Lawyers in Firm	739
100+ Lawyers in Firm	2,324
Respondents	**29,289**
No Response	**10,480**
All Member Types	**39,769**

By Ethnicity	
American Indian / Native Americar	254
Asian	1,436
Black/African descent	649
Caucasian/White	24,090
Multi Racial	797
Not Listed	179
Pacific Islander	56
Spanish/Hispanic/Latina/o	697
Respondents	**28,158**
No Response	**11,611**
All Member Types	**39,769**

By Gender	
FEMALE	12,169
MALE	17,364
Respondents	**29,533**
No Response	**10,236**
All Member Types	**39,769**

By Disabled Status	
N	17,990
Y	957

By LGBT	
N	17,804
Y	1,039

By Age	All	Active
21 to 30	2,049	1,963
31 to 40	9,156	8,175
41 to 50	9,580	7,862
51 to 60	8,685	6,839
61 to 70	7,676	5,743
71 to 80	2,071	1,380
Over 80	552	119
Total:	**39,769**	**32,081**

*** Includes active attorneys, emeritus pro-bono, honorary, inactive attorneys, judicial, limited license legal technician (LLLT), and limited practice officer (LPO).**

By Practice Area	
Administrative-regulator	2,284
Agricultural	230
Animal Law	112
Antitrust	303
Appellate	1,638
Aviation	164
Banking	456
Bankruptcy	1,097
Business-commercial	5,337
Civil Litigation	5,452
Civil Rights	1,067
Collections	605
Communications	229
Constitutional	647
Construction	1,356
Consumer	792
Contracts	4,291
Corporate	3,568
Criminal	4,030
Debtor-creditor	1,038
Disability	698
Dispute Resolution	1,393
Education	501
Elder	966
Employment	2,899
Entertainment	326
Environmental	1,342
Estate Planning-probate	3,628
Family	2,982
Foreclosure	568
Forfeiture	87
General	2,947
Government	2,847
Guardianships	933
Health	980
Housing	311
Human Rights	328
Immigration-naturaliza	1,038
Indian	614
Insurance	1,768
Intellectual Property	2,280
International	930
Judicial Officer	394
Juvenile	925
Labor	1,182
Landlord-tenant	1,386
Land Use	835
Legal Ethics	290
Legal Research-writing	745
Legislation	411
Litigation	4,628
Lobbying	176
Malpractice	804
Maritime	306
Military	385
Municipal	968
Non-profit-tax Exempt	621
Not Actively Practicing	1,768
Oil-gas-energy	223
Patent-trademark-copyr	1,323
Personal Injury	3,424
Real Property	2,579
Real Property-land Use	2,388
Securities	828
Sports	159
Subrogation	99
Tax	1,354
Torts	2,176
Traffic Offenses	748
Workers Compensation	748

By Languages Spoken	
Afrikaans	6
Akan /twi	4
Albanian	2
American Sign Language	13
Amharic	16
Arabic	53
Armenian	6
Bengali	11
Bosnian	7
Bulgarian	13
Burmese	2
Cambodian	6
Cantonese	93
Cebuano	3
Chamorro	4
Chaozhou/chiu Chow	1
Chin	2
Croatian	17
Czech	7
Danish	19
Dari	3
Dutch	23
Egyptian	2
Farsi/persian	57
Fijian	1
Finnish	7
French	692
French Creole	2
Fukienese	4
Ga/kwa	2
German	426
Greek	28
Gujarati	14
Haitian Creole	2
Hebrew	38
Hindi	87
Hmong	1
Hungarian	13
Ibo	5
Icelandic	2
Ilocano	9
Indonesian	11
Italian	148
Japanese	209
Kannada/canares	4
Khmer	1
Kongo/kikongo	1
Korean	229
Lao	6
Latvian	6
Lithuanian	4
Malay	3
Malayalam	9
Mandarin	330
Marathi	5
Mongolian	2
Navajo	1
Nepali	3
Norwegian	38
Not listed	32
Oromo	3
Other	23
Pashto	1
Persian	21
Polish	33
Portuguese	119
Portuguese Creole	1
Punjabi	56
Romanian	19
Russian	228
Samoan	9
Serbian	16
Serbo-croatian	7
Sign Language	23
Singhalese	2
Slovak	2
Somali	1
Spanish	1,773
Spanish Creole	9
Swahili	3
Swedish	54
Tagalog	64
Taishanese	2
Taiwanese	17
Tamil	9
Telugu	3
Thai	14
Tigrinya	3
Tongan	1
Turkish	9
Ukrainian	40
Urdu	38
Vietnamese	85
Yoruba	9
Yugoslavian	2

C.

Oregon State Bar Statement of the Board of Governors, Professional Liability Fund - 1977 Annual Meeting

OREGON STATE BAR

Statement of the BOARD OF GOVERNORS PROFESSIONAL LIABILITY FUND

1977 ANNUAL MEETING
SEASIDE, OREGON

INFORMATION TO MEMBERS REGARDING PROFESSIONAL LIABILITY FUND

A number of questions are frequently asked as to why the Oregon State Bar should establish a Professional Liability Fund. As background to the members for their consideration prior to the 1977 Annual Meeting, the Board of Governors has prepared the following questions and answers.

A. What has happened to professional liability coverage and premiums in Oregon?

During the last 15 years all of the professions, lawyers included, have experienced substantial difficulties in the areas of professional liability and liability insurance. The trend is to require increasing premiums for diminishing coverage.

The cost of professional liability insurance for Oregon lawyers has more than tripled in 10 years. Within the last two years, one carrier writing professional liability insurance for lawyers in Oregon increased its premium from $256 to $904 per year for a claims made policy. Oregon lawyers pay among the highest premiums in the country.

Concurrently with the increase in premiums has been a decrease in coverage. Historically, most professional liability insurance coverage was written on an "occurrence" basis. Coverage existed for acts or omissions occurring during the policy period, regardless of when a claim was asserted. In recent years most carriers have limited their policies to coverage for claims asserted during the policy period, requiring continuous purchase of policies (at higher premiums) to protect against risks arising from prior acts.

Claims against lawyers have increased dramatically both in number and magnitude. For example, by 1970 all companies reporting to the Insurance Service Organization disclosed 6,780 claims totaling $33 million in losses; by 1975 these same companies reported a total of 13,333 claims totaling $111 million in losses. Despite this increasing risk, the concurrent increase in premium cost has precluded many lawyers from obtaining professional liability coverage. Some of the companies which previously wrote such coverage in Oregon have withdrawn from the state completely.

B. What has the Bar done in response to the professional liability problem?

At the request of the Bar following action by the members at the 1972 Annual Meeting, the 1973 Legislature authorized a mandatory professional liability insurance program. At the 1976 Annual Meeting the members voted to authorize the Board of Governors to seek legislation authorizing a profes-

sional liability fund. A bill was drafted and amended by the Committee on Legislation which passed the Oregon Legislature and was signed by the Governor on July 20, 1977. Senate 190 (Chapter 527, Oregon Laws 1977) authorizes the Board of Governors to:

> ". . . either by itself, or in conjunction with other bar organizations, to do whatever is necessary and convenient to implement this provision, including the authority to own, organize and sponsor any insurance organization authorized under the laws of the State of Oregon and to establish a lawyer's professional liability fund. This fund shall pay, on behalf of members of the Oregon State Bar in the private practice of law, all sums as may be provided under such plan which any member shall become legally obligated to pay as money damages because of any claim made or omission of such member in rendering or failing to render professional services for others in the member's capacity as an attorney or caused by any other person for whose acts or omissions the member is legally responsible. The Board shall have the authority to assess all attorneys in the private practice of law for contributions to such insurance organization or fund. Any fund so established shall not be subject to the Insurance Code of the State of Oregon." (A copy of the entire statute is attached as Exhibit A.)

At its July 1977 meeting the Board of Governors passed a resolution establishing The Oregon State Bar Lawyer's Professional Liability Fund. A copy of that resolution is attached as Exhibit B.

C. How will the fund work?

1. Effective July 1, 1978, every lawyer (except patent lawyers) in the private practice of law will be required to carry professional liability coverage with the Oregon State Bar Professional Liability Fund. Patent lawyers are excluded because of the unique nature of their practice and the availability to them of similar coverage through a national association; to qualify for this exemption patent lawyers will be required to provide evidence of such coverage. House counsel, public defenders, legal aid lawyers and government lawyers are not included in the private practice of law.

2. All lawyers (except patent lawyers) in the private practice of law must subscribe to the Fund; lawyers who claim to be exempt from the mandatory coverage must file a request for an exemption. Assessments for the Fund will be subject to the same rules as annual membership dues.

3. The coverage will be on a claims-made basis with $100,000 limit of protection for all claims arising out of the same, related or continuing acts, errors, or omissions, subject to a maximum liability of $200,000 per coverage period. For the period July 1, 1978 through December 31, 1978, the assessment will be $250.00, to be paid with the annual dues. Members admitted after September 1, 1977, shall pay one-half the assessment; members entering the private practice of law between July 1, 1978 and December 31, 1978 will pay a prorata portion of the assessment.

4. The Fund will be administered by a board of directors appointed by the Board of Governors and shall evaluate, investigate, negotiate and defend claims. A Claims Review Committee, consisting of lawyers experienced in the trial of professional liability cases, will be appointed to evaluate claims. The Fund shall have authority to settle claims. If requested by the affected lawyer, the Claims Review Committee will independently evaluate any such offers of settlement.

5. A loss prevention program will be implemented, probably in conjunction with the continuing legal education program.

6. Future assessments for the Fund shall be based upon claims experience of the Fund, and may be varied with the claims history and the nature of the individual lawyer's practice. The Directors of the Fund shall evaluate all claims on a quarterly basis, shall provide current information to the Board of Governors and the membership of the Oregon State Bar, and shall exercise the underwriting, rating, risk evaluation, investment, and management functions incident to the operation of the Fund.

7. It is expected that excess coverage will be available through private carriers, but definite arrangements for such excess coverage have not yet been made.

8. Coverage will not exist for dishonest, fraudulent, criminal or malicious acts or for punitive damages. Coverage will not exist for any conduct other than that of a lawyer engaged in the private practice of law. The plan will not extend coverage for bodily injury or property damage claims, and will contain other exclusions similar to existing professional liability insurance coverage. The plan of coverage will be provided to each lawyer.

D. What are the advantages of having a Professional Liability Fund?

The Professional Liability Fund should cost the individual attorney far less than comparable commercial insurance because:

a. There will be no profit factor.

b. The costs of "acquisition" such as advertising and broker's commission will be eliminated.

c. Large accumulations of reserves in anticipation of claims that may never be asserted will not be necessary.

d. Broad participation will spread the risk and reduce the cost.

e. The Fund will utilize a detailed record-keeping system to determine what is occurring generally in the area of professional liability so as to minimize future problems and reduce costs.

E. Why must participation in the Fund be mandatory?

The Committee and the Board of Governors considered carefully the alternative of various voluntary insurance programs, both operated by the Bar or through existing private carriers. For a number of reasons, they have concluded that a liability fund program is in the interest of the majority of members. The primary reason is to avoid large reserve accumulations and disadvantageous tax impacts. Under a liability fund program, mandatory coverage is necessary to assure an adequate base over which to spread the risks if coverage is to be available for all members.

EXHIBIT A

Oregon Legislative Assembly—1977 Regular Session

Enrolled

SENATE BILL 190

Ordered printed by the President of the Senate in conformance with presession filing rules and indicates neither advocacy nor opposition on the part of the President (at the request of Oregon State Bar)

CHAPTER 527

AN ACT

Relating to attorneys; amending ORS 9.080 and 9.191.

Be It Enacted by the People of the State of Oregon:

Section 1. ORS 9.080 is amended to read:

9.080. (1) The state bar shall be governed by the board of governors, except as provided in ORS 9.130. The board is charged with the executive functions of the state bar and shall at all times direct its power to the advancement of the science of jurisprudence and the improvement of the administration of justice. It shall have the authority to adopt, alter, amend and repeal bylaws and to adopt new bylaws containing provisions for the regulation and management of the affairs of the state bar not inconsistent with law. The board shall have the authority to require all active members of the state bar engaged in the private practice of law in Oregon to carry professional liability insurance and shall be empowered [*to do whatever is necessary to implement this provision, including the authority to organize and sponsor any insurance organization authorized under the laws of the State of Oregon. It shall promote and encourage voluntary county or other local bar associations. The board may appoint such committees, officers and employes as it deems necessary or proper and fix and pay their compensation and necessary expenses. At any meeting of the board, two-thirds of the total number of members then in office shall constitute a quorum.*] either by itself, or in conjunction with other bar organizations, to do whatever is necessary and convenient to implement this provision, including the authority to own, organize and sponsor any insurance organization au-

thorized under the laws of the State of Oregon and to establish a lawyer's professional liability fund. This fund shall pay, on behalf of members of the Oregon State Bar in the private practice of law, all sums as may be provided under such plan which any member shall become legally obligated to pay as money damages because of any claim made against such member as a result of any act or omission of such member in rendering or failing to render professional services for others in the member's capacity as an attorney or caused by any other person for whose acts or omissions the member is legally responsible. The board shall have the authority to assess all attorneys in the private practice of law for contributions to such fund. Any fund so established shall not be subject to the Insurance Code of the State of Oregon.

(2) The board may appoint such committees, officers and their compensation and necessary expenses. At any meeting of the board, two-thirds of the total number of members then employes as it deems necessary or proper and fix and pay in office shall constitute a quorum. It shall promote and encourage voluntary county or other local bar associations.

[*2*] (3) Except as provided in this subsection, an employe of the state bar shall not be considered an "employe" as the term is defined in the public employes' retirement laws. However, an employe of the state bar may, at his option, for the purpose of becoming a member of the Public Employes' Retirement System, be considered an "employe" as the term is defined in the public employes' retirement laws. The option, once exercised by written notification directed to the Public Employes' Retirement Board, may not be revoked subsequently, except as may otherwise be provided by law. Upon receipt of such notification by the Public Employes' Retirement Board, an employe of the state bar who would otherwise, but for the exemption provided in this subsection, be considered an "employe," as the term is defined in the public employes' retirement laws, shall be so considered. The state bar and its employes shall be exempt from the provisions of the State Merit System Law. No member of the state bar shall be considered an "employe" as the term is defined in the public employes' retirement laws, the unemployment compensation laws and the State Merit System solely by reason of his membership in the state bar.

[*3*] (4) As used in this section, an attorney is not engaged in the private practice of law if he is a full-time employe of a corporation other than a corporation incorporated under ORS chapter 58, the state, an agency or department thereof, a county, city, special district or any other public or municipal corporation or any instrumentality thereof. However, an attorney who practices law outside of his full-time employment is engaged in the private practice of law.

Section 2. ORS 9.191 is amended to read:

9.191. The annual membership fees to be paid by members of the state bar on or before February 1 of each year shall be established by the board, and notice thereof shall be published and distributed to the membership on or before August 15 of the preceding year. Any increase in annual membership fees over the amount established for the preceding year must be approved by a majority of members voting thereon at the annual meeting of the members. In establishing annual membership fees, the board shall consider and be guided by the anticipated financial needs of the state bar for the year for which the fees are established, time periods of membership and active or inactive status of members. Annual membership fees may include any amount assessed under any plan for legal liability insurance for attorneys engaged in the private practice of law as provided in ORS 9.080. No annual membership fees shall be required or assessed by the board for members who have been admitted to practice law in Oregon for 50 years or more except that such member shall be required to pay any amount assessed under any plan for legal liability coverage if such member is in the private practice of law.

Approved by the Governor July 20, 1977.

Filed in the office of the Secretary of State July 20, 1977.

