

SHOULD  
MALPRACTICE  
INSURANCE BE  
MANDATORY  
FOR ALL  
WASHINGTON  
LAWYERS?



Join the discussion as a  
WSBA task force prepares  
its recommendation

**I**N SEPTEMBER 2017, the Board of Governors created a Mandatory Malpractice Insurance Task Force to determine whether to recommend mandatory malpractice insurance for all lawyers in Washington, to develop a model that might work best here, and to prepare draft rules to implement that model. In July, the Task Force provided the Board with an interim report that included a tentative recommendation to mandate malpractice insurance for Washington-licensed lawyers, with certain exceptions.

**YOUR VOICE  
MATTERS!**

Task Force members want to hear from you now through December as they finalize a recommendation to the Board of Governors.

Read the interim report and learn more at [www.wsba.org/insurance-task-force](http://www.wsba.org/insurance-task-force).

Send comments to [insurancetaskforce@wsba.org](mailto:insurancetaskforce@wsba.org).

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## PROPOSAL

After accumulating a considerable amount of data, and hearing from other states, from WSBA members and regulators, and from industry professionals, the Task Force reached a consensus that uninsured lawyers pose a distinct risk to their clients and themselves.

At this point, the Task Force favors mandatory malpractice insurance through a free-market model (allowing lawyers to purchase insurance from any provider they wish) as a condition of licensing. Still to be determined are categories of lawyers to be exempt, such as government and in-house private-company lawyers, and non-practicing attorneys who maintain their licenses. Also yet to be determined is the recommended minimum level of coverage to be required.

## NEXT STEPS

The Task Force will continue to meet in the coming months to hone in on remaining issues, discuss modeling, and draft its detailed proposal, including proposed court rules, for the board's consideration. The final report is due to the Board of Governors in January 2019.

## TASK FORCE HISTORY AND PROCESS

As specified by the Washington Supreme Court in General Rule 12.1, a key objective in regulating legal services providers is protection of the public. Consistent with this objective, the Washington Supreme Court Admission and Practice Rules currently require lawyers to annually report whether they are covered by professional liability insurance. By contrast, Washington's two other licenses to practice law (Limited License Legal Technicians and Limited Practice Officers) are obligated to show proof of financial responsibility (which is typically established by certifying malpractice insurance coverage). Recognizing this anomaly, and bearing in mind the responsibility to regulate the profession in the public interest, the Board of Governors in 2016 formed a work group to study Washington's current and historic approach to malpractice insurance for all license types. The current Task Force was formed to research the topic in greater depth, gather member input, and make a recommendation to the Board.

Since its first meeting in January 2018, the Task Force has focused on information gathering and has reviewed WSBA data on Washington lawyers, mandatory malpractice insurance requirements in other jurisdictions, national research on lawyers who go uninsured, an ABA study of malpractice insurance, data from insurance-industry professionals, and the experience of a legal malpractice plaintiff's lawyer. The Task Force has also solicited and examined WSBA member comments.

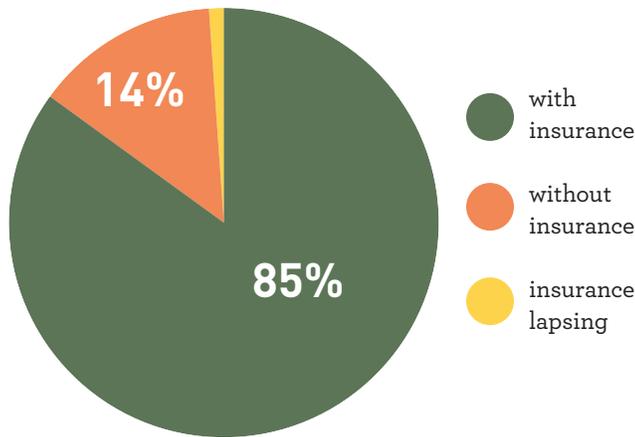
## APPROACHES IN WASHINGTON AND OTHER JURISDICTIONS

The vast majority of common-law and civil-law countries outside the U.S. require some form of malpractice insurance for lawyers in private practice. In the U.S., many jurisdictions like Washington require lawyers to report and/or disclose whether they are covered by professional liability insurance. Only two states, however, currently require insurance as a condition of licensing: Idaho (open-market model, minimum limit of \$100,000 per occurrence with a \$300,000 annual aggregate) and Oregon (bar-created professional liability fund, \$3,500 annual per-member assessment, and \$300,000/\$300,000 coverage). Illinois requires any lawyer who does not carry liability insurance to undergo an online practice assessment that also provides four hours CLE credit. The State Bar of Nevada has submitted a mandatory malpractice insurance rule for consideration by the Nevada Supreme Court, and the State Bar of California is studying whether to require professional liability insurance.

