HOUSE . . . . . No. 6235

The Commonwealth of Massachusetts

HOUSE OF REPRESENTATIVES, May 14, 1979.

The committee on Insurance, to whom was referred the petitition (accompanied by bill, House, No. 2922) of the Massachusetts Bar Association, Raymond M. LaFontaine, Theodore J. Aleixo, Jr., Daniel J. Foley, William A. Carey, Leon J. Lombardi and Robert J. Rohan for legislation to grant certain authority to the Commissioner of Insurance relative to legal malpractice insurance, reports recommending that the accompanying bill (House, No. 6235) ought to pass.

For the committee,

RAYMOND M. LaFONTAINE

The Commonwealth of Massachusetts

In the Year One Thousand Nine Hundred and Seventy-Nine.

An Act granting certain authority to the commissioner of insurance with respect to legal malpractice insurance.

Be it enacted by the Senate and House of Representatives in General Court assembled and by the authority of the same, as follows:

1 The General Laws are hereby amended by inserting after Chap-
2 ter 175E the following chapter:

3 CHAPTER 175F
4 THE LEGAL PROFESSIONAL LIABILITY
5 INSURANCE PLACEMENT FACILITY AND
6 JOINT UNDERWRITING ASSOCIATION

7 *Section 1.* As used in this chapter, unless the context otherwise
8 requires or a different meaning is specifically prescribed, the fol-
9 lowing words shall have the following meanings: —
10 "Commissioner", the commissioner of insurance;
11 "Facility", the legal professional liability insurance placement
12 facility, as further defined herein;
13 "Association", the legal professional liability joint underwriting
14 and reinsurance association, as further defined herein;
15 "Legal professional liability insurance", insurance coverage
16 against the legal liability of the insured and against loss, damage or
17 expense to the insured incident to a claim arising out of an injury of
18 any person as the result of negligence or malpractice of the insured
19 in rendering professional service as an attorney.
20 "Attorney", any person admitted to the bar by the Supreme
21 Judicial Court and registered with the Board of Bar Overseers.
22 "Premiums written" gross direct premiums written on liability
23 and casualty insurance written pursuant to the provisions of chap-
24 ters ninety and one hundred and seventy-five of the General Laws,

25 including the liability component of multiple peril package policies
26 as computed by the commissioner, less all premiums and dividends
27 credited or returned to policyholders on the unused or unabsorbed
28 portion of premium deposits.

29 *Section 2.* The purpose of this chapter is to promote the public
30 welfare by authorizing the commissioner to establish appropriate
31 mechanisms for the provision of legal professional liability insu-
32 rance to attorneys licensed to practice law in the Commonwealth,
33 to the end that citizens of the Commonwealth shall at all times be
34 able to obtain proper and adequate legal representation and
35 services.

36 *Section 3.* If at any time the commissioner shall determine or
37 the Massachusetts Bar Association by petition filed with the com-
38 missioner shall claim that a substantial number of attorneys is or is
39 likely to become unable to obtain legal professional liability insu-
40 rance from companies licensed to write such insurance in the
41 Commonwealth, the commissioner, after proper notice and hear-
42 ing, shall make, within ninety days following the date of filing of
43 said petition, or if no petition shall have been filed, within ninety
44 days following the date of mailing or publication of said notice, a
45 written determination whether the lack of such insurance is adver-
46 sely affecting or will adversely affect the practice of law in the
47 Commonwealth and, consequently, the ability of citizens of the
48 Commonwealth to obtain proper and adequate legal representa-
49 tion or services. Within fourteen days following a finding of
50 adverse effect, as aforesaid, the commissioner shall, subject, how-
51 ever to the provisions of section 5 hereof, promulgate an order
52 requiring all insurance companies licensed to provide casualty and
53 liability insurance pursuant to the provisions of chapters ninety
54 and one hundred and seventy-five of the General Laws to cooper-
55 ate in organizing the Legal Professional Liability Insurance Place-
56 ment Facility in such a manner as shall be approved by the
57 commissioner. Such companies shall submit to the commissioner,
58 within 30 days following the promulgation of said order, a plan of
59 organization and a plan of operation for the facility. Such plans
60 shall, among other appropriate provisions deemed necessary and