EXHIBIT B

RESOLUTION

WHEREAS, the Board of Governors of the Oregon State Bar is empowered, under the provisions of ORS 9.080, as amended by Chapter 527, Oregon Laws, 1977, to (a) require that each active member of the Oregon State Bar engaged in the private practice of law in Oregon carry professional liability insurance and (b) establish a lawyers' professional liability fund ("Fund") and plan, such Fund to pay, on behalf of members of the Oregon State Bar in the private practice of law in Oregon, all sums as may be provided under such plan which any such member shall become legally obligated to pay as money damages because of any claim made against such member as the result of any act or omission of such member in rendering or failing to render professional services for others in the member's capacity as an attorney, or caused by any other person for whose acts or omissions the member is legally responsible, subject to the bylaws of the Fund and plan (coverage agreement) to be adopted by the Board of Directors of the Fund and ratified by the Board of Governors of the Oregon State Bar; and

WHEREAS, such statute further provides that the Board of Governors has the authority to assess all attorneys in the private practice of law in Oregon for contributions to such Fund and, pursuant to ORS 9.181, as amended by Chapter 527, Oregon Laws, 1977, the annual membership fees may include any amount assessed under any plan for legal liability coverage; and

WHEREAS, the Board of Governors of the Oregon State Bar considers it in the interest of the citizens of the State of Oregon and of the active members of the Oregon State Bar in the private practice of law in Oregon to enact and create such Fund and plan and cause such assessments to be made for legal liability coverage:

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT:

1. Effective July 1, 1978, all active members of the Oregon State Bar engaged in the private practice of law in Oregon shall carry professional liability coverage with aggregate limits of not less than $100,000.

2. Such professional liability coverage for all active members engaged in the private practice of law in Oregon, except patent attorneys, shall be obtained through the Oregon State Bar Professional Liability Fund. Each patent attorney shall be required to furnish evidence, by February 1, 1978, that he or she has or will have in force at least $100,000 of comparable coverage with a private insurance carrier covering the period July 1 to December 31, 1978, and shall be required to furnish evidence, by February 1 of each year thereafter, of the same coverage for that full year.

3. The Oregon State Bar does hereby establish a fund, to be known as the Oregon State Bar Professional Liability Fund; and its duration shall be perpetual unless and until such Fund shall be dissolved pursuant to law.

4. The Fund shall be under the control of the Board of Governors of the Oregon State Bar, but shall be managed by a Board of Directors appointed by the Board of Governors. The initial Board of Directors shall be appointed by October 1, 1977. The Board of Directors of the Fund shall consist of seven active members of the Oregon State Bar in the private practice of law in Oregon. The term of such Directors shall be three years, on staggered terms, with the term of two members expiring at the conclusion of the 1978 annual meeting of the Oregon State Bar; the terms of two members expiring at the conclusion of the 1979 annual meeting; and the terms of three members expiring at the conclusion of the 1980 annual meeting.

5. The bylaws of the Fund shall be promulgated by the Board of Directors, subject to the approval of the Board of Governors.

6. The Board of Governors shall have authority to vest in the Board of Directors of the Fund such authority as is necessary or convenient to carry out the provisions of ORS 9.080 relative to the requirement that all active members carry professional liability coverage, establish and manage the Fund to provide such coverage and recommend to the Board of Governors amounts active members shall be assessed for participation therein.

7. As a contribution to the Fund, the Board of Governors shall assess each active member of the Oregon State Bar in the private practice of law in Oregon as part of his or her annual membership fee, or otherwise pursuant to law. For the year 1978, for professional liability coverage from July 1, 1978 through December 31, 1978, the assessment shall be $250, to be paid with and as a part of the annual membership fee. Any member admitted to practice in Oregon after September 1, 1977 shall be assessed one-half the assessment for 1978. Any member entering the private practice of law in Oregon between July 1, 1978 and December 31, 1978, but admitted in Oregon prior to September 1, 1977, shall be assessed a prorata portion of the 1978 assessment. Members of the bar in the

practice of law in Oregon for whom annual membership fees are waived shall, nevertheless, be subject to assessment for professional liability coverage under the provisions of this resolution.

8. All active members of the Oregon State Bar in the private practice of law in Oregon shall, prior to November 1, 1977, complete and return a claims information for to be transmitted by the Board of Directors of the Fund.

9. The assessments for the Fund for 1978 shall be included in the 1978 membership fee resolution submitted to the membership of the Bar at the 1977 annual meeting.

10. The Oregon State Bar shall lend such sums to the Fund as necessary for organizational expenses to be repaid by the Fund.

D.
Minimum Financial Responsibility for Lawyers – Revised April 2014

MINIMUM FINANCIAL RESPONSIBILITY FOR LAWYERS

A Description of the Oregon State Bar Professional Liability Fund
and Discussion of Alternatives for State Bar Insurance Programs

By Kirk R. Hall,
Former Chief Executive Officer

Revised October 27, 2011 and April 2014[1]

I. Introduction

From time to time, lawyers, legislatures, and bar officials have considered whether practicing lawyers should be required to carry malpractice coverage or show other proof of minimum financial responsibility. In most states, between 30 and 50 percent of the lawyers in private practice go "bare," and do not carry malpractice coverage. This is especially true during hard insurance market cycles, when the cost of coverage goes up and availability decreases.

The minimum financial responsibility question has arisen again in many states, in part because of the activities of the American Bar Association (ABA). On February 4, 1992, the ABA House of Delegates adopted the Report of the Commission on Evaluation of Disciplinary Enforcement, known as the McKay Commission. That commission was created in February 1989 to conduct a nationwide evaluation of lawyer discipline enforcement and to provide a model for responsible regulation of the legal profession for the next century.

Kirk R. Hall is a lawyer and served from 1987 to 2000 as the chief executive officer of the Oregon State Bar Professional Liability Fund, the only compulsory lawyers' professional indemnity insurance program in the United States. Oregon State Bar Professional Liability Fund, P. O. Box 231600, Tigard, Oregon 97281, telephone: 503-639-6911. Note: PLF address updated in 2008.

[1] Information relevant to the Oregon State Bar Professional Liability Fund was updated by Ira Zarov, the current CEO of the Fund.

While the chief focus of the McKay Commission was on discipline and enforcement, the Commission came up with a number of related recommendations as well. One recommendation reads as follows:

Recommendation 18
Mandatory Malpractice Insurance Study

> **The American Bar Association should continue studies to determine whether a model program and model rule should be created to: (a) make appropriate levels of malpractice insurance coverage available at a reasonable price; and (b) make coverage mandatory for all lawyers who have clients.**
>
> Comments:
>
> In the course of examining measures to protect the public, the Commission has considered recommending a court rule requiring all lawyers who have clients to carry malpractice liability insurance. The Commission took testimony from representatives of the Oregon State Bar Professional Liability Fund, the ABA Standing Committee on Lawyers' Professional Liability, and many individuals on the issue of malpractice insurance. The issue of mandatory coverage is complex. There are many different forms of coverage and many legal and economic issues to be considered. We recognize that further study is necessary. (Footnotes omitted.) ABA Center For Professional Responsibility, *Lawyer Regulation For A New Century (Report Of The Commission On Evaluation Of Disciplinary Enforcement)* (1992).

The balance of this paper discusses whether there is a need for a minimum financial responsibility rule for lawyers, and if so, the alternatives available to implement such a rule.

II. Is There a Need for a Minimum Financial Responsibility Rule for Lawyers?

As a threshold question, lawyers and bar associations should determine whether there is a need for a minimum financial responsibility rule for lawyers in private practice.

This question was faced by the lawyers of Oregon in the mid-1970s, when the Oregon State Bar Professional Liability Fund (the "Fund") was created. Since that time, we have occasionally been asked what is the justification for requiring all lawyers in private practice to carry malpractice coverage. The question is sometimes asked whether we are aware of any malpractice claims in Oregon before 1978, or any malpractice claims in any other state, which went unpaid because a lawyer did not carry malpractice coverage. The answer is a resounding "yes". We know anecdotally of meritorious malpractice claims which either went unpaid or which were settled at a reduced amount because the erring attorney had no malpractice coverage and few assets. We also know of cases where attorneys defending themselves on meritorious claims created such difficulties for the claimants that the claims were abandoned. Finally, we know from the claims which we pay that in many cases our "insured" lawyer could not have paid the claim on his or her own.

This question can be considered in another fashion. In most states, as many as half the

practicing attorneys carry no malpractice coverage at all. Is there any reason to believe that these attorneys do not make errors causing claims, while their fellow attorneys with malpractice coverage do? Assuming that each group (those with malpractice insurance and those without) generate roughly equal numbers of losses, is there any reason to believe the uninsured lawyers are able to pay and are, in fact, paying all such claims out of their own pockets? It is more likely that many claims against uninsured attorneys are simply dropped or significantly compromised if the uninsured attorneys either have few assets or indicate a willingness to litigate to the bitter end, even on a meritorious claim.

Many state bar associations have already addressed this matter in part by sponsoring and supporting lawyer-owned malpractice insurance companies. The 16 lawyer-owned companies now providing coverage in over 30 states are the best first step toward ensuring that lawyers can find malpractice coverage at a reasonable price, and that members of the public will be protected from lawyer negligence. Lawyer-owned companies are generally non-profit, and are focused exclusively on legal malpractice coverage; they exist for the sole purpose of providing coverage year after year to their lawyer-owners on an economical basis. In contrast, many commercial carriers charge whatever the traffic will bear, and pull out of markets precipitously whenever conditions change. However, support of lawyer-owned companies does not guarantee that all lawyers will buy or be eligible for the coverage.

We believe in Oregon that some form of malpractice coverage should be mandatory, just as auto drivers are required to carry coverage. We have always required lawyers to be responsible in their *ethical duties* through the Disciplinary Rules. A generation ago we required lawyers to be responsible in their *fiduciary duties* through the creation of a state bar client security fund. The third logical step, in our opinion, was to require lawyers to be responsible for the financial effects of their own *negligence*. This led to the creation of a mandatory bar malpractice fund.

In addition, lawyers themselves benefit greatly from carrying malpractice coverage. Roughly 65 percent of all claims are resolved without payment of any indemnity; without malpractice insurance, lawyers must handle these defensible claims themselves and bear all the costs of defense. As to malpractice claims resulting in indemnity payments, lawyers benefit by avoiding an unexpected (and possibly enormous) financial loss.

The question of the need for minimum financial responsibility rules is inextricably linked to the practicality of any proposed solution. Even if a need is found, the lawyers of each state must determine whether there is a solution which truly addresses the problem without creating needless difficulties or expense. Five possible solutions are discussed below.

In considering each possible solution, one must recognize that no system will guarantee every malpractice claim against a lawyer will be paid in full. All malpractice insurance policies contain standard exclusions which can be significant in certain cases (e.g., intentional wrongful acts). In addition, all policies contain maximum limits for each claim and in the aggregate, which means that some portion of some large claims may not be covered by insurance. However, these coverage limitations will apply to very few claims, and so malpractice insurance coverage provides the public with substantial protection in most instances.

III. Five Alternative Models for Minimum Financial Responsibility Rules

The balance of this paper presents five alternative proposals for minimum financial responsibility rules governing lawyers. The proposals are presented in order of increasing complexity and public protection.

A. Disclosure Requirements

As a "minimalist" approach, a bar association could require lawyers in private practice to disclose to their clients in writing (1) whether or not the lawyer carries malpractice coverage, (2) the applicable coverage limits, and (3) the name of the insurance company, policy number, and expiration date for the coverage. The lawyer could also be required to provide clients with an explanatory brochure concerning the difference between ethics and malpractice complaints, the nature of claims made malpractice coverage, and the telephone number of the state bar association for further questions. Finally, lawyers could also be required to notify all current clients in the event that the malpractice coverage is terminated or reduced in amount, or if the firm changes carriers. These requirements could be imposed through the bar ethics rules or by statute, and enforced through disciplinary proceedings in the event of violations.

California adopted a version of this approach by statute in the early 1990s. See California Business & Professions Code section 6147 (pertaining to contingency fee agreements) and section 6148 (pertaining to other fee agreements). Prior to 1994, California attorneys were obligated to include, in the fee agreement, a statement disclosing whether they maintained errors and omissions insurance coverage, and the policy limits of that coverage if less than $100,000 per occurrence/$300,000 aggregate.

In 1994, both provisions of the California Code were amended so as to only require the attorney to include, in the fee agreement, a statement that the attorney does not maintain malpractice insurance applicable to the services to be rendered, if such is the case, or that the attorney has not filed a written agreement with the California State Bar guaranteeing payment of claims for errors or omissions arising out of the services to be rendered, if that is the case.

However, both sections 6147 and 6148 were subject to "sunset" provisions expired on January 1, 2000. At that time, amended sections 6147 and 6148 took effect, which means California attorneys are no longer obligated to include in the fee agreement any disclosure regarding whether the attorney maintains malpractice insurance or has filed a guarantee agreement with the California State Bar. It is uncertain at this time whether or not the disclosure rules will be restored.

By rule of the Virginia Supreme Court, Virginia lawyers must annually certify whether they have professional liability coverage or if they have an outstanding judgment against them arising out of rendering legal services. This information is available to any member of the public. If an attorney falsely certifies, the attorney may be subject to bar discipline. According to the Virginia State Bar, roughly 90 percent of Virginia lawyers in private practice maintain some form of malpractice insurance coverage. If so, this is a high level of coverage; in other states, only 50 to 70 percent of lawyers carry any coverage.

The Alaska Supreme Court recently amended Rule 1.4 of the Alaska Rule of Professional Conduct to include the following requirements:

Rule 1.4 Communication.

***

(c) A lawyer shall inform an existing client in writing if the lawyer does not have malpractice insurance of at least $100,000 per claimant and $300,000 total and shall inform the client in writing at any time the lawyer's malpractice insurance drops below these amounts or the lawyer's malpractice insurance is terminated. A lawyer shall maintain a record of these disclosures for six years from the termination of the client's representation.

Alaska Comment

Subsection (c) does not apply to lawyers in government practice or lawyers employed as in-house counsel.

Lawyers may use the following language in making the disclosures required by this rule:

(1) no insurance: "Alaska Rule of Professional Conduct 1.4(c) requires that you, as the client, be informed in writing if a lawyer does not have malpractice insurance of at least $100,000 per claimant and $300,000 total and if, at any time, a lawyer's malpractice insurance drops below these amounts or a lawyer's malpractice insurance coverage is terminated. You are therefore advised that (name of attorney or firm) does not have malpractice insurance coverage of at least $100,000 per claimant and $300,000 total."

(2) insurance below amounts**: "**Alaska Rule of Professional Conduct 1.4(c) requires that you, as the client, be informed in writing if a lawyer does not have malpractice insurance of at least $100,000 per claimant and $300,000 total and if, at any time, a lawyer's malpractice insurance drops below these amounts or a lawyer's malpractice insurance coverage is terminated. You are therefore advised that (name of attorney or firm)'s malpractice insurance has dropped below at least $100,000 per claimant and $300,000 total."

(3) insurance terminated: "Alaska Rule of Professional Conduct 1.4(c) requires that you, as the client, be informed in writing if a lawyer does not have malpractice insurance of at least $100,000 per claimant and $300,000 total and if, at any time, a lawyer's malpractice insurance drops below these amounts or a lawyer's malpractice insurance coverage is terminated. You are therefore advised that (name of attorney or firm)'s malpractice insurance has been terminated."

This Alaska rule took effect on January 15, 1999.

The one shortcoming of the new Alaska rule is that no disclosure or reporting to the Alaska State Bar itself is required. This means that the Bar will not be able to develop any statistics concerning the percentage of Alaska attorneys practicing without malpractice coverage, and will have no way of determining whether or not the rule is, in fact, causing more attorneys to purchase malpractice coverage. Instead, the Bar will only find out if an Alaska attorney has violated the disclosure rules if an ethics complaint is made by a former client. Alaska attorneys who have violated the disclosure rules may choose to settle quietly with the former client out-of-pocket in order to head off any ethics complaints with the Bar.

The State Bar of South Dakota may have the best disclosure rule of all. Since January 1, 1999, the South Dakota Rules of Conduct have included the following disclosure requirements.

First, as part of the membership renewal process each year, every lawyer must certify to the Bar Association whether or not the lawyer carries professional liability coverage, the name of the insurance carrier, the policy number, and the limits of coverage.