**SOME KEY INTERIM REPORT FINDINGS\***

**WASHINGTON LAWYERS IN PRIVATE PRACTICE MALPRACTICE INSURANCE (2015-2017)**

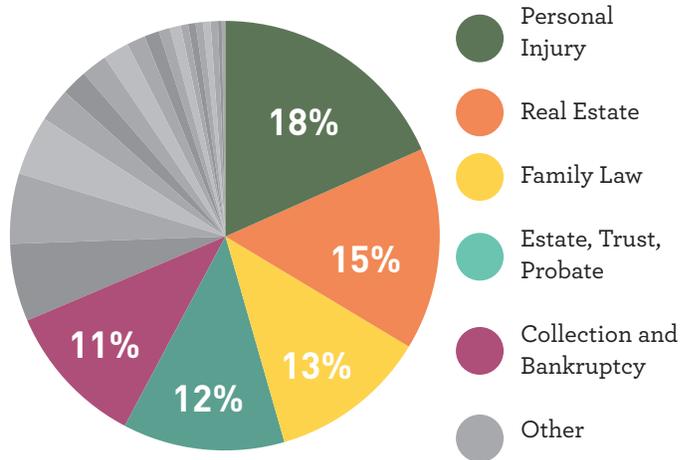
The vast majority of Washington lawyers representing private clients carry malpractice insurance (14 percent report being uninsured).



SOURCE: WSBA Member Demographic Reporting

**NUMBER OF CLAIMS BY AREA OF LAW (2015 STUDY)**

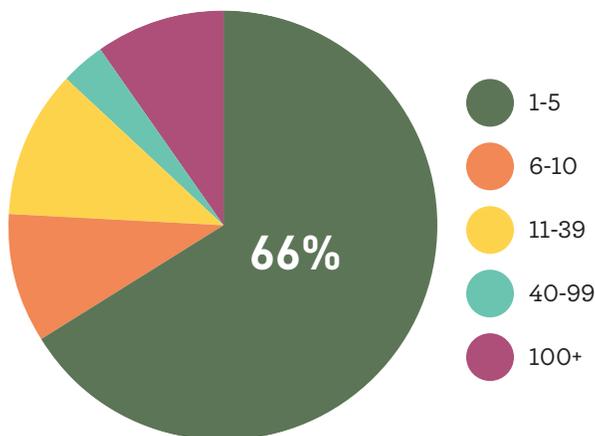
The practice areas of personal injury, real estate, family law, estate planning, certain corporate practices, and collection/bankruptcy have the highest incidence of malpractice claims.



SOURCE: 2015 ABA Profile on Legal Malpractice Claims

**CLAIMS BY NUMBER OF ATTORNEYS IN FIRM (2015 STUDY)**

Among insured lawyers, those who practice in solo or small firms represent a disproportionate share of malpractice claims.



SOURCE: 2015 ABA Profile on Legal Malpractice Claims

Malpractice plaintiffs' lawyers report numerous instances of worthy claims they must reject for representation because the defendant lawyer is uninsured, making a recovery much less likely.

89 percent of malpractice claims nationally are resolved for less than \$100,000; 95 percent of claims are resolved for less than \$250,000.

SOURCE: 2015 ABA Profile on Legal Malpractice Claims

Malpractice insurance premiums vary significantly based on many factors, including years in practice, area of practice, size and practice mix of a firm, lawyer history with malpractice claims and disciplinary actions, and state characteristics.

Over the last five years, 11 percent of applications to WSBA's Client Protection Fund were denied because they described instances of malpractice rather than theft or dishonest conduct.

\*For source information and more details, see the complete interim report at [www.wsba.org/insurance-task-force](http://www.wsba.org/insurance-task-force).

## MEMBER FEEDBACK

Of 69 member comments sent to the Task Force so far, the most (29 percent) express concerns about the cost of malpractice insurance, followed by concerns that retired/semi-retired members will not be able to practice if malpractice insurance is required (22 percent). Other comments recommend exemptions, ask for more information, and express concern for lawyers who might be uninsurable, among other topics.

COMMENTS FROM MEMBERS SO FAR	
29%	Concerns about Cost
22%	Concerns about Retired/Semi-Retired Members Being Able to Practice
10%	Requests for Exemptions for Lawyers Not in Private Practices
9%	Exemption Recommendations
7%	Issues About Public Protection and/or Impact to Profession's Reputation
3%	Requests for More Information
3%	Un-insurability Concerns

## POSSIBILITIES CONSIDERED

In the Task Force's view, the WSBA has a duty delegated by the Washington Supreme Court to protect the public and maintain the integrity of the profession. Using this lens, the Task Force members also considered the following approaches:

- Do nothing and maintain the status quo
- Implement a proactive management-based regulation model like Illinois
- Implement a professional liability fund model like Oregon
- Implement more extensive malpractice insurance disclosure requirements
- A combination of some of the above models

Ultimately, the Task Force concluded that, as compared to a market-based approach, these models were impractical, would protect the public less effectively, or both.

## YOUR FEEDBACK MATTERS

Especially as the Task Force members work through the details of preparing a draft rule, they want to hear from WSBA members to better understand what minimum level of coverage and which exemptions make sense. The Task Force will continue to reach out to all members and specific groups, such as currently uninsured lawyers, as its proposal takes shape.

Task Force meeting dates, materials, resources, and contact information are available at [www.wsba.org/insurance-task-force](http://www.wsba.org/insurance-task-force).

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