61 helpful to achieve the purposes of this chapter, provide that:
62 (1) Each insurance company licensed to write liability and casu-
63 alty insurance pursuant to the provisions of chapters ninety and
64 one hundred and seventy-five of the General Laws shall participate
65 in the facility and in the plan of operation as a condition precedent
66 to obtaining or maintaining authority to sell all or any part of such
67 insurance in the Commonwealth.
68 (2) The facility shall be governed by a board of fifteen directors,
69 who shall serve without compensation. Eleven of the directors shall
70 be elected annually by cumulative voting by the members of the
71 facility whose votes in such election shall be weighed in accordance
72 with each member's premiums written during the preceding
73 calendar year. Four directors shall be attorneys appointed annu-
74 ally by the commissioner as representatives of the legal profession,
75 after consultation with the Massachusetts Bar Association.
76 (3) The facility shall have the authority to make an equitable
77 apportionment of legal professional liability insurance among all
78 its member companies in a method and manner approved by the
79 commissioner as reasonably calculated to distribute fairly among
80 insurers on the basis of premiums written within the Common-
81 wealth the risk or loss which may be incurred in connection with
82 such insurance.
83 (4) Every attorney, upon proof that he has made a reasonable
84 effort to obtain legal professional liability insurance and has been
85 unable to obtain it, shall be entitled on request to the facility to:
86 (a) a prompt inspection of his qualifications by representatives
87 of the facility, in such manner and form as the facility shall pres-
88 cribe with the approval of the commissioner;
89 (b) a report from the facility stating that it has presented the
90 application and inspection report to insurance companies partici-
91 pating in the facility and that a member or members of the facility
92 have agreed to write all or part of the coverage requested, or that
93 such member or members have agreed to write such coverage if
94 certain specified recommendations are implemented by the attor-
95 ney within a reasonable time, or that, for specified reasons, no com-
96 pany has agreed to write any of the coverage requested; and
97 (c) insurance coverage, if any, agreed to in the report, up to a

98 reasonable insurable value, upon satisfactory proof that any
99 recommendations contained in the report have been implemented,
100 and upon payment of the required premium to the company or
101 companies, or agents thereof, that agree to provide the coverage.
102 Presentation to the facility of a written statement from a com-
103 pany, broker or agent that it is unable to provide the required
104 amount of such insurance shall be evidence of a reasonable effort
105 to obtain insurance.
106 *Section 4.* No insurance company shall direct any agent or
107 other producer not to solicit business through the facility; no
108 insurance agent shall direct any other agent in his employ or any
109 broker or other producer not to solicit business through the facil-
110 ity; and no agent, broker or other producer shall be penalized in
111 any way by an insurance company or employer producer for
112 submitting applications to the facility.
113 No insurance agent or broker licensed to sell casualty and liabil-
114 ity insurance shall be allowed to refuse a request for inspection
115 from an eligible attorney requesting legal malpractice insurance
116 unless such attorney is:
117 (a) then indebted to any agent, broker or company for coverage
118 requested in the past; or
119 (b) then unwilling to make satisfactory payment arrangements
120 for the coverage requested.
121 Agents and brokers submitting applications to the facility shall
122 be compensated by commissions upon the original issuance of
123 coverage, upon each installment payment, if any, of the premium
124 payable for such coverage, and upon each renewal of such cover-
125 age, and shall be entitled to no other compensation.
126 Commissions to licensed insurance agents and brokers from the
127 facility and from any joint underwriting and reinsurance associa-
128 tion established in accordance with with the provisions of this
129 chapter shall be set by the commissioner from time to tme at such
130 percentage of the average commission rate customarily paid by
131 insurance companies that customarily compensate agents by com-
132 missions, as the commissioner, after appropriate hearing, shall find
133 to be sufficient to encourage agents and brokers to seek out risks in
134 legal professsional liability insurance while at the same time leav-