Second, Rule 1.4 of the South Dakota Rules of Conduct now provides:

Rule 1.4. Communication ***

> (c) If a lawyer does not have professional liability insurance with limits of at least $100,000, or if during the course of representation, the insurance policy lapses or is terminated, a lawyer shall promptly disclose to a client by including as a component of the lawyer's letterhead, using the following specific language, either that:
>
> (1) "This lawyer is not covered by professional liability insurance;" or
>
> (2) "This firm is not covered by professional liability insurance"
>
> (d) The required disclosure in 1.4(c) shall be included in every written communication with the client.
>
> (e) This disclosure requirement does not apply to [house counsel and government lawyers who do not represent clients outside their employment].

The related Comments clarify that the disclosure must be made at the start of the attorney-client relationship, and that ongoing clients must be notified if a policy lapses or is terminated.

In addition, South Dakota's proposed new Rule 7.5(f) relating to Firm Names and Letterheads states:

> (f) The disclosure required in Rule 1.4(c)(1) or (2) shall be in black ink with type no smaller than the type used for showing the individual lawyer's names.

The Comments to Rule 1.4 state in part:

> Since the rule mandates disclosure only to the client, it necessarily means that lawyers without malpractice insurance will have to maintain two sets of letterhead—one for communications with the client and another for all other letters. Component of the letterhead means pre-printed. In other words, when a lawyer prepares his or her letterhead for printing, the disclosure must appear on the face of the letterhead using precise language provided in 1.4(c)(1) or (2).

Finally, South Dakota's Proposed Rule 7.2(1) on Advertising states as follows:

> (1) Mandatory Disclosure. Every lawyer shall, in any written or media advertisements, disclose the absence of professional liability insurance if the lawyer does not have professional liability insurance having limits of at least $100,000, using the specific language required in Rule 1.4(c)(1) or (2).

The Comments clarify that this disclosure requirement applies to all forms of advertising, but not to simple telephone directory listings.

South Dakota has an integrated Bar, and lawyers must renew their membership and disclose their coverage status annually on a calendar year basis. As of February 2000, the number of South Dakota attorneys practicing with and without malpractice coverage was as follows.

Category	Number of Attorneys	Percent Practicing With Malpractice Coverage	Percent Practicing Without Malpractice Coverage
Sole Practitioners	343	90.1 %	9.9 %
Partners in Firms of Two or More	510	99.6 %	0.4 %
Associates in Firms of Two or More	142	93.7 %	6.3 %
All Attorneys in Private Practice	995	95.5 %	4.5 %

(The third category, "Associates in Firms of Two or More" includes attorneys who are not viewed as members of firms, such as contract attorneys, research attorneys, etc. They may work simultaneously for more than one firm.)

Anecdotally, the malpractice insurance carriers who write in South Dakota have indicated there was a significant increase in the number of new applications just prior to the 1999 effective date of this new disclosure rule. In essence, some lawyers and firms who had previously been uninterested in maintaining malpractice insurance apparently decided to purchase the coverage in order to avoid the embarrassment and administrative hassles of disclosing their lack of coverage to

clients. The current "soft" market, in which malpractice coverage is easily available at low prices, undoubtedly helped these firms decide to obtain coverage as well.

The results of the new South Dakota rule are stunning. Through a simple step which requires minimal administrative effort by the bar association, the number of lawyers practicing without malpractice coverage in the state has been significantly decreased. Greater public protection has been achieved as a result.

There are both pros and cons to a simple disclosure approach. On the positive side, bar regulatory and record-keeping requirements are minimal. Virtually all lawyers will comply with the disclosure requirements, and clients will be able to decide for themselves whether or not to hire a lawyer without coverage. Over time, most lawyers would be likely to carry coverage, if for no other reason than marketing purposes. Lawyers will have an incentive to avoid malpractice claims, as this would jeopardize their insurability and, therefore, their future marketability to prospective clients.

On the negative side, some lawyers might falsely claim to carry coverage, gambling on the prospect that no claims will arise or that any claims which do arise can be settled out of pocket. Other lawyers may carry coverage in inadequate amounts or with undercapitalized or unregulated insurers in order to minimize premium costs.

There would also be no guarantee that a malpractice claim against an attorney who carried insurance coverage (and advertised that fact to clients) would actually be covered by any policy. Due to the complexities arising from claims-made professional liability coverage, a lawyer may effectively be without coverage for a claim even though the lawyer maintained some policy in force at all times. This could happen, for example, if a lawyer switches carriers without obtaining tail coverage from the old carrier or prior acts coverage from the new carrier. As another example, a lawyer may allow coverage to lapse (or coverage may be terminated) after completion of a legal matter for a client, but before the client knows of a potential claim; in that case, there will be no malpractice coverage for the claim when it is asserted. In other words, even if lawyers comply with the disclosure rule and are carrying coverage when representing a client, there is still no guarantee that coverage will be available to satisfy any particular claim.

Finally, some clients may be too unsophisticated (or too poor or desperate) to understand the implications of a disclosure indicating the lawyer carries no malpractice coverage. These could be people at the bottom of the socioeconomic scale, or people served by lawyers at the bottom ranks of their profession. These are often the very types of clients who need protection the most.

B. Certification of Coverage with Reliance on the Commercial Market

As a second alternative, lawyers in a state could be required to carry malpractice coverage in a certain minimum amount (and meeting certain minimum requirements as to scope of coverage, deductible, exclusions, etc.), or post an equivalent bond with the bar association. Coverage would have to be obtained from existing commercial and bar-related carriers, without any alternative mechanism to place coverage for lawyers unable to obtain it on the open market; presumably those uninsurable lawyers would have to post some equivalent form of bond. To ensure compliance, lawyers each year would be required to certify to the bar association or state licensing authority that

they carry the minimum required coverage, and to indicate the name of the insurance company, policy number, and policy expiration date. Lawyers would also be required to file an amended certificate mid-year if coverage is renewed or if coverage is shifted to a different carrier. Coverage information from the bar association would be available to clients and potential clients upon request. These requirements would be stated in ethics rules or by statute, and enforced through disciplinary proceedings.

In support of this approach, the ethics rules in a state could also be amended to require attorneys to pay clients for all judgments arising from malpractice claims or face disciplinary action; however, such a rule probably would not be enforceable if the attorney filed for bankruptcy.

This approach has already been adopted by many state lawyer referral services, which will not allow a lawyer to participate without showing proof of coverage. There are again pros and cons to this proposed solution. On the positive side, the requirement should ensure that all lawyers carry coverage, thereby eliminating a need for disclosure of coverage status and evaluation by individual clients. Bar association record-keeping requirements would not be significantly increased, and there would be a central location for coverage information where injured clients could determine the carrier for their former lawyer. In many states, injured clients have been frustrated by their inability to learn from their former lawyer who is providing the lawyer's malpractice coverage; state bar associations are presently unable to provide this information.

However, the major drawback to this approach is that it effectively delegates to the commercial insurance market the right to determine who may practice law in a given state. A lawyer who is turned down for coverage by all available carriers due to prior claims, practice area, prior disciplinary action, or for other reasons would have no recourse other than to post a substantial bond. In many cases, these lawyers would be unable to post a bond and so would be prohibited from private practice. It is doubtful that any bar association or state supreme court would be satisfied with such a result.

C. Certification of Coverage With Alternative Coverage Mechanism

As a third approach, lawyers could be required to maintain malpractice insurance in a certain minimum amount (or provide an equivalent bond), and provide evidence of coverage to the bar association or licensing authority on an annual basis. In contrast to the previous proposal, however, an alternative coverage mechanism would be established to deal with "uninsurable" lawyers.

Under this alternative, attorneys would be permitted in the first instance to obtain coverage from a list of approved commercial and bar-related carriers, allowing competitive market forces to work, and would also be required to make information concerning their malpractice coverage readily available to clients, either through disclosure in a written fee agreement or through public records maintained by the bar association.

As noted in Subsection B above, simply requiring attorneys to maintain malpractice coverage does not guarantee that all licensed attorneys in the state will be able to purchase such coverage. Some attorneys may be declined for coverage by all available carriers, while others might be offered coverage on terms which are unaffordable or with special exclusions or conditions which

effectively void most coverage. Unless steps are taken to make certain that basic coverage is available to all attorneys in the state, a bar association will effectively be delegating to commercial insurance companies the right to determine who may practice law in the state.

The most obvious solution to this problem is the creation of a joint underwriting association (JUA) or assigned risk pool to provide coverage for those attorneys who are unable to obtain it from the open market. Such a JUA could be modeled after similar associations created to provide "uninsurable" drivers with coverage. A JUA could provide coverage either by assigning each insurance carrier in the state a number of "uninsurable" lawyers for coverage (perhaps in proportion to the percentage of the market held by each carrier), or could provide coverage through some type of bar-or state-owned fund. The cost of such coverage could be determined through general actuarial principles, although those principles would be harder to apply to the rather unpredictable area of professional malpractice coverage than to other lines of insurance.

While this proposal, including a JUA, sounds relatively straightforward, in fact it contains significant complexities. First, the state (through the legislature, the courts, or the bar association) would have to determine what minimum level of coverage was adequate to protect the public. In this regard, the state would have to determine permissible deductibles, general terms of coverage (i.e., acceptable exclusions, scope of coverage grant, etc.), and other aspects of coverage. Finally, some state authority would have to examine and approve proposed policy forms from competing carriers, and also determine the financial viability of potential carriers before adding them to an approved list. Some offshore or out-of-state carriers might not be very cooperative in helping the state complete these inquiries.

As part of this determination, the state would also have to decide whether to impose minimum coverage requirements on an individual *attorney* basis, or on a *firm* basis. It will be easier to ensure compliance if the requirement is imposed on individual attorneys, rather than firms; however, as virtually all commercial malpractice insurance is sold on a firm-wide basis, there could be significant problems in ensuring coverage. In the alternative, the requirement of coverage could be imposed on a firm basis; this raises the question of whether coverage requirements and permissible deductible levels should be modified according to firm size. However, if the requirement is only imposed on a firm basis, individual lawyers who move from firm to firm may or may not have applicable coverage for particular claims. Disputes could arise in many cases as to which firm – and carrier – were responsible for a claim.

Another level of complexity arises because of the claims made nature of professional liability coverage. Under claims made policies, a claim against a professional is generally covered only by the insurance policy in effect at the time the claim is made (not the policy in effect at the time of the occurrence or error giving rise to the claim). When professionals begin coverage with the carrier, they receive a "retroactive date," which effectively cuts off coverage for any claim made during the policy period arising from an occurrence before the retroactive date. Many policies impose no retroactive date, and so effectively give full prior acts coverage to the firm; however, other policies do impose a retroactive date, particularly if the firm has had prior significant claims.

This can mean there is no coverage for a claim against a firm, even though the firm is currently maintaining malpractice coverage.

A related problem arises in connection with extended reporting coverage or "tail" coverage. All claims made policies give the insured the right to extend coverage beyond the end of the policy period for a limited period (e.g., 12 months or 24 months) for payment of a specified additional premium. The tail coverage will cover any claim made during the extended reporting period based on an error occurring before the end of the prior policy period (so long as the occurrence is after any applicable retroactive date). In many cases, a law firm will buy tail coverage if it is rejected for ongoing coverage by the insurer due to bad claims experience. However, if a firm does not buy tail coverage when switching to a new carrier, and if the new carrier does not offer the firm full prior acts coverage, the firm will have no coverage for a claim made after the new carrier's policy is in force based on an alleged error occurring while the firm was with the old carrier. In other words, in certain cases a firm with claims made coverage could have *no coverage* for a particular claim, even though the firm maintained professional liability insurance at all relevant times.

In order to deal with these unfortunate possibilities, a state which wishes to impose effective minimum financial requirements on lawyers through the commercial market will have to regulate the insurers concerning such coverage provisions as prior acts coverage (retroactive date), tail coverage (extended reporting coverage), and excluded activities and attorneys. Such regulation might require all carriers to provide unlimited extended reporting coverage to firms who are rejected for ongoing coverage, or might require all carriers to provide unlimited prior acts coverage (i.e., no retroactive date) for new firms accepted for coverage. Similarly, firms or lawyers who end up in the joint underwriting association because of rejection by commercial carriers would have to receive coverage which ensured that there would be no gaps because of the prior acts coverage/tail coverage problems described above.

Attorneys who are required to obtain coverage from the JUA might also be required to undertake various loss prevention measures, including remedial classes, limitation on types of practice, etc. This could have a beneficial effect of helping to reduce the frequency and severity of malpractice claims in the future.

Obviously, implementation of this alternative would require a massive cooperative effort among lawyers, insurers, the bar association, the insurance commissioner, and the legislature. Record keeping and regulatory requirements would be significant. Because of the existence of multiple carriers and law firms, significant disputes could arise concerning which carrier and law firm was responsible for a particular claim. Rate and policy form regulation would be increased.

On the positive side, members of the public would be assured that, in virtually all cases, their malpractice claims would be covered by insurance, and lawyers would be assured that some form of insurance coverage would be available.

The situation described above – the requirement that lawyers carry coverage, but reliance on competition in the commercial market with a joint underwriting authority as back-up – will actually be tried in England and Wales this year. For decades, the 55,000 active solicitors in England and Wales were required to purchase malpractice coverage from the Law Society's Solicitors Indemnity Fund (SIF). Unfortunately, rates were high (recently averaging eight percent of a firm's gross billings), and SIF developed a deficit of roughly £450 million ($750 million) due to lack of actuarial

studies and a surge in real estate conveyancing claims against solicitors in the early 1990s. As a result, 70 percent of solicitors voted to allow firms to seek coverage from the commercial market as of September 2000. SIF will go into runoff after that date (handling pending claims until their conclusion), and will be the claims manager for *new* claims for St. Paul, the Law Society's endorsed carrier. Other commercial carriers will be permitted to compete, but their policy form will have to meet certain minimum coverage requirements. The Law Society is also setting up an assigned risk pool in which all carriers must participate to deal with solicitors who cannot otherwise find coverage, claims not otherwise covered by a policy, etc. For the most current information on this program, see the following website:

http://www.lawsociety.org.uk/dcs/third_tier.asp?section_id=3139&ictop=5

The implementation of this new program for solicitors in England and Wales presents issues of staggering complexity, and will be a useful experiment to show whether or not a requirement of mandatory coverage can exist alongside competition in the commercial market.

D. Creation of a Back-up Lawyer Malpractice Fund

As a fourth alternative, a state can combine a disclosure requirement with a backup "Lawyer Malpractice Fund" paid for only by lawyers without coverage to deal with unsatisfied malpractice judgments. The details would be as follows.

A state can first require that all lawyers disclose whether or not they carry malpractice coverage as part of the annual license renewal. Lawyers would be required to specify the coverage limits, carrier name, policy number, and expiration date of the coverage. If a lawyer is engaging in private practice but is not carrying malpractice coverage (or has permitted a lapse in coverage of any sort, including switching carriers without obtaining prior acts coverage or tail coverage), the lawyer would be required to indicate this on the license renewal form.

The state would then use this annual malpractice insurance information to levy varying contributions to a "Lawyer Malpractice Fund" according to the following rules. Lawyers who have continuously maintained malpractice coverage in a prescribed minimum amount with acceptable carriers would pay no annual assessment to the Lawyer Malpractice Fund. Lawyers who maintain no malpractice insurance would pay the maximum annual contribution to the Fund. Finally, lawyers with gaps in coverage, inadequate limits, or coverage with a non-approved carrier would pay an intermediate annual assessment to the Fund.

The Lawyer Malpractice Fund would *not* provide malpractice coverage to the lawyers who contribute to it. Instead, the Fund would operate in the same manner as a typical client security fund, except that the Lawyer Malpractice Fund would pay clients for *lawyer negligence or malpractice*, not for theft or defalcation. The Fund would operate as follows.

