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Washington State
Supreme Court

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Mandatory Malpractice Insurance Should Be Rejected

To the Washington State Supreme Court Justices:

The State Supreme Court of Washington is now considering the issue of mandating malpractice insurance for Washington lawyers. The Board of Governors of the Washington State Bar Association earlier considered such a proposal for mandatory malpractice insurance and rejected it as unwarranted. The Supreme Court should likewise reject this proposal.

Before the Supreme Court imposes mandatory malpractice insurance on Washington lawyers the Court should know what the benefits of such a coercive action would be and what the costs would be.

Specifically, the Court should know the answers to the following questions:
What percentage of malpractice cases are filed against uninsured lawyers.
What percentage of those malpractice cases filed against uninsured lawyers are successful.
What percentage of successful malpractice suits filed against uninsured lawyers are uncollectible because of lack of malpractice insurance.

The above questions have never been answered, not by the Mandatory Malpractice Insurance Task Force and not by any of the mandatory insurance proponents now seeking a decision on this matter from the Washington State Supreme Court.

Since the vast majority of Washington attorneys already have malpractice insurance, we are talking about only a tiny fraction of a tiny fraction of the total number of Washington attorneys. The number of uninsured attorneys who have lost a malpractice case and the resulting judgments were uncollectible solely because of a lack of malpractice insurance is likely a very small number. The number could even be zero. So we have no measurable reason to impose mandatory malpractice insurance on Washington attorneys.

Also, consider the collateral damage this will likely cause. Insurance premium rates will likely rise when the mandatory malpractice rule gives the insurance industry a captive market of attorneys. Solo practitioners and small firms will struggle and a certain number of pro bono and low bono legal services will disappear. Poorer members of the public who make up a large part of the clientele of solo practitioners and small firms will experience a rise in the cost of legal services.

Further, the small percentage of uninsured lawyers is actually performing a service to the profession and to the public by keeping insurance rates down. The insurance companies know that if they squeeze too hard, then the presently insured attorneys can vote with their feet and move over to join the uninsured. If we lose freedom of choice about purchasing malpractice insurance, then we will lose this important safety valve.

Insurance companies are the real winners in a mandatory malpractice insurance scheme. Due to the captive market of lawyers, they will be able to raise their rates at will and drop "problem" lawyers at will. Insurance companies will have a lock on the legal profession. Insurance companies will have the de facto power to disbar attorneys from the practice of law. It should be noted that insurance companies already refuse to insure certain areas of practice such as the adult entertainment area, certain types of patent law or copyright law, and some areas of financial investment law. Therefore, some attorneys could be put into the position of being required to obtain malpractice insurance which is impossible to get.

Moreover, mandatory insurance is unlikely to protect the public. The public will be forced into litigation against insurance companies, one of the most aggressive and difficult litigants in the legal profession. Insurance companies prefer to collect premiums rather than to pay out claims.

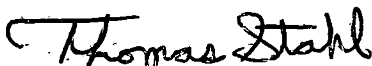
Also, mandatory professional liability insurance is no remedy for the victims of a lawyer's intentional acts or omissions and criminal or fraudulent conduct. These acts along with numerous others fall under common policy exclusions that often foreclose relief to claimants.

At this stage, when there is no mandatory malpractice insurance and insurance companies are eager for Washington to invoke mandatory insurance, it is reminiscent of the spider and the fly . . . "*Come into my parlor,*" said the spider to the fly. Here, the spider is insurance companies and the fly is the small firms and solo practitioners that the proponents of coercion are trying to force into the insurance company's web. However, once insurance is mandatory then all lawyers will be captive and then all will eventually be drained by insurance companies. The public will suffer as well due to the increase in legal costs caused by the increase in the cost of malpractice insurance.

At a time in our state's history when virtually all private businesses are struggling and we face the very real threat of a recession due to the recent corona virus outbreak, it would be ill-timed and ill-advised for the Court to encumber lawyers with the additional financial burden of mandatory insurance.

Since the benefits of imposing mandatory malpractice insurance are little to none, and since the downsides are considerable, we urge the Washington State Supreme Court to reject the mandatory malpractice insurance proposal.

Sincerely,



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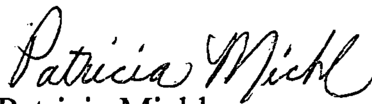

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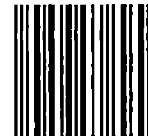

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