135 ing a further incentive to the agent or broker to place such business
136 through his customary markets when he finds that such placement
137 is practicable.
138 *Section 5.* If at any time the commissioner shall determine or
139 the Massachusetts Bar Association by petition filed with the com-
140 missioner shall claim that a substantial number of attorneys is or is
141 likely to become unable to obtain legal professional liability insu-
142 rance from companies licensed to write such insurance in the
143 Commonwealth the commissioner, after proper notice and hearing,
144 shall make within ninety days following the date of filing of said
145 petition, or if no petition shall have been filed, within ninety days
146 following the date of mailing or publication of said notice, make a
147 written determination whether the lack of such insurance is adver-
148 sely affecting or will adversely affect the practice of law in the
149 Commonwealth and, consequently, the ability of citizens of the
150 Commonwealth to obtain proper and adequate legal representa-
151 tion or services. Within fourteen days following a finding of
152 adverse effect, as aforesaid and upon a further finding that estab-
153 lishment of the facility will not adequately fulfill the purpose of this
154 chapter, as set forth in seciton two hereof, the commissioner shall
155 promulgate an order establishing in the Commonwealth the Legal
156 Professional Liability Joint Underwriting and Reinsurance Asso-
157 ciation consisting of all insurers licensed to provide casualty and
158 liability insurance pursuant to the provisions of chapters ninety
159 and one hundred and seventy-five of the General Laws. Every such
160 insurer shall be a member of the association and remain a member
161 as a condition of its authority to write such kinds of insurance
162 within the Commonwealth. Within ninety days following any such
163 order, the association shall submit to the commissioner a proposed
164 plan of operation, consistent with the purposes of this chapter, to
165 provide for the prompt and efficient provision of legal professional
166 liability insurance to attorneys meeting reasonable underwriting
167 standards who are otherwise unable to obtain adequate legal
168 professional liability insurance coverage. Such plan of operation
169 shall contain provisions for the economical, fair and nondiscrimi-
170 natory administration of the association; preliminary assessment
171 of all members for initial expenses necessary to commence opera-

172 tions; establishment of necessary facilities; management of the
173 association; assessment of members to defray losses and expenses;
174 commissions; reasonable underwriting standards and limits of
175 liability; acceptance and cession of reinsurance; procedures for
176 determining amounts of insurance to be provided; and for such
177 other matters as may be approved by the commissioner in light of
178 the purposes of the association and of this chapter.

179 The plan of operation shall be subject to approval by the com-
180 missioner and shall take effect ten days after having been approved
181 by him. If the commissioner disapproves the proposed plan of
182 operation, the association shall within thirty days submit for
183 review an appropriately revised plan of operation and, if the associ-
184 ation fails to submit such a plan, or if the revised plan is also
185 disapproved by the commissioner, the commissioner shall promul-
186 gate a plan of operation. The association may, on its own initiative,
187 and shall, at the request of the commissioner, amend the plan of
188 operation, subject to approval by the commissioner. Any member
189 of the association may cede to the association legal professional
190 liability insurance to the extent, if any, and on the terms and
191 conditions set forth in the plan of operation. All members of the
192 association shall participate in its writing, expenses, profits and
193 losses in the proportion that the premiums written by each such
194 member bear to the aggregate premiums written in the Common-
195 wealth by all members of the association. Such participation by
196 each insurer in the association shall be determined annually on the
197 basis of premiums written during the preceding calendar year as
198 disclosed in the annual statements and other reports filed by the
199 insurer with the commissioner. The association shall be governed
200 by a board of fifteen directors, who shall serve without compensa-
201 tion. Eleven of the directors shall be elected annually by cumulative
202 voting by the members of the association, whose votes in such
203 election shall be weighted in accordance with each member's pre-
204 miums written during the preceding calendar year. Four directors
205 shall be attorneys appointed annually by the commissioner as
206 representatives of the legal profession, after consultation with the
207 Massachusetts Bar Association.