In the event a client was injured by the malpractice of an attorney without applicable liability insurance, the client would be required to sue the lawyer and obtain a judgment for malpractice (unless the claim was below a specified amount, e.g., $5,000, in which case the Lawyer Malpractice Fund could waive the requirement of a judgment). Next, the client would be required to attempt

collection of the judgment directly from the negligent lawyer. Only if collection efforts were futile could the injured client present a claim to the Lawyer Malpractice Fund. Payments from the Fund would be totally discretionary, and subject to a specific dollar limit per claimant or group of claimants. The Fund would take an assignment of the client's judgment, and could later proceed against the lawyer. Failure to pay the judgment could perhaps be made a disciplinary offense or reason for license suspension, although this might not stand up under bankruptcy laws.

Because the Lawyer Malpractice Fund would *not* be insurance, the negligent lawyer would not receive a defense from the Fund and could not demand any payment or settlement from the Fund to protect the lawyer's interests. Similarly, the Fund would not be required to pay a claimant's claim if the Fund was dissatisfied for any reason (e.g., that the claimant's judgment was taken by default and the attorney's negligence was never determined, the claimant's judgment was collusive, the claimant's claim relates to business transactions with the lawyer and does not arise from the lawyer's private practice, etc.). Obviously the governing rules would be drafted so that a claimant's claim would qualify for coverage under either the state's client security fund or its Lawyer Malpractice Fund, but not under both.

Not only would the Lawyer Malpractice Fund pay for judgments against lawyers who never carried malpractice coverage, but it would also pay unsatisfied judgments against lawyers who had dropped their coverage after leaving practice, who had a gap in coverage, who purchased coverage from a failed insurer, etc. In other words, the Fund would cover all unsatisfied malpractice judgments, including those which ultimately were not paid by a malpractice insurer for some reason.

Finally, a statute or bar rule could also be enacted which required lawyers to disclose to their prospective clients whether or not they maintain malpractice coverage, the name of the carrier, etc., similar to existing rules in Virginia, Alaska, and South Dakota.

This alternative has several advantages. First, it would induce all lawyers in private practice to obtain commercial malpractice coverage in order to avoid admitting to clients that they carried no coverage and to avoid paying an assessment to a Lawyer Malpractice Fund which might be as costly as an insurance premium but which offered no coverage to the lawyer. Second, lawyers who were unable to obtain commercial malpractice insurance could nonetheless continue to practice in the state, as an alternative facility (the Lawyer Malpractice Fund) would exist to cover any unsatisfied judgments for negligence rendered against them. Third, administration of such a Fund would be easier than creation of a mandatory malpractice fund or lawyer-owned insurance company, as the Lawyer Malpractice Fund would not be required to hire defense counsel, follow insurance company rules, evaluate exposure and settle claims in litigation, etc.

On the other hand, some injured clients might be unable to find new counsel to sue a negligent lawyer, obtain a judgment, and attempt to satisfy the judgment. Other injured clients might be so wary of the civil litigation system that they would be unwilling to hire a new lawyer and commence a new round of litigation against their former lawyer. Some malpractice claims might be too small to be of interest to any lawyer for the purpose of obtaining a judgment against a negligent lawyer, which would leave the injured client without recourse unless the requirement of obtaining a malpractice judgment was waived. Attorneys who pay into the Fund may complain that they are receiving no direct benefit (i.e., no defense or indemnity) in exchange for their contributions to the

Fund. Finally, a Lawyer Malpractice Fund would require some staff to evaluate and process claims, especially smaller claims for which no judgment is required.

It is possible that such a Lawyer Malpractice Fund could successfully be maintained for a relatively modest annual assessment against attorneys who practice without malpractice coverage. The size of the assessment, as well as the maximum amount available to individual claimants from such a Fund, could be adjusted from year to year.

This alternative should be seriously considered by any state bar association which wants to ensure payment of all legitimate malpractice claims up to a certain amount but does not want to make coverage mandatory or create its own insurance fund or joint underwriting association among existing carriers.

E. Creation of a Mandatory Fund to Cover All Lawyers in a State

As a fifth alternative, a state can require that all lawyers carry malpractice coverage, and can require the lawyers to obtain that coverage from a single bar fund. This fund, in turn, would be required to provide coverage to all lawyers in the state so long as they were licensed to practice law.

This last proposal is, in essence, what has existed in Oregon since 1978. The remaining discussion under this Subsection E will focus specifically on the experience of the Oregon State Bar Professional Liability Fund.

1. History of Fund

The Oregon State Bar is an integrated, mandatory bar association. The Professional Liability Fund was created in 1978 to achieve two objectives: (1) to create a stable market for malpractice coverage for Oregon lawyers, and (2) to protect the Oregon public by ensuring that all Oregon lawyers would carry malpractice coverage.

The first idea for a Fund arose in the mid-1970s when lawyers, doctors, and other professionals experienced a "hard" market in the commercial insurance industry. The cost of malpractice coverage rose, terms and availability decreased, and in many cases carriers disappeared from the marketplace. These insurance industry problems had nothing to do with the history of claims against lawyers in Oregon, but instead were dictated by world reinsurance trends, changes in the business objectives or ownership of insurance companies, and general economic conditions. Roughly half the lawyers in Oregon were practicing "bare," without any malpractice coverage. The lawyers of the state became dissatisfied with the product provided by the commercial insurance industry and decided to take action to form a locally-based fund for Oregon lawyers which would provide coverage through both hard and soft insurance cycles. The concept of a fund was similar in many respects to the Oregon Client Security Fund, which had been established a decade earlier.

Several other state bar associations reached similar conclusions at the same time. Those states opted to form mutual insurance, reciprocal, or stock companies under applicable state law, in effect simply competing against the commercial carriers. Lawyers in those states were not required to carry malpractice coverage, and the bar-related mutual insurance companies which were created likewise were not required to provide coverage to all lawyers of the state. As a result, lawyers in these states have enjoyed lower and more stable rates from the bar-related insurance companies, but the public is not assured that every lawyer practicing in the state carries malpractice coverage and individual lawyers are not assured that they can obtain coverage. Today, lawyer-owned insurance companies write coverage in more than 30 states.

In Oregon, the lawyers decided that creating an alternative coverage source solved only half the problem. We believed it was also important to make coverage mandatory for lawyers in private practice, just as auto insurance is mandatory for all drivers. After considerable study, we determined that the best approach was to pool all Oregon lawyers in a state bar malpractice fund as to the first layer of coverage (presently $300,000). Once the state bar imposed the requirement of mandatory coverage, the only alternative to a mandatory bar fund for all would have been to create a joint underwriting association or assigned risk pool for only those lawyers rejected by the commercial carriers, which has not proved successful in other lines of insurance. As described above, a joint underwriting association would also have created problems when lawyers shifted from one carrier to another or in and out of the pool, raising questions concerning prior acts coverage, tail coverage, disputes among carriers as to responsibility for a particular claim, etc.

To create the Fund, the Board of Governors of the Oregon State Bar obtained authorizing legislation from the 1975 and 1977 Oregon legislatures. A final proposal was approved by the Board of Governors and the membership at the November 1977 bar convention. The Fund commenced operations on July 1, 1978, and has been in operation ever since.

While the Oregon State Bar Professional Liability Fund is unique to the United States, there are similar mandatory bar programs in every province of Canada, Great Britain, and every state in Australia. All have performed well over the past two decades, resulting in considerable protection of the public and savings to the practicing lawyers.

2. Current Program

Under the current program, all lawyers in private practice in Oregon must obtain malpractice coverage from the Fund in the amount of $300,000 per claim/$300,000 aggregate per year, plus an additional $50,000 claims expense allowance. There is no deductible. Coverage is written on an individual basis, not firm basis, so the aggregate limits for a firm are equal to the number of lawyers with coverage at the firm (e. g., a ten-partner firm effectively has PLF limits of $300,000 per claim/$3 million aggregate). Lawyers who fail to pay the annual Fund assessment are suspended from bar membership and may no longer practice law in the state.

There are roughly 14,000 members of the Oregon State Bar, of which approximately 10,000 are active and reside in Oregon. Of these lawyers, approximately 7,400 are in private practice and participate in the Fund, while the remaining 2,600 lawyers claim exemption from the Fund. These are lawyers who work as in-house corporate or government counsel, law professors, employed legal

aid attorneys, retired attorneys, etc. The Fund offers coverage on a claims-made basis, and the terms of coverage are as broad as commercial programs.

Only active members of the Oregon State Bar whose principal office is in Oregon are permitted and required to participate in the Fund. Oregon Bar members who are members of other bars and who spend a majority of their time at an out-of-state office are neither permitted nor required to participate. These lawyers may be representing Oregon clients in Oregon without carrying commercial malpractice coverage. It is likely that Oregon will some day require *all* attorneys representing *any* clients in Oregon (including Oregon Bar members whose principal office is outside Oregon and non-Oregon lawyers seeking admission to practice in Oregon courts *pro hac vice*) to demonstrate proof of malpractice coverage as a condition to practicing even part-time in the state.

3. Cost of Coverage

The cost for coverage in 2012 is $3,500 per attorney. It is difficult to compare the cost of PLF coverage with neighboring states because there is no deductible and a firm will get the benefit of more than $300,000 in aggregate coverage if there are multiple claims.

New attorneys are charged only 60% of the regular assessment in their first year of practice. The cost of coverage is then "step-rated" up to the full assessment over the following two years.

4. Extended Reporting or "Tail" Coverage

Because the PLF is a claims-made plan, attorneys must obtain extended reporting or "tail" coverage when they leave the private practice of law. This tail coverage applies to claims first made against the attorney after retirement arising from actions occurring before retirement.

Most commercial companies offer tail coverage to retiring attorneys on a very unfavorable basis--e.g., at a price of 200 percent of the annual premium for only a one- or two-year extended reporting period. In contrast, our Fund provides tail coverage to retiring attorneys automatically at no additional cost. This applies also to attorneys who are leaving the private practice of law for other ventures, such as government or corporate work or business ventures.

5. Coverage of Individuals vs. Firms

It is a hard for lawyers and insurance professionals to conceive of malpractice coverage that is written on an individual basis, not on a firm basis. Our main reason for this choice is that participation in the Fund is tied to membership in the Oregon State Bar, not to membership in any particular firm. Collection of the annual assessment and suspension for nonpayment must necessarily relate to individuals and not firms. However, there are other additional benefits as well. Lawyers frequently change firm association mid-year, and firms themselves merge and split. It would be an additional bureaucratic burden to keep track of all these hirings, firings, mergers, and splits, and to have to reissue coverage each time. In contrast, because Fund participation is tied to bar membership, we provide coverage to individual lawyers wherever they may be practicing.

6. Multi-State Firms

Some Oregon firms have opened branch offices in other states. These firms typically buy excess coverage above our $300,000/$300,000 primary limits, and have had no difficulty in obtaining "drop-down" primary coverage for their out-of-state attorneys from the commercial excess carriers. The PLF also offers excess coverage to multi-state firms, as discussed in detail below.

7. Differences Among Segments of the Bar

As noted above, the Fund charges each lawyer in Oregon the same amount for coverage, with a surcharge for attorneys with prior claims. This is underwriting based on actual claims experience, not a hypothetical projection of claims based on such factors as firm size, area of practice, etc.

On occasion, we have been asked why we don't offer discounts to selected "low risk" firms or specialties and impose surcharges on selected "high risk" firms or specialties. Our answer is that we cannot see significant and long-term statistical differences between lawyers and between groups of lawyers in Oregon. For example, large firms of 100 lawyers or more tend to have fewer reported claims per lawyer, but the severity of large firm claims is significantly worse. On balance, we have paid out as much in defense and indemnity of claims against large firms in Oregon as the firms have paid to us in annual assessments. Put another way, the large firms have not been "subsidizing" other segments of the bar through their regular annual assessments.

Similarly, while some practice areas appear to present lower risk than others, there is no guarantee that any particular lawyer will practice solely in a low risk area during a given year. Oregon does not certify lawyers for practice in specialty areas, and so each attorney is authorized to take on any type of practice matter. Some of our worst claims have been business or securities matters taken on by lawyers whose regular practice is concentrated on criminal defense, or financial matters taken on by insurance defense lawyers. Rather than attempt to analyze each year the practices of each of the 6,600 lawyers participating in the Fund in order to make small variations in the annual assessment, we treat all lawyers the same until they have shown themselves to be different by generating claims (at which point the lawyers are surcharged). This eliminates a tremendous amount of paperwork, and treats all Oregon lawyers as equals.

8. Reinsurance

Insurance companies often obtain reinsurance to protect them on the risks assumed and spread those risks to other financial entities, the reinsurers. Because Oregon has a mandatory program, and because the limits of coverage ($300,000 per claim) are relatively low, we are able to operate safely without reinsurance. This is a great strength, as we are able to charge Oregon lawyers for coverage based solely on the Oregon claims experience. When the national and international reinsurance markets tighten, the price of reinsurance skyrockets and availability shrinks (as occurred in the mid-1980s). This affects commercial companies writing lawyers' malpractice insurance in every state. However, because we are limited to Oregon lawyers, and because we are insulated from the reinsurance markets, we are able to ride out hard-market insurance cycles without any effect on price or availability in Oregon.

9. Claims Handling

When claims are made, they are handled primarily by staff attorneys with several years' experience in private practice. We employ independent lawyers from a select defense panel for cases in litigation, but staff attorneys always monitor cases closely even while in litigation. If a lawyer has made a mistake causing damages, we try to repair or pay the claim as quickly as possible; on the other hand, if the lawyer has not made a mistake or has not caused damages, our policy is to defend the claim vigorously. For the years 1996 -2005, 20% of claims were closed after payment to the claimant and expense, 36% were closed after expense only, 17% with payment to claimant and no expense, and 27% with no expense or payment to claimant.

We believe our claims handling is far superior to that of most commercial carriers, which sometimes do a good job of marketing, but a bad job of claims handling. Consistent with that view, Oregon lawyers are happy with our handling of their malpractice claims. Upon the closing of a claim file we send a detailed evaluation form to each insured asking how well we did. Roughly two-thirds of the lawyers respond, and the results are extremely positive. In 2007, we received the following feedback on two chief questions:

1. How satisfied were you overall with the handling and disposition of your claim?

Very Satisfied	89%
Satisfied	11%
Not Satisfied	1%

2. How satisfied were you overall with the services provided by the PLF staff attorney?

Very Satisfied	91.2%
Satisfied	8.3%
Not Satisfied	.5%

We have occasionally been asked whether the existence of a mandatory fund creates claims against lawyers. The answer is probably yes, but that is not necessarily a drawback. The existence of a mandatory fund may allow unrepresented claimants to present small claims with merit which would have otherwise gone uncompensated due to the cost of hiring another lawyer. Spurious or frivolous claims which are presented because of the existence of a mandatory fund are dealt with firmly as described above, which tends to inhibit the presentation of similar claims in the future. We doubt that the existence of mandatory coverage has a significant effect on the overall number of malpractice claims any more than the requirement of auto coverage does on auto claims.

On average, an Oregon lawyer has a one-in-nine chance of having a claim made in any given year; this is approximately the same as the national average for all claims made against attorneys (including those claims falling within any applicable deductible). For these reasons, we do not believe that the existence of a mandatory fund increases the cost of malpractice coverage for

participating lawyers.

10. Loss Prevention

Loss prevention is one of our greatest achievements, and one which can only be implemented to the greatest extent through a mandatory bar program. On average, we spend $130 per lawyer per year on loss prevention activities. In contrast, the other bar-related mutual insurance companies spend considerably less per lawyer per year on loss prevention, and the commercial companies spend virtually nothing.

This discrepancy is for two reasons. First, some commercial companies may have little interest in loss prevention, as they are not particularly anxious to decrease the number and severity of claims, which in turn would decrease the total premium charged and the profit to the insurer. Second, both the commercial companies and the bar-related insurance companies have to worry that their current insureds will shift to another company in the next year; this would mean that any money spent on loss prevention for the insured firm would effectively be "wasted" and the benefits would be enjoyed by another insurer. The bar-related companies also operate in a competitive environment, and cannot pass on the cost of loss prevention through their premiums.

In contrast, because the Oregon State Bar Professional Liability Fund is a mandatory, ongoing program, we know that every dollar invested in loss prevention will result in a benefit of several dollars to us in future years through the reduction of malpractice claims. Our loss prevention activities focus on four areas: (1) education by way of written materials and workshops, (2) in-office assistance with law office systems, (3) alcohol and chemical dependency counseling and intervention, and (4) stress, burnout, and career change counseling and intervention.

Our education programs all qualify for mandatory CLE credit and are provided free of charge several times a year. As a result, our programs are heavily attended. In addition, we make available audio cassette programs which qualify for CLE credit and which are mailed free to lawyers upon request.

We also make materials on malpractice avoidance available through the internet and in printed form for those who feel uncomfortable with electronic media. Our current list of handbooks includes malpractice avoidance information relating to time deadlines and statutes of limitations, securities law, office systems (docket control, conflicts, etc.), planning for retirement, planning for an unexpected event that makes the continued practice of law impossible, and environmental and pollution liability law. We also publish a loss prevention newsletter six times a year and a newsletter concerning attorneys' personal problems four times a year.

In addition, we maintain six staff members who travel around the state working with lawyers on a confidential basis in such areas as law office systems, alcohol and chemical dependency problems, and stress, burnout, and career change problems. We also maintain separate and anonymous meeting facilities where support group meetings are held on a daily basis to deal with problems of substance abuse, codependency, and other matters which can impair a lawyer's performance. This assistance program operates independently of the bar, and does not report any information to the bar discipline staff. As a result, we receive dozens of referrals every month from

lawyers and judges around the state concerning impaired lawyers who need help.

Over the past 18 years, we have assisted over perhaps a thousand lawyers and judges with alcohol or chemical dependency problems back into productive sobriety, and we have assisted literally hundreds of law offices, large and small, in straightening out their office systems relating to docket control, conflicts, mail handling procedures, and similar matters. This has all been accomplished on a 100 percent confidential basis. In 1999, the Oregon Legislature enacted new statutory provisions to make all program information confidential and not subject to discovery under most circumstances.

All these activities are funded from our assessment dollars as a valuable investment in prevention of future claims. This is an especially good reason for a mandatory bar malpractice fund, as there usually will be no other funding source available for such intensive loss prevention programs. We believe in loss prevention, as it helps not only the lawyers but also the image of the profession and the public at large.

11. Legal Challenges

Over our 29 years of operation, we have faced a number of legal challenges to our existence and our requirements. These have included claims relating to due process, equal protection, antitrust statutes, civil rights, etc. In each case, we have prevailed. Both state and federal courts have found that the existence of a mandatory malpractice fund in an integrated state bar association is proper, just as the requirement of participation in a client security fund was upheld in many states a generation ago.

12. Excess Coverage

Of the 7,400 lawyers in private practice in Oregon, approximately 60% carry additional malpractice coverage above our $300,000/$300,000 limits. Starting in 1991, the Oregon State Bar Professional Liability Fund began offering excess coverage to firms on an optional, underwritten basis. Standard rates in 2011 will be approximately $892 per attorney for excess coverage of $700,000 excess of the mandatory $300,000 coverage (or $1 million total coverage). This brings the total cost for coverage of $1 million/$1 million with no deductible to $4,392 per attorney. Firms which *renew* their excess coverage also receive continuity credits equal to 2 percent a year, up to 20 percent total. Higher coverage limits to $10 million are also available at favorable rates.

The program is reinsured through top rated reinsurers, and is financially separate from the mandatory, primary fund. The lawyers of Oregon are pleased that they can now obtain all their malpractice coverage from a single source located in their home state at advantageous prices.

13. Disadvantages of a Mandatory Bar Fund

This Subsection E has concentrated on the many advantages of a mandatory bar malpractice fund. Needless to say, there are certain disadvantages which should be considered:

(a) The mandatory nature of the program can offend some lawyers who don't like to be told

what to do;

(b) There is the possibility that, due to the mandatory nature of a bar fund, "bad" lawyers will cause the cost of coverage to go up for the majority of "good" lawyers; this has definitely not been the experience in Oregon;

(c) There is a potential problem for young lawyers and part-time lawyers who do not wish to carry any malpractice coverage because of cost (even though new lawyers pay a reduced amount in Oregon); however, for the protection of the public it may be important to require such lawyers to carry coverage;

(d) The practice of law has changed significantly since the mid-1970s. At that time, all lawyers and firms relied on the same sources for malpractice coverage, and all suffered equally from a hard-market cycle. Today, there is a segmentation of the bar based upon firm size, type of practice, and the existence of multi-state firms. Special insurance programs are offered for large firms, plaintiffs' firms, insurance defense firms, etc. which may appear preferable to a single bar program in the eyes of the targeted firms. In particular, large firms may wish to carry significant deductibles or self-insured retentions, (e.g., $500,000 per claim) rather than participate in a state bar fund. However, as noted above, we believe each segment of the bar benefits equally from a mandatory bar fund, and would not experience any long-term savings from a special commercial program. Firms allowed to "opt out" would not enjoy the benefits of expert claims handling and the Fund's comprehensive loss prevention services.

(e) Although the likelihood is exceedingly small, there is a possibility that a bar malpractice fund could face financial problems or even fail in the event of bad claims experience. However, not a single bar-related insurance company or bar fund has failed over the past 40 years, and there is virtually no risk of failure from a mandatory fund with proper administration.

(f) Creation of a mandatory fund eliminates competition with the commercial market at the primary coverage level. Competition is always beneficial as a spur against complacency. However, many of the benefits of a state bar program can only be achieved if the program is mandatory (for example, strong loss prevention programs). Complacency from non-competition is avoided because the bar program is locally based and run by the lawyers' own elected representatives. A mandatory fund also avoids the many coverage and regulatory problems described above for the other approaches to minimum financial responsibility requirements for lawyers.

While there are potential problems, we believe the Oregon program has shown that any possible drawbacks are greatly outweighed by the benefits:

(a) All lawyers in the state are covered continuously, and so the public is assured of protection in the event of malpractice;

(b) Oregon lawyers are rated and pay premiums based on actual claims experience in Oregon only, not the experience of other lawyers in other states;

(c) Because of the large base of lawyers and relatively moderate limits of the mandatory

coverage, no reinsurance is required and so a bar fund is free from the fluctuations of world reinsurance markets;

(d) A mandatory bar fund can afford to set up a full-scale loss prevention program which is tied into existing bar CLE programs. These programs can deal effectively with alcohol- and drug-dependent lawyers, office system problems, etc.

(e) A mandatory bar fund can compile a full range of claims data for the state. This is information not available from any other source.

(f) A mandatory bar fund is subject to local control by the lawyers themselves.

(g) There will automatically be significant price savings from elimination of broker commissions, marketing costs, taxes, regulatory fees, and contributions to state guaranty funds. In many cases, these costs can account for 30% of the commercial insurance premium.

(h) Creation of a mandatory bar malpractice fund will improve the image of the bar among the public;

(i) A mandatory fund results in easy procedures for maintaining coverage. Lawyers are not required to fill out annual applications or be involved in other paperwork;

(j) Because of the mandatory and ongoing nature of a bar fund, there is no requirement of a start-up capital contribution from bar members. In contrast, creation of a bar-related mutual insurance company will typically require an initial capital contribution from each lawyer of between $1,000 and $2,000;

(k) Finally, a bar fund will result in superior claims handling from in-house staff and from a carefully selected defense panel of local attorneys.

Oregon lawyers continue to give strong support to the requirement of mandatory malpractice coverage, and to the existence of the Fund as the sole source of that coverage. In a 1995 survey, Oregon lawyers responded to the following two questions:

> Do you believe Oregon should require all attorneys in private practice to carry professional liability coverage (whether or not through the PLF)?

Yes	94%
No	6%

> Do you believe the Professional Liability Fund should continue to exist as the mandatory source of professional liability coverage for all Oregon lawyers?

Yes	86%
No	14%

We received similar results in a comprehensive survey in 1986. Clearly, mandatory coverage requirements can work and receive the broad support of the membership.

14. Challenges to Mandatory Funds in Other Countries

As noted above, mandatory funds have existed for many years in Canada, Great Britain, Australia, and elsewhere. From time to time, there have been challenges to the monopoly aspect of a few of these funds, and proposals for change. Until recently, the fund's monopoly has been reaffirmed in each case.

In Ontario, the law society's malpractice fund developed an unfunded liability of approximately C$150 million during the early 1990s as a result of claims arising from the economic recession and prior underfunding of reserves. This deficit represented approximately C$10,000 per practicing lawyer. In response, rates were increased dramatically and a task force was commissioned to study whether or not the fund should continue. After careful study, the task force decided that the law society's mandatory fund was preferable to other alternatives, but recommended various internal changes. Fortunately, the changes were implemented by new management, rates have decreased, deficit has largely been eliminated, and member support has returned.

As noted above, the Solicitors Indemnity Fund (SIF) had a similar experience in the mid-1990s, discovering it had an unfunded reserves deficit of approximately £450 million (roughly $750 million). This represented a deficit of approximately $13,000 for each practicing solicitor. An outside task force was appointed, and consulted broadly with the membership. It recommended that the SIF be continued as the preferred alternative, again with certain changes to its procedures and its assessment rules. However, the governing council voted in mid-1999 to end SIF's monopoly on providing coverage, and to open the market to commercial carriers beginning in September 2000. SIF will continue to handle prior claims in the "run-off" period after that date, and will handle claims for St. Paul, which Law Society's endorsed carrier. As of this date, the rules for competition by commercial carriers are being formulated. Clearly, there will have to be standardization and minimum requirements as to terms of coverage, the provision of prior acts and extended reporting coverage, the handling of coverage disputes among insurers, and the establishment of an assigned risk pool for law firms which are rejected by all carriers.

The mandatory lawyer malpractice funds in the states of Australia have recently been subject to reexamination as a result of a new competition policy being implemented by the state and federal governments. In the state of New South Wales, for example, the law society's mandatory fund recently contracted with Australia's largest insurer to transfer all the program's risk for a three-year period; the mandatory fund will remain in place, however, and continue to handle all claims for the insurer. The annual assessment in New South Wales was high by Australian standards, in part because of a greater level of litigation against lawyers in the state and in part because of a recent economic downturn which resulted in failed business and real estate transactions and related claims against lawyers. The new insurance relationship had the advantage of lowering the New South Wales assessment by roughly one-third for 1999, and rates were guaranteed for a multi-year period. The mandatory fund will have the opportunity to take back the risk in a future year if the price charged by the insurer rises to an unacceptable level..

The state government in the Australian state of Victoria also endorsed a new competition policy, and enacted legislation requiring the existing law society mandatory fund to give up its monopoly (i.e., permit commercial insurers to sell coverage to Victoria lawyers as an alternative to the law society fund) by year-end 1998. The Law Society in Victoria, however, was convinced that this combination of mandatory coverage requirements without a monopoly fund could not succeed, not least because there would be no mechanism to provide coverage to lawyers rejected by competing carriers for prior claims or other reasons.

After two years of consultation and consideration, the Victoria state government agreed, reversed course, and restored the monopoly status to the existing mandatory fund in late 1998. At least part of the reason for restoration of the existing fund's monopoly position was the reluctance of the commercial insurers to agree to appropriate terms for dealing with rejected firms, including extended reporting or "tail" coverage for firms which were non-renewed, ongoing coverage for a limited period for rejected firms, and participation in a state-wide joint underwriting association. In addition, the existing monopoly program had been very efficient and kept prices down, and so was popular with the membership.

Finally, the law society in the Republic of Ireland established a lawyer-owned malpractice insurance mutual in 1989, but the mutual does not have a monopoly status and must compete with commercial carriers. The government has required since 1995 that Irish lawyers maintain coverage, but does not provide any mechanism to guarantee that coverage will be available. Instead, Irish law firms rejected by three insurers (one of which must be the mutual) are offered coverage by an assigned risk pool supported by all the carriers. The firm may stay in the pool only for two years, and may be charged a premium of up to 200 percent of the last year's premium plus an additional amount for "run-off" (i.e., prior acts coverage). After two years, the firm must rely solely on the market, and if no carrier offers coverage, the firm presumably must cease the practice of law.

Even though the requirement of mandatory coverage is relatively new in Ireland, there have already been one or two firms rejected by all existing carriers, including the law society's mutual, after two years in the assigned risk pool. Without malpractice coverage, the lawyers in those firms could not continue to practice. Rather than face the expected displeasure of the Supreme Court of Ireland, some of the insurers have agreed to insure the rejected firms on a joint, *ad hoc* basis, with very high premiums. It remains to be seen whether this informal arrangement for dealing with rejected firms will continue to work in the future.

The mandatory programs in other jurisdictions have not faced similar challenges, and enjoy widespread support. In many cases, they offer superior coverage and claims handling and prices below that of commercial carriers. Being non-profit, these programs pass on all financial benefits to the members. As an example, in Quebec the cost of C$1 million in mandatory coverage in 1999 was only C$1 per lawyer! The law society had developed a large surplus due to conservative reserving practices and superior investment returns, and decided to return some of that surplus to its members by lowering the annual assessment from C$500 to C$1. It is unlikely that a commercial insurer would be as generous toward its insureds with any excess surplus it developed.

15. Summary and Conclusions Regarding a Mandatory Fund

We believe the benefits from a mandatory bar malpractice program have been demonstrated many times over in Oregon since 1978, and by similar mandatory bar programs in Canada, Great Britain, and Australia. We also believe that similar benefits can be realized in other states. However, a mandatory bar fund can succeed in a state only if it is widely supported by lawyers from all segments of the bar and all regions of the state. This, in turn, requires that lawyers and firms put aside their own personal interests to some degree and consider what is best for the bar as a whole and the public interest. If bar members believe that malpractice coverage should be mandatory for all attorneys in private practice, we believe that a single bar fund is the best, least expensive, and most efficient way to go.

IV. Alternative Models For Firms with Special Needs

The question of minimum financial responsibility requirements has become more difficult in recent years, as the demographics of the legal profession have become more varied. Today, large multi-state law firms may have little in common with smaller firms operating from a single office. Specialty "boutique" firms (e.g., patent firms, entertainment law firms, business firms with investment services, etc.) may have unusual coverage needs, and may not be acceptable under the general underwriting criteria of major carriers. Any new minimum financial responsibility requirement must take into account the needs and characteristics of these specialty firms.

The first, second, and fourth alternatives stated in Section III above would permit specialty firms to obtain coverage from specialty programs, and would not impose any greater burden on them than on other law firms generally. However, the third and fifth alternatives (requiring that coverage be uniform and mandatory with a joint underwriting association as back-up, or providing universal coverage through a mandatory bar fund) present greater difficulties. A central source of coverage may not have the underwriting ability or desire to "cut a deal" tailored to the needs of a specialty firm.

The problem is especially difficult for multi-state firms, where the attorneys in a branch office in a particular state are required to obtain coverage from a mandatory bar fund while other firm members in other states can go “bare” or buy from a commercial carrier. Every province in Canada requires attorneys to participate in its local mandatory fund, and problems concerning multi-province law firms are worked out through joint agreements among the various mandatory funds. However, it may be harder to achieve such working protocols among insurers and bar associations in the more diverse United States.

V. Premium Tax for Loss Prevention

Finally, some lawyers are attracted to a mandatory bar malpractice program, but discover the concept is not feasible in their state for political or other reasons. They then lament that a comprehensive loss prevention program similar to Oregon's is not possible, given the strictures on bar association fees and the unwillingness of commercial insurers to fund loss prevention.

As an alternative to a mandatory bar malpractice program as the funding source for loss prevention, lawyers and bar associations should consider lobbying the legislature and insurance

commissioner for a special premium tax to apply only to lawyers professional liability insurance policies (of both admitted and non-admitted carriers), with the proceeds of the tax to be dedicated to intensive loss prevention programs sponsored by the bar association.