208 *Section 6.* The Commissioner shall, annually on or before

209 December first, after due hearing and investigation, fix and estab-
210 lish fair and reasonable classifications of risks and adequate, just,
211 reasonable and nondiscriminatory premium charges on the claims
212 made and/or on the occurrence basis to be used and charged by the
213 association in connection with the issuance or execution of legal
214 professional liability insurance for the ensuing calendar year or any
215 part thereof. Upon the termination of the policy period of any
216 coverage on the claims made basis offered by the association, the
217 association shall offer, at premium charges fixed and established
218 by the commissioner as aforesaid, the coverage commonly known
219 as "extended reported period coverage", for all claims first made
220 after the termination of said policy period and arising out of any
221 act or omission of the insured which occurred prior to said termi-
222 nation. In fixing the establishing premium charges in accordance
223 with the provisions of this paragraph, the commissioner shall
224 prorate equally all charges to the insured according to actual
225 calendar days of coverage. The effective dates of procurement or
226 cancellation of insurance from the association shall determine the
227 cost to the insured for each coverage on an equal per diem basis
228 established for the calendar year cost of insurance policies. The
229 commissioner shall, on or before said date, sign memoranda of the
230 classifications and premium charges fixed and established by him
231 in such form as he may prescribe and file the same in his office and
232 cause a duly certified copy of such classifications and schedule of
233 premium charges forthwith to be transmitted to the association. In
234 fixing and establishing premium charges, as provided in this para-
235 graph, the commissioner shall take into account investment
236 income and potential income from unearned premiums, loss
237 reserves and all cash flows, and shall make appropriate provision
238 in premium charges for recoupment of losses, if any, incurred by
239 the association during the calendar year for which such premium
240 charges are fixed and established.

241 *Section 7.* The operation of the facility and of the association
242 shall at all times be subject to the supervision and regulation of the
243 commissioner. The commissioner or any suitable person desig-
244 nated to act for him shall have the power to examine and investi-
245 gate the operation of the facility and the association and shall have

246 free access to all the books, records, files, papers and documents
247 that relate to such operations, may summon and qualify witnesses
248 under oath, and may examine directors, officers, agents or
249 employees or any other person having knowledge of such opera-
250 tions for the purpose of determining if the purposes and provisions
251 of this chapter are being fulfilled.

252 *Section 8.* There shall be no liability on the part of, and no cause
253 of action of any nature shall arise against, insurance companies,
254 the facility, the association, agents or employees of the foregoing,
255 insurance agents or brokers using the facility or the association, or
256 the commissioner or his authorized representatives, for any inspec-
257 tions undertaken or acts or omissions in connection therewith, or
258 for statements made in any reports or communications concerning
259 the insurability of any attorney, or made in connection with any
260 administrative hearing or proceeding conducted in connection
261 with any of the foregoing, or made in any findings required by the
262 provisions of this chapter. The reports and communications of the
263 facility and of the association shall not be considered public
264 records.

265 *Section 9,* The denial by the facility or by the association of a
266 part or all of the coverage requested by an attorney and any
267 decision of the facility or the association requiring that recommen-
268 dations be implemented as a condition of providing legal profes-
269 sional liability insurance shall be subject to review by the
270 commissioner, upon the filing of an appeal with the commissioner
271 by an aggrieved attorney within ten days of any such denial or
272 decision. Upon receipt of any such appeal the commissioner shall
273 cause an investigation of the facts to be made, shall grant all
274 interested parties an opportunity to be heard and shall enter such
275 findings, order or decision as are supproted by the evidence and are
276 consistent with the purposes of this chapter.

277 Any person aggrieved by any such finding, order or decision, or
278 by any other finding, order or decision of the commissioner,
279 including findings and determinations made pursuant to sections
280 three, five and six of this chapter, or by any rule or regulation of the
281 commissioner made pursuant to this chapter may, within ten days
282 of the filing of any such finding, order, decision, rule or regulation

283 in the office of the commissioner, appeal therefrom to the superior
284 court for the county in which the complainant resides. The court
285 shall, after such notice to the parties as it deems reasonable, hold a
286 summary hearing on such appeal and shall have jurisdiction in
287 equity to review all questions of fact and law, and to affirm, reverse
288 or modify such finding, order, decision, rule or regulation and to
289 make any appropriate decree or judgment. The decision of the
290 court shall be final and binding on all parties and may include such
291 order as to costs as the court may deem equitable.
292 Any person aggrieved by the final findings, order or decision of
293 the commissioner made pursuant to the provisions of this chapter
294 shall be entitled to judicial review thereof in accordance with the
295 provisions of chapter 30A of the General Laws. For purposes of
296 judicial review of any written determination of the commissioner
297 required by the first paragraph of section three or of section five of
298 this chapter, or of the plan of organization or the plan of operation
299 of the facility or the plan of operation of the association, in each
300 case as finally approved by the commissioner, the Massachusetts
301 Bar Association shall be deemed a person aggrieved.