These programs would include malpractice avoidance seminars, publications, and handbooks, as well as confidential programs to deal with law office systems and problems of alcohol, chemical dependency, and stress. A special 2 to 3 percent premium tax could raise $60 to $90 per lawyer, and should result in a decrease in malpractice coverage rates over the following years which is greater than the tax as lawyers in the state improve their practices. The corresponding benefit to the public of decreased malpractice and disciplinary violations would be even more significant. The insurance companies should not oppose such a special premium tax because the tax would be the same for all carriers in the state. No carrier would be put at a competitive disadvantage, and the quality of practice of their insureds would steadily improve.

Bar associations could go one step further. Because loss prevention programs should be available to all, it is only fair to charge lawyers who do not carry malpractice coverage (and therefore do not pay the special premium tax) an additional amount as part of their annual bar dues. This additional amount would be added to the premium tax revenues dedicated to loss prevention. A bar dues surcharge for lawyers who go "bare" would be an added incentive for all lawyers in the state to carry malpractice coverage.

VI. General Conclusion

In conclusion, the decision to impose minimum financial responsibility requirements on attorneys is not a simple one. First, the lawyers in the state must determine that the need is great enough to justify the difficulties which will follow such a requirement. Second, the lawyers must then decide the best way to impose such minimum financial responsibility requirements. Each choice is fraught with difficulties.

A "minimalist" approach is simply to require full disclosure to clients concerning a lawyer's current malpractice coverage. At the opposite end of the spectrum, bar associations can successfully create their own mandatory bar fund, with many claims handling and loss prevention benefits; however, this diminishes freedom of choice for attorneys and creates some difficult issues, particularly for multi-state firms.

As a separate matter, lawyers and bar associations can consider a special premium tax on malpractice insurance policies, which would be dedicated to intensive loss prevention efforts.

With the McKay Commission Report and the growing interest by state legislators and regulators in the protection of the public from attorneys who go "bare," the question of minimum financial responsibility for lawyers is likely to be a continuing issue in this new decade.

E.
Oregon State Bar Act 9.080

9.080 Duties of board of governors; professional liability fund; quorum; status of employees of bar. (1) The state bar shall be governed by the board of governors, except as provided in ORS 9.136 to 9.155. The board is charged with the executive functions of the state bar and shall at all times direct its power to the advancement of the science of jurisprudence and the improvement of the administration of justice. It has the authority to adopt, alter, amend and repeal bylaws and to adopt new bylaws containing provisions for the regulation and management of the affairs of the state bar not inconsistent with law.

(2)(a)(A) The board has the authority to require all active members of the state bar engaged in the private practice of law whose principal offices are in Oregon to carry professional liability insurance and is empowered, either by itself or in conjunction with other bar organizations, to do whatever is necessary and convenient to implement this provision, including the authority to own, organize and sponsor any insurance organization authorized under the laws of the State of Oregon and to establish a lawyer's professional liability fund. This fund shall pay, on behalf of active members of the state bar engaged in the private practice of law whose principal offices are in Oregon, all sums as may be provided under such plan which any such member shall become legally obligated to pay as money damages because of any claim made against such member as a result of any act or omission of such member in rendering or failing to render professional services for others in the member's capacity as an attorney or caused by any other person for whose acts or omissions the member is legally responsible.

(B) The board has the authority to assess each active member of the state bar engaged in the private practice of law whose principal office is in Oregon for contributions to the professional liability fund and to establish the date by which contributions must be made.

(C) The board has the authority to establish definitions of coverage to be provided by the professional liability fund and to retain or employ legal counsel to represent the fund and defend and control the defense against any covered claim made against the member.

(D) The board has the authority to offer optional professional liability coverage on an underwritten basis above the minimum required coverage limits provided under the professional liability fund, either through the fund, through a separate fund or through any insurance organization authorized under the laws of the State of Oregon, and may do whatever is necessary and convenient to implement this provision. Any fund so established shall not be subject to the Insurance Code of the State of Oregon.

(E) Records of a claim against the professional liability fund are exempt from disclosure under ORS 192.311 to 192.478.

(b) For purposes of paragraph (a) of this subsection, an attorney is not engaged in the private practice of law if the attorney is a full-time employee of a corporation other than a corporation incorporated under ORS chapter 58, the state, an agency or department thereof, a county, city, special district or any other public or municipal corporation or any instrumentality thereof. However, an attorney who practices law outside of the attorney's full-time employment is engaged in the private practice of law.

(c) For the purposes of paragraph (a) of this subsection, the principal office of an attorney is considered to be the location where the attorney engages in the private practice of law more than 50 percent of the time engaged in that practice. In the case of an attorney in a branch office outside Oregon and the main office to which the branch office is connected is in Oregon, the principal office of the attorney is not considered to be in Oregon unless the attorney engages in the private practice of law in Oregon more than 50 percent of the time engaged in the private practice of law.

(3) The board may appoint such committees, officers and employees as it deems necessary or proper and fix and pay their compensation and necessary expenses. At any meeting of the board, two-thirds of the total number of members then in office shall constitute a quorum. It shall promote and encourage voluntary county or other local bar associations.

(4) Except as provided in this subsection, an employee of the state bar shall not be considered an "employee" as the term is defined in the public employees' retirement laws. However, an employee of the state bar may, at the option of the employee, for the purpose of becoming a member of the Public Employees Retirement System, be considered an "employee" as the term is defined in the public employees' retirement laws. The option, once exercised by written notification directed to the Public Employees Retirement Board, may not be revoked subsequently, except as may otherwise be provided by law. Upon receipt of such notification by the Public Employees Retirement Board, an employee of the state bar who would otherwise, but for the exemption provided in this subsection, be considered an "employee," as the term is defined in the public employees' retirement laws, shall be so considered. The state bar and its employees shall be exempt from the provisions of the State Personnel Relations Law. No member of the state bar shall be considered an "employee" as the term is defined in the public employees' retirement laws, the unemployment compensation laws and the State Personnel Relations Law solely by reason of membership in the state bar. [Amended by 1955 c.463 §2; 1975 c.641 §3; 1977 c.527 §1; 1979 c.508 §1; 1983 c.128 §2; 1985 c.486 §1; 1989 c.1052 §5; 1995 c.302 §17; 2015 c.122 §4]

F.
2016 Oregon Professional Liability Fund Annual Report

2016 ANNUAL REPORT

OSB Professional Liability Fund

INTRODUCTION

Welcome to our reformatted Annual Report. Although the PLF has been providing Oregon lawyers with a year in review for over 30 years, we concluded that the format was dated and we were missing an opportunity to provide more information in a more inviting format. We hope you agree. As always, I welcome your feedback about this or any other questions or concerns you may have about the PLF.

Thanks to lower-than-anticipated claim costs and a continued general slowdown in total claims, the PLF ended 2016 in a strong financial position. For the seventh year in a row, the assessment remained unchanged. Our net position at year end was just over $10.5 million. Our net position helps ensure that we maintain a stable assessment because we can absorb higher-than-projected losses, as occurred in 2015. Despite the near $1 million loss at the close of 2015, we did not raise the assessment. We do not anticipate raising the assessment for 2018, although it is still early enough in the year that no decision can be made. Last year at this time, we projected a claim count of 885 for the year. The pace of new claims slowed considerably in the second half of the year, however. This change in predicted claim count contributed to our positive year-end results.

PLF STATISTICS

2001–2016

	Assessments	Claims
2012	$3,500	1,030
2013	$3,500	902
2014	$3,500	911
2015	$3,500	808
2016	$3,500	839
2017	$3,500	850*

**Projected*

We spent significant time in 2016 rewriting all of our Coverage Plans. While both the PLF staff and the Board of Directors review the Plans every year, we had not done a major overhaul for over 10 years. While there were a few substantive changes, discussed below, the significant change was to the order and flow of the Plans. We believe the new Plans now flow more naturally and allow the reader to more easily read and understand the Plans without having to refer back and forth to different sections. The Primary and Excess Plans are available online, and we urge you to read them. Although many people put in a lot of time to this effort, special thanks go to Madeleine Campbell, one of our Claims Attorneys, for her significant efforts to ensure the success of the rewrite.

You will notice throughout our Annual Report that some of the statistics we have traditionally reported have changed. For the last 18 months, we have updated the way we track information about every claim that is filed. We believe this information will give us an increased ability to understand how claims develop and to better target both our loss prevention and claims handling efforts to ensure maximum value and best outcomes.

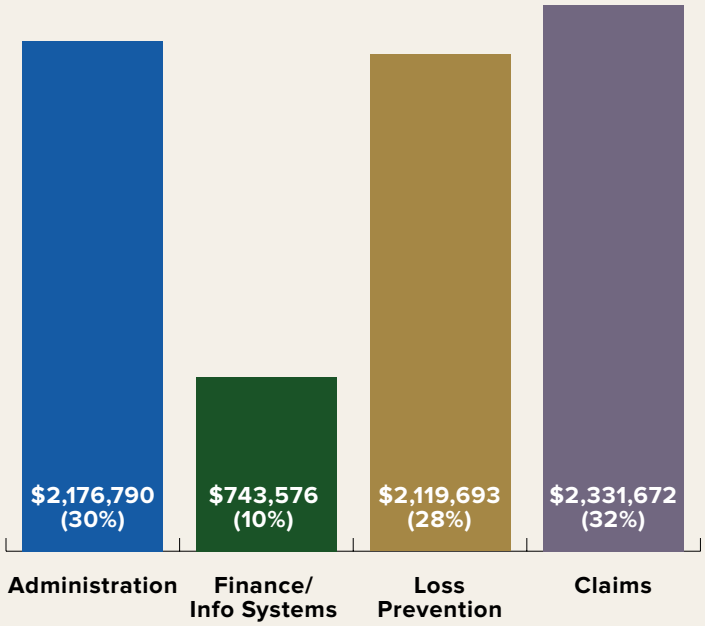
While there was much to celebrate in 2016, we have to acknowledge the loss of our senior Claims Attorney and friend, Steve Carpenter. His humor, warmth, and commitment to Oregon lawyers are missed both in the office and across the state.

Finally, the recent events during the new president's administration highlighted the benefits of the PLF. In response to some of the immigration enforcement efforts, many lawyers wanted to volunteer to provide pro bono legal services to impact individuals. The PLF quickly gathered information – which we published on our website – to ensure that lawyers who wanted to donate their time in this highly specialized area had the necessary resources to do so in a way that minimized risk. Our Board Chair, Teresa Statler, an immigration attorney with 25 years of experience, was invaluable in helping us get this information available so quickly. The PLF spends 28% of its operating budget on loss prevention efforts, and we believe this benefits both Oregon lawyers and the clients they serve.

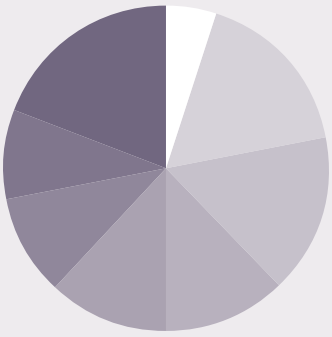
Carol J. Bernick
PLF Chief Executive Officer

Operating Costs by Department

2016

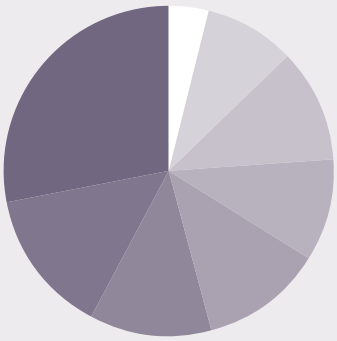


Claims Frequency by Years in Practice since 2012



0-5 YEARS	5%
6-10 YEARS	17%
11-15 YEARS	16%
16-20 YEARS	12%
21-25 YEARS	12%
26-30 YEARS	10%
31-35 YEARS	9%
36-40 YEARS	19%

Claims Severity by Years in Practice since 2012



0-5 YEARS	4%
6-10 YEARS	9%
11-15 YEARS	11%
16-20 YEARS	10%
21-25 YEARS	12%
26-30 YEARS	12%
31-35 YEARS	14%
36-40 YEARS	28%

TABLE OF CONTENTS

How Is the PLF Doing With Claims Handling?

492 successful repairs from January 1, 2012 through December 31, 2016

"Repair" has been part of PLF terminology going way back. A "repair," in PLF-ese, is where the PLF agrees to pay for a lawyer to represent the claimant in an effort to reverse, cure, or mitigate the consequences of an error by a covered party (lawyer covered by the PLF). The most common repairs are those that can put a matter back on track in the same condition it was before the lawyer's error, such as setting aside defaults and fixing other missed deadlines.

Whether the PLF will embark on a repair is completely within the discretion of the PLF. See, Section I.B.2. of the 2017 PLF Primary Coverage Plan and PLF Policy 4.300 (PLF Policies and Bylaws Manual).

New Claims

By Calendar Year 2012–2016

Cost of Closed Claims by Area of Law

January 1, 2012 to December 31, 2016

AREA OF LAW	NUMBER OF CLAIMS	INDEMNITY PAID	EXPENSES PAID	TOTAL PAID	AVG COST PER CLAIM BY AOL
Appellate	63 (1%)	$411,130 (40%)	$606,964 (60%)	$1,018,094	$16,160
Bankruptcy & Debtor-Creditor	611 (13%)	$4,693,584 (47%)	$5,361,443 (53%)	$10,055,027	$16,457
Business Transactions/Banking & Finance/Commerical Law	315 (7%)	$5,388,043 (40%)	$7,952,276 (60%)	$13,340,319	$42,350
Construction/Liens	8 (.17%)	$32,900 (40%)	$50,155 (60%)	$83,055	$10,382
Criminal	300 (6%)	$349,367 (20%)	$1,416,100 (80%)	$1,765,466	$5,885
Domestic Relations/Family Law/ Parental Rights/Juvenile Law	780 (17%)	$4,426,602 (51%)	$4,280,280 (49%)	$8,706,881	$11,163
Employment/Employee Benefits/ Labor	9 (.19%)	$0 (0%)	$31,394 (100%)	$31,394	$3,488
Estate Planning/Probate/Trust/Gift Tax	408 (9%)	$4,151,093 (50%)	$4,133,132 (50%)	$8,284,225	$20,304
Immigration	12 (.26.%)	$0 (0%)	$20,460 (100%)	$20,460	$1,705
Intellectual Property	5 (.11%)	$0 (0%)	$24,879 (100%)	$24,879	$4,976
Other	808 (17%)	$6,131,551 (45%)	$7,617,138 (55%)	$13,748,690	$17,016
Personal Injury	581 (13%)	$7,658,668 (58%)	$5,497,136 (42%)	$13,155,805	$22,643
Personal Injury; Tort/Personal Injury (Plaintiff)	3 (.06%)	$21,531 (83%)	$4,416 (17%)	$25,947	$8,649
Public Body Claims/Government/ Municipal	1 (0%)	$4,471 (100%)	$0 (0%)	$4,471	$4,471
Real Estate/Land Use/Zoning	401 (9%)	$5,055,605 (45%)	$6,207,260 (55%)	$11,262,864	$28,087
Securities/Investments	24 (1%)	$395,000 (25%)	$1,209,859 (75%)	$1,604,859	$66,869
Tax/Non-Profit	31 (1%)	$350,347 (48%)	$383,064 (52%)	$733,411	$23,658
Tort/Personal Injury (Plaintiff)	32 (1%)	$164,295 (40%)	$244,328 (60%)	$408,623	$12,769
Tort/Personal Injury (Plaintiff); Tort/ Personal Injury (Plaintiff)	35 (1%)	$877,486 (70%)	$367,712 (30%)	$1,245,198	$35,577
Tort/Personal Injury (Plaintiff); Other Civil Litigation	45 (1%)	$270,560 (28%)	$707,357 (72%)	$977,917	$21,731
Workers Compensation	122 (3%)	$1,512,895 (67%)	$737,935 (33%)	$2,250,830	$18,449
No Area of Law Given	26 (1%)	$43,914 (14%)	$275,268 (86%)	$319,181	$12,276
	4,620 (100%)	**$41,939,041.23**	**$47,128,554.80**	**$89,067,596.03**	

What Is the PLF Doing in the Areas of Personal and Practice Management Assistance?

The PLF continues to provide free and confidential personal and practice management assistance to Oregon lawyers. These services include legal education, on-site practice management assistance (through the PLF's Practice Management Advisor Program), and personal assistance (through the Oregon Attorney Assistance Program).

750+ people attended the PLF CLE in-person seminars.

Approximately 3,500 CLE programs were downloaded or streamed from our online CLE service providers.

1,005 requests for CDs and 787 requests for DVDs.

Personal and practice management assistance seminars in 2016 included our annual practice skills program for new admittees, Learning The Ropes, programs on various law practice management software products, technology updates, how to avoid ethics violations and malpractice claims, practicing law with ADD/ADHD, retirement planning, and career workshops.

In addition, the PLF continues to offer free audio and video programs that are available as CDs, DVDs, or by downloading or streaming from our website:

- **91 free audio and video programs available**
- ***In Brief* and *In Sight* publications**
- **over 400 practice aids**
- **4 handbooks:**
  Planning Ahead: A Guide to Protecting Your Clients' Interests in the Event of Your Disability or Death (2015); A Guide to Setting Up and Running Your Law Office (2016); A Guide to Setting Up and Using Your Lawyer Trust Account (2016); and Oregon Statutory Time Limitations (2014).

Our practice aids and handbooks are all available free of charge. You can download them at **www.osbplf.org**, or call the Professional Liability Fund at 503.639.6911 or 800.452.1639.

Practice Management Advisor Program

Our practice management advisors (PMAs), Sheila Blackford, Hong Dao, Jennifer Meisberger, and Rachel Edwards answer practice management questions and provide information about effective systems for conflicts of interest, mail handling, billing, trust accounting, general accounting, time management, client relations, file management, and software. In 2016, the PMAs presented seminars all over the state on practice management. In addition to these presentations, the PMAs also provide in-house CLEs for law firms.

100% of the people who returned surveys were “very satisfied” or “satisfied” with the following areas: (1) reaching a PMA by telephone; (2) the promptness within which the lawyer received a return phone call; (3) the amount of time between calling for an appointment and when the appointment took place; (4) practice management advisor’s ability to explain information clearly; (5) how the lawyer was treated by the practice management advisor (patience, courtesy, etc.); (6) receiving information that was helpful; (7) follow-up; and (8) overall level of satisfaction with service.

100% of the people who returned surveys were "very satisfied" or "satisfied" with eight aspects of the PMA program.

Oregon Attorney Assistance Program

The Oregon Attorney Assistance Program (OAAP) attorney counselors, Shari R. Gregory, Mike Long, Douglas Querin, Kyra Hazilla and Bryan Welch, provide assistance with alcohol and chemical dependency; burnout; career change and satisfaction; depression, anxiety, and other mental health issues; stress management; and time management. In 2016, the OAAP sponsored addiction support groups, lawyers-in-transition meetings, career workshops, a depression support group, a support group for lawyers with ADD, a women’s wellness retreat, a men’s work/life balance support group, a *trans support group, a resiliency building group, a support group for minority lawyers, a mindfulness group, creating healthy habits support group.

744 lawyers assisted with personal issues in 2016, including alcoholism, drug addiction, career satisfaction, retirement, and mental health issues.

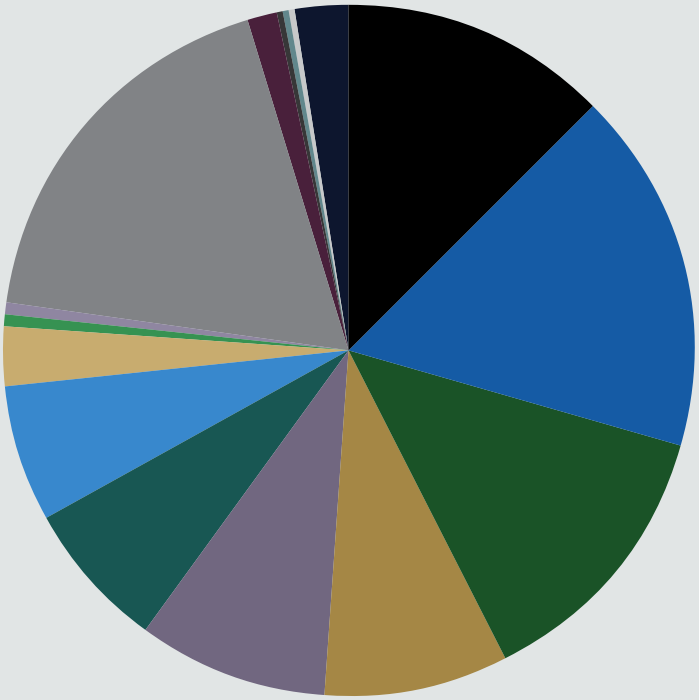
What Are the Changes to the Coverage Plan?

Last year, the PLF completely overhauled the Primary and Excess Coverage Plans. The Plans were significantly reorganized and reformatted, but the substantive changes were limited. Some, but not all, of the revisions are discussed below. In order to understand the scope of coverage under the 2017 Plans, it is important to read them in their entirety.

The revised Primary and Excess Plans are reorganized to eliminate unnecessary or repetitive language and to make it easier to find and identify related provisions. For instance, all Plan language relating to who qualifies as a Covered Party is integrated into Section II of the revised Primary Plan. By making this change, we were able to eliminate current Plan Exclusion 14 (Government Lawyers) and Exclusion 15 (Other Lawyers Not in Private Practice). Under the new language,

Frequency of Closed Claims

By Area of Law – January 1, 2012 to December 31, 2016



Personal Injury	12.58%
Domestic Relations / Family Law	16.88%
Bankruptcy & Debtor-Creditor	13.23%
Real Estate/Land Use/Zoning	8.68%
Estate Planning & Estate Tax	8.83%
Business Transactions / Commercial Law	6.82%
Criminal	6.49%
Workers Compensation / Admiralty	2.64%
Tax/Non Profit	0.67%
Securities	0.52%
Other	18.05%
Appellate	1.36%
Construction Liens	0.17%
Employment/Benefits/Labor	0.19%
Immigration	0.26%
Intellectual Property	0.11%
Public Body Claims/Government/Municipal	0.02%
Tort Personal Injury Plaintiff	2.49%

an attorney is simply not a Covered Party regarding work that was within the scope of these previous exclusions. Similarly, everything relating to covered activities under the Plan, including language that previously appeared only in Comments and Examples, is integrated into Section III of the revised Primary Plan, Covered Activity. We believe these changes make the Plan clearer and eliminate the need for extensive explanations in the form of Comments or Examples.

1. Legally Obligated.

The Primary Plan has long included language that coverage is provided only for Damages that the Covered Party is "legally obligated" to pay. The new Plan includes, for the first time, a definition of "Legally Obligated." This definition is added to the 2017 Plan in response to a ruling in *Brownstone Homes Condominium Association v. Brownstone Forrest Heights, LLC*, 358 Or 223 (2015). In *Brownstone*, the Court ruled that the words "legally obligated," as used in a liability policy, are ambiguous. The new definition in the Plan is intended to remove any ambiguity as to the PLF's intended meaning of these words. Under the definition of Legally Obligated, the PLF has no obligation to pay a settlement or Stipulated Judgment where the attorney has no actual obligation to pay money Damages and/or is protected or absolved from actual payment of Damages by reason of any covenant not to execute, a contractual agreement, or a court order, preventing the ability of the claimant to collect such Damages directly from the attorney. However, the bankruptcy of a Covered Party, standing alone, does not affect the PLF's duties under the Plan.

2. Damages Definition.

The 2017 Plan revises the Damages definition and clarifies, but does not change, the PLF's intent as to what types of damages are covered under the Plan. The Plan applies only to monetary damages arising from a legal malpractice claim. Under the Damages definition, the Plan does not apply to fines; penalties; punitive or exemplary damages; statutorily enhanced damages; rescission; injunctions; accountings; equitable relief; restitution; disgorgement; set-off of any fees, costs, or consideration paid to or charged by a Covered Party; or any personal profit or advantage to a Covered Party.

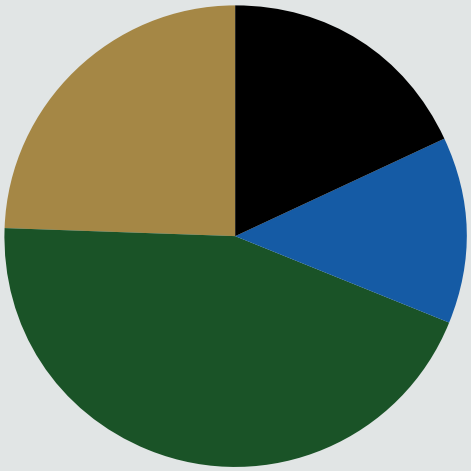
3. Defense Provisions.

A. Arbitration Agreements.

The revised Plan Section I.B.1 adds language to make clear that the PLF is not bound by fee agreements entered into by any Covered Party that call for arbitration of malpractice claims. The PLF does not want to be restricted by the terms of these agreements.

Payment Allocation of Closed Claims

January 1, 2012 to December 31, 2016



B. Nature and Scope of Defense.

The PLF has long had a practice of attempting to repair "mistakes" before they become claims. Repair efforts by the PLF are not a right or duty under the Plan. Section I.B.2. makes clear that the PLF has sole discretion to decide whether to undertake a repair.

C. Defense Regarding Certain Excluded Claims.

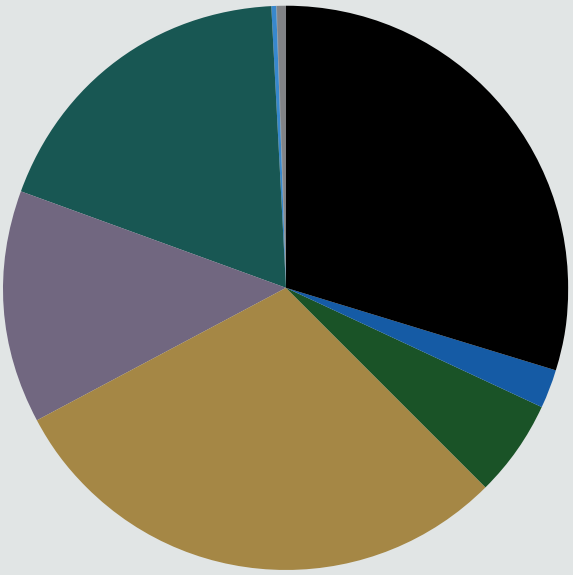
The revised Plan adds a specific defense provision stating that the PLF will defend, but not indemnify, claims for malicious prosecution, abuse of process, wrongful initiation of legal proceedings, and sanctions claims subject to Exclusion 4 of the Plan. The Plan language reflecting this policy and practice is relocated and clarified.

4. Addition of Definitions for "Private Practice" and "Principal Office."

The revised Plan adds two new definitions, one for Private Practice and one for Principal Office. These definitions clarify the PLF's meaning and are now stated as qualifications for who is a Covered Party, rather than being in the Covered Activity section, as in the previous Plan.

Disposition of Closed Claims

January 1, 2012 to December 31, 2016



Settled - Agreement of Parties	1382 (29.91%)
Coverage Denied	106 (2.29%)
Disposed of By A Court	253 (5.48%)
Claim Abandoned	1373 (29.72%)
Claim Denied	616 (13.33%)
Claim Repaired	861 (18.64%)
Other	8 (0.17%)
Disposed Binding Arbitration	4 (0.09%)
Referred to Prior Carrier	2 (0.04%)
Consolidated for Trial	1 (0.02%)
Limits Exhausted-referred to Excess	14 (0.30%)

5. Related Claims.

The concept of "Same or Related" has been renamed Related Claims, and clarifying language has been added. The revised Plan also contains examples that demonstrate how limits work when there are Related Claims against multiple Covered Parties.

6. Exclusions.

There are some substantive changes to exclusions in the Plan. These include, but are not limited to, Exclusion 4 relating to punitive damages and sanctions, and Exclusion 11 relating to family members.

In the 2016 Plan, Exclusion 4 excluded coverage for all amounts awarded as sanctions "intended to penalize" certain types of conduct, but provided for a defense regarding such claims. The previous Plan Exclusion applied whether or not the sanction was awarded against the Covered Party or the Client. There are, however, numerous kinds of sanctions, not all of which necessarily require bad faith, malicious or dishonest conduct, or misrepresentation on the part of an attorney. Moreover, it is not always clear whether a sanction awarded is "intended to penalize" because the court may or may not include findings or other language to allow the Fund to assess the intent of the sanction.

The 2017 Revised Plan excludes imposition of attorney fees, costs, fines, penalties, or remedies imposed as sanctions against the attorney regardless of whether there was an allegation or a finding of bad faith by the attorney or a finding of such by a court. Under the new language, vicarious liability for the sanction against the Covered Party is also excluded. However, if a sanction is imposed against a Client, there is coverage for a resulting claim against the Covered Party or those vicariously liable for the Covered Party, but only if the Covered Party establishes that the sanction was caused by mere negligence. The burden of proof is therefore on the Covered Party.

The Family Member Exclusion is expanded to include additional family members and to exclude work done by family members of those who reside in the household in a spousal equivalent relationship with the Covered Party.

A chart showing changes to the exclusions between the 2016 Primary Plan and the Revised 2017 Primary Plan is available at **www.osbplf.org**.

Some of the exclusions described above also apply to the Excess Plan. The primary change to the Excess Plan is to eliminate redundant provisions. A new Section IV regarding when a claim is First Made has been added to the Excess Plan. The new language clarifies that when a claim is First Made under the Excess Plan may not be the same plan year as when the claim is First Made for the Primary Plan. There is also a new Section V clarifying which claims are Related and subject to the same Claim Year Limit. The intent is to clarify the distinction between when Claims are Related for Primary purposes versus Excess purposes.

Finally, we have made relevant exclusions identical in both Plans.

A chart showing changes between the 2016 Excess Plan and the Revised 2017 Excess Plan is available at **www.osbplf.org**.

What is the Status of the Excess Program?

Participation in the PLF Excess Program remains stable. In large part due to the new underwriting and rating model, 2016 was the first year in many years that the excess program saw an increase in firm and attorney participants over the prior year. This increase included adding back midsized firms to PLF Excess coverage that were lost to the commercial market over the past five years.

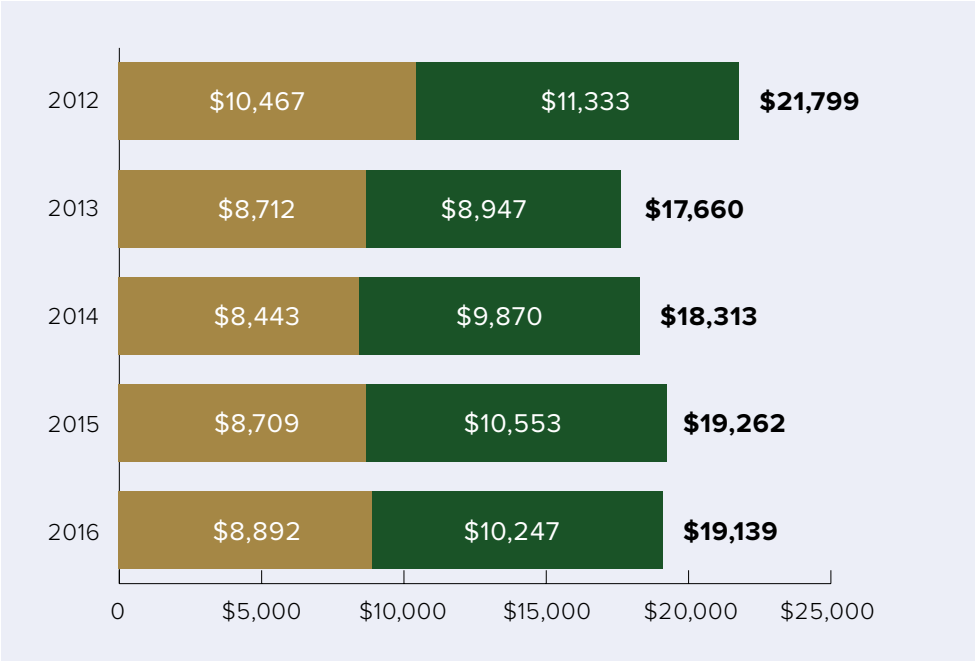
For the 2016 plan year, 720 firms with a total of 2,126 attorneys purchased excess coverage from the PLF.

The modest growth in the size of the excess book is primarily due to the use of a new rate sheet and underwriting model. Unlike in prior years, the excess program now prices law firms using a variety of factors including: area of practice, attorney CLE attendance, use of practice management systems, firm size, use of an office manager, claims history, desired coverage limits, etc. The resulting premium charged to a firm based on the new rate sheet now more accurately reflects the risk presented by that particular firm.

The 2016 year was not without its challenges, however. A spike in the number and severity of excess claims in mid to late 2016 required an increase in premium for the 2017 coverage year as well as a reexamination of how the excess program underwrites law firms engaged in practices that generate exposure under ORS Chapter 59 (Oregon Securities).

Average Cost Per Closed Claim

By Year of Reporting 2012–2016



Many of the large and expensive claims experienced by the excess program over the years have related to ORS 59 exposure ($9 million in claims in the past five years). To address this issue, the PLF engaged a consultant to review and rewrite the Securities Law Supplemental application and develop a new Business Law Supplement. For firms that completed either supplement, underwriting review is enhanced and occasionally requires additional review by an outside securities consultant. Because of this process, we were better able to review and underwrite law firms that presented this additional risk under the Oregon Securities laws.

The PLF Excess Program continues to be entirely re-insured and financially independent from the mandatory PLF Primary Coverage Program. Limits available range from $700,000 to $9.7 million. All excess coverage sold also includes an endorsement for Cyber Liability and Data Breach response. In 2016, three claims were reported under this Endorsement. Higher limits for Cyber Liability coverage are now available upon request.

Summary Financial Statements

(Unaudited, Primary and Excess Programs Combined)

	12/31/2016	12/31/2015
ASSETS		
Cash and Investments at Market	$57,314,337	$52,663,201
Other Assets	$1,768,367	$3,582,586
Capital Assets	$743,576	$740,183
TOTAL ASSETS	**$59,826,280**	**$56,985,970**
LIABILTIES AND FUND EQUITY		
Estimated Liabilities For Claim Settlements and Defense Costs	$34,300,000	$35,300,000
Deferred Revenues	$10,771,503	$10,847,994
Other Liabilities	$750,353	$666,585
PERS Pension Liabilities	$2,948,600	$2,255,126
Net Position	$11,055,824	$7,916,265
TOTAL LIABLITIES AND NET POSITION	**$59,826,280**	**$56,985,970**
REVENUE		
Assessments	$24,299,773	$25,461,021
Investment and Other Income	$3,806,737	$91,920
TOTAL REVENUE	**$28,106,510**	**$25,552,941**
EXPENSE		
Administrative	$7,510,264	$8,768,450
Provision for Settlements	$7,668,773	$10,362,499
Provision for Defense Costs	$9,017,791	$7,323,794
TOTAL EXPENSE	**$24,196,828**	**$26,454,743**
NET INCOME	**$3,909,682**	**-$901,802**

Professional
Liability Fund

PHYSICAL ADDRESS
16037 SW Upper Boones Ferry Road, Suite 300
Tigard, OR 97224

MAILING ADDRESS
PO Box 231600 | Tigard, OR 97281-1600

p: 503.639.6911 | *www.osbplf.org*

G.
Supreme Court of the State of Idaho Amended Order on Idaho Bar Commission Rules

In the Supreme Court of the State of Idaho

IN RE: AMENDMENTS TO SECTIONS OF THE IDAHO BAR COMMISSION RULES (I.B.C.R.)

AMENDED ORDER

The Board of Commissioners of the Idaho State Bar having presented proposed changes to the Idaho Bar Commission Rules (I.B.C.R), and the Idaho Supreme Court having reviewed and approved the recommendations;

NOW, THEREFORE, IT IS HEREBY ORDERED, that the Idaho Bar Commission Rules (I.B.C.R.), as they appear in the Idaho State Bar Desk Book and on the Idaho State Bar website be, and they are hereby, amended as follows:

1. That Rule 302 of SECTION III be, and the same is hereby, amended as follows:

SECTION III
Licensing

RULE 302. Licensing Requirements. Following admission as a member of the Bar, an attorney may maintain membership as follows:

(a) **Active or House Counsel Member.** An Active or House Counsel Member shall:

(1) Pay the annual license fee required by Rule 304;

(2) Comply with trust account requirements;

(3) Comply with all applicable MCLE requirements under I.B.C.R. 402;

(4) Verify the attorney's membership information under Rule 303, including an email address for electronic service from the courts; and

(5) Certify to the Bar ~~on or before February 1 of each year~~ (~~1~~A) whether the attorney represents private clients; and (~~2~~B) if the attorney represents private clients, ~~whether the attorney is currently covered by professional liability insurance; and (3) whether the attorney intends to maintain professional liability insurance during the next twelve (12) months~~ submit proof of current professional liability insurance coverage at the minimum limit of $100,000 per occurrence/$300,000 annual aggregate. Each attorney admitted to the active practice of law in this jurisdiction who ~~reports being covered by~~ is required to have professional liability insurance shall identify the primary carrier and shall notify the Bar in writing within thirty (30) days if the professional liability insurance policy providing

coverage lapses, is no longer in effect, or terminates for any reason, unless the policy is renewed or replaced without substantial interruption.

...

2. That Rule 303 of SECTION III be, and the same is hereby, amended as follows:

SECTION III
Licensing

RULE 303. Membership Information.

(a) **Required Information.** All members of the Bar must provide the following membership information, which shall be considered public information:

(1) Full name;

(2) Name of employer or firm, if applicable;

(3) Mailing address;

(4) Phone number;

(5) Email address for use by the Bar; and

(6) In addition to the above information, an Active or House Counsel Member shall also provide:

(A) An email address for electronic service of notices and orders from the courts in those counties and district courts where electronic filing has been approved by the Supreme Court. This email address may be the same as the email address identified in subsection (a)(5) above. If no separate email address for electronic service from the courts has been designated, the email address identified in subsection (a)(5) will be used for such service; and

(B) Whether the attorney has professional liability insurance, if such ~~disclosure~~ insurance is required under Rule 302(a).

...

3. That Rule 402(e) of SECTION IV be, and the same is hereby, amended as follows:

SECTION IV
Mandatory Continuing Legal Education

RULE 402. Education Requirement Report.

...

(e) **Exemptions.** Exemptions from all or part of the CLE requirements of subsection (a) may be granted as follows:

(1) **Eligibility**. An exemption may be granted:

(A) Upon a finding by the Executive Director of special circumstances constituting an undue hardship for the attorney; or

(B) Upon verification of the attorney's disability or severe or prolonged illness, in which case all or a specified portion of CLE credits may be earned through self-study; or

(C) For an attorney on full-time active military duty who does not engage in the practice of law in Idaho.

...

IT IS FURTHER ORDERED that the amendments to Rule 302 and 303 shall be effective January 1, 2018, and amendments to Rule 402 shall be effective immediately.

IT IS FURTHER ORDERED, that the above designation of the striking of words from the Rules by lining through them, and the designation of the addition of new portions of the Rules by underlining such new portion is for the purposes of information only as amended, and NO OTHER AMENDMENTS ARE INTENDED. The lining through and underlining shall not be considered a part of the permanent Rules.

DATED this 30 day of March, 2017.

By Order of the Supreme Court

Daniel T. Eismann, Vice Chief Justice

ATTEST:

for Clerk

I, Stephen W. Kenyon, Clerk of the Supreme Court of the State of Idaho, do hereby certify that the above is a true and correct copy of the [illegible] entered in the above entitled cause and now on record in my office.

WITNESS my hand and the Seal of this Court 3-30-17

STEPHEN W. KENYON, Clerk

By: [illegible] Chief Deputy

H.
Idaho State Bar Professional Liability Insurance Coverage Certification

PROFESSIONAL LIABILITY INSURANCE COVERAGE CERTIFICATION

to be completed by all Active and House Counsel Members

(Please make any necessary corrections.)

I, _____, ISB Number _____,

hereby certify the following pursuant to Idaho Bar Commission 302(a)(5):

1. I am an Active or House Counsel Member of the Idaho State Bar; and

(Choose One)

2. (A) ❑ I DO NOT represent private clients and am not required to carry professional liability insurance.

or

(B) ❑ I represent private clients and am currently covered by professional liability insurance. The name of my primary insurance carrier is: _____.

- Attorneys selecting option (B) must submit proof of current professional liability insurance coverage at the minimum limit of $100,000 per occurrence/$300,000 annual aggregate. Proof may be in the form of a certification from your insurer that includes the name of the carrier, name of the insured(s), term and policy limits. *If you submit the Declaration page from your policy to prove compliance with this rule, please redact any information not required by this rule, including the premium amount.* Please submit your proof of coverage with this form.

(C) ❑ I am an Active or House Counsel Member whose practice of law is limited to practicing within an employment setting exclusively for an employer and its commonly owned organizational affiliates and my employer is not in the business of providing legal services.

The name of my employer is _____.

My employer maintains insurance coverage that is the equivalent of that required by I.B.C.R. 302(a)(5) that covers my practice of law.

- Attorneys selecting option (C) do not need to submit proof of insurance coverage.

3. I will notify the Idaho State Bar in writing within 30 days if any professional liability insurance policy providing coverage lapses, is no longer in effect, or terminates for any reason, unless the policy is renewed or replaced without substantial interruption.

Dated this _____ day of _____, _____.

_____

Attorney's Signature

PLEASE SEE REVERSE FOR ADDITIONAL INFORMATION

Professional Liability Insurance Coverage Requirement
General Information

IDAHO BAR COMMISSION RULE 302. Licensing Requirements.

Following admission as a member of the Bar, an attorney may maintain membership as follows:
(a) Active or House Counsel Member. An Active or House Counsel Member shall:
***

(5) Certify to the Bar (A) whether the attorney represents private clients; and (B) if the attorney represents private clients, submit proof of current professional liability insurance coverage at the minimum limit of $100,000 per occurrence/$300,000 annual aggregate. Each attorney admitted to the active practice of law in this jurisdiction who is required to have professional liability insurance shall identify the primary carrier and shall notify the Bar in writing within thirty (30) days if the professional liability insurance policy providing coverage lapses, is no longer in effect, or terminates for any reason, unless the policy is renewed or replaced without substantial interruption.

What information must I provide to confirm I have coverage?
You must provide information from your carrier listing the name of carrier, name of insured, coverage limits and policy expiration date. If you submit your policy declaration page to demonstrate your compliance with this rule, please redact the premium amount and any other information not required by the rule.

Can I maintain an active license and not obtain coverage?
Yes, if you do not represent private clients.

If I only take a few cases a year, am I required to obtain coverage?
Yes.

If I only do pro bono work, do I need coverage?
Yes. However, if you only plan to take pro bono cases, coverage may be available through the Idaho Law Foundation's Idaho Volunteer Lawyers Program. You can contact the program at 208-334-4500.

If I practice out of state am I required to obtain coverage?
Yes, if you practice out of state and represent private clients, under the rule you are required to have professional liability insurance coverage.

What prompted the rule change?
A resolution proposing to amend the Bar Commission Rules to require a minimum amount of professional liability insurance coverage was submitted to the membership during the 2016 resolution process. The resolution passed by a 51% to 49% vote of bar members. The proposed rule change was submitted to the Idaho Supreme Court. The Court adopted the rule change in an order issued March 30, 2017.

Who can I contact about getting a policy?
The Idaho State Bar endorses ALPS, https://www.alpsnet.com/. If you have an insurance broker, he or she may be able to provide options. PayneWest in Spokane, Moreton and Company in Boise, and the Hartwell Corporation in Caldwell and Idaho Falls assist lawyers with obtaining legal professional liability insurance coverage and may have other carrier options. In addition to ALPS, a few carriers we know provide coverage in Idaho are; Attorney Protective, Travelers, and Allied World. There are other carriers that offer coverage. If you find a carrier that is not listed above, we recommend that you confirm the carrier has a history of providing professional liability insurance coverage in Idaho.

Questions?
Please contact Diane Minnich, Executive Director, (dminnich@isb.idaho.gov) or Maureen Ryan Braley (mryanbraley@isb.idaho.gov) at (208) 334-4500 if you have any additional questions.

I.
Idaho Malpractice Coverage Requirement, Frequently Asked Questions

Idaho State Bar

Author: Annette Strauser

2018 Malpractice Coverage Requirement - General Information

Posted on August 29, 2017 by Annette Strauser

When does the Rule take effect?

Lawyers subject to the rule will be required to report on their professional liability insurance in their 2018 licensing forms (mailed November 2017, due to ISB February 1, 2018).

Idaho Bar Commission Rule 302(a)(5):

> **Rule 302. Licensing Requirements.** Following admission as a member of the Bar, an attorney may maintain membership as follows: (a) **Active or House Counsel Member.** An Active or House Counsel Member shall: *** (5) Certify to the Bar (A) whether the attorney represents private clients; and (B) if the attorney represents private clients, submit proof of current professional liability insurance coverage at the minimum limit of $100,000 per occurrence/$300,000 annual aggregate. Each attorney admitted to the active practice of law in this jurisdiction who is required to have professional liability insurance shall identify the primary carrier and shall notify the Bar in writing within thirty (30) days if the professional liability insurance policy providing coverage lapses, is no longer in effect, or terminates for any reason, unless the policy is renewed or replaced without substantial interruption.

When do I report that I have coverage?

Lawyers subject to rule will be required to report on their professional liability insurance coverage annually during licensing using the Professional Liability Insurance Certification form. Unless there is a lapse or termination in coverage that lasts longer than 30 days, this is the only time that lawyers will be required to report on their coverage.

What information must I provide to confirm I have coverage?

You must provide information from your carrier listing the name of carrier, name of insured, coverage limits and policy expiration date. If you submit your policy declaration page to demonstrate your compliance with this rule, please redact the premium amount and any other information not required by the rule.

Can I maintain an active license and not obtain coverage?

Yes, if you do not represent private clients. You can indicate this on the disclosure form that you will receive in your licensing packet.

If I only take a few cases a year, am I required to obtain coverage?

Yes.

If I only do pro bono work, do I need coverage?

Yes. However, if you only plan to take pro bono cases, coverage may be available through the Idaho Law Foundation's Idaho Volunteer Lawyers Program. You can contact the program at 208-334-4500.

If I practice out of state am I required to obtain coverage?

Yes, if you practice out of state and represent private clients, under the rule you are required to have malpractice coverage.

What prompted the rule change?

A resolution proposing to amend the Bar Commission Rules to require a minimum amount of legal malpractice coverage was submitted to the membership during the 2016 resolution process. The resolution passed by a 51% to 49% vote of bar members. The proposed rule change was submitted to the Idaho Supreme Court. The Court adopted the rule change in an order issued March 30, 2017.

Who can I contact about getting a policy?

The Idaho State Bar endorses ALPS, https://www.alpsnet.com/. If you have an insurance broker, he or she may be able to provide options. PayneWest in Spokane, Moreton and Company in Boise, and the Hartwell Corporation in Caldwell and Idaho Falls assist lawyers with obtaining legal professional liability coverage and may have other carrier options. In addition to ALPS, a few carriers we know provide coverage in Idaho are; Attorney Protective, Travelers, and Allied World. There are other carriers that offer coverage. If you find a carrier that is not listed above, we recommend that you confirm the carrier has a history of providing legal malpractice coverage in Idaho.

Posted in Home, Licensing