From: Timothy J. Nault
To: Mandatory Malpractice Insurance Task Force
Subject: Mandatory Malpractice Insurance
Date: Thursday, February 28, 2019 4:27:15 PM

Dear Task Force:

I'd like to suggest that a less onerous possibility than mandatory malpractice insurance could be requiring those attorneys who do not have malpractice insurance to disclose such fact to their clients, such as in part of any retainer agreement.

This could be a "softer" way of achieving the goal, assuming that the marketplace would react to it.

Thanks,

Timothy J. Nault

Randall | Danskin
A Professional Service Corporation
601 W. Riverside Avenue, Ste. 1500
Spokane, WA 99201
(509) 747-2052
(509) 624-2528 (fax)
www.randalldanskin.com

From:	Stephen Henderson
To:	Mandatory Malpractice Insurance Task Force
Subject:	Mandatory insurance
Date:	Thursday, February 28, 2019 4:48:40 PM

Hard to understand who the committee listened to. I don't see a need for this new requirement. It may help the insurance companies but not the practicing lawyers.
If I were still on the BOG, I would vote no.
Steve Henderson
Olympia

Sent from my iPhone

From:	Amy Stephson
To:	Mandatory Malpractice Insurance Task Force
Cc:	amystep@aol.com
Subject:	Opposition to Mandatory Insurance
Date:	Thursday, February 28, 2019 5:00:02 PM

Board of Governors:

I am a semi-retired lawyer who has maintained her license in order to do occasional, non-litigation-related, employment law. I do not have malpractice insurance and do not intend to get it since I do very low risk work, not very much of that, and would self-insure if a problem arose. Which is unlikely since I've never had a claim or even a hint of one in my 40+ years of practice.

The TF report states that semi-retired lawyers can get cheap insurance since they are working part-time. In my experience, that is not true. It is very difficult to obtain insurance in such a circumstance and it is not cheap.

I oppose mandatory malpractice insurance except in cases of lawyers who have been sued for malpractice and have not been able or willing to pay the judgment. Otherwise, I oppose it.

I would add that if the WSBA imposes this requirement, I will quit the bar rather than pay for unnecessary malpractice insurance -- and I suspect many others in my position will do it as well, resulting in serious financial loss for the Bar.

Please listen to your members and not an arrogant, out-of-touch task force that has little actual evidence to support its recommendation.

Amy Stephson

Amy J. Stephson
Employment Attorney & Coach
9725 3rd Avenue N.E., Suite 600
Seattle, WA 98115
(206) 223-7215
www.amystephson.com

From: Joseph Quinn
To: Mandatory Malpractice Insurance Task Force
Subject: Government Lawyers exemptions
Date: Thursday, February 28, 2019 5:19:50 PM

WSBA: My practice (90 percent) involves representing municipal clients, and almost exclusively fire district clients. The legal work is indistinguishable from that of a city attorney or civil deputy prosecutor. It seems unfair to require malpractice insurance for the minuscule work I do for private clients so am I forced to forego any private work? In a 42 year career I have never had a malpractice claim when insured (or not). Joseph F. Quinn, #6810.

Sent from my iPhone

From: mmittge@compprime.com
To: Mandatory Malpractice Insurance Task Force
Subject: Mandatory malpractice insurance
Date: Thursday, February 28, 2019 6:06:07 PM

I retired from law practice approximately 2 years ago (at age 68), but have now resumed working for just one client (a property management company) doing exclusively evictions. I had represented them for many years prior to retirement, and only resumed representation at their request (I'm very good at it, "if I do say so myself") My fees average $500 per month, and "it gives me something to do". I practiced in primarily real estate matters for 30 years without a single claim or even a fee dispute. Mandatory malpractice would effectively put me out of my (limited) business, much to the chagrin of my client. I'm sure they would execute a Covenant Not to Sue in a heartbeat, if requested. If I do make a mistake and they want recompense, they could recover most of it by simply not giving me the normal assortment of restaurant gift cards at Christmas.

It is also interesting that in representing plaintiffs in eviction actions, the malpractice exposure is approximately one month's rent for the property in question. If you get it wrong the first time, just start over the next month and get it right, and the client only loses one month's rent (if the tenant does not pay up in the meantime).

Thank you for your consideration.

Michael R. Mittge
Chehalis WA
WSBA 17249

From:	Mary Shea
To:	Mandatory Malpractice Insurance Task Force
Subject:	Mandatory professional liability insurance
Date:	Thursday, February 28, 2019 6:06:54 PM

‘I am adamantly opposed to a mandatory insurance requirement as it is too costly and reduces an attorney’s ability to effectively render legal services. Please do Not make mandatory the obtaining of professional liability insurance.
Sincerely,
Mary Shea, Esq. #34913

From:	Carolyn Cliff
To:	Mandatory Malpractice Insurance Task Force
Subject:	Opposition and Comment On Proposal for Mandatory Malpractice Insurance; Suggestion for Exemption
Date:	Thursday, February 28, 2019 7:37:09 PM

Dear Members of the Board of Governors;

I write to oppose adoption of a mandatory requirement for malpractice Insurance as a condition to practicing law in the state of Washington. I was engaged in the private practice of law in the State of Washington from the time of my admission to the bar, in 1984, until my retirement from private practice in 2016. For the first four years, I worked at a large law firm; for the remainder, I had my own sole practice. Throughout that time, I had malpractice insurance, even though the expense was a significant burden during the initial years that I was establishing my own practice. Throughout that time, none of my carriers ever paid a dime to any claimant; although I was sued twice during the course of my career, both were cases filed by pro se litigants, and both were resolved with orders of dismissal, without any payment to anyone but defense counsel, early in the process. Although hindsight thus demonstrated that I would have done better financially to self-insure, I nonetheless believe that I made the right decision, for me, to pay for malpractice insurance throughout my career: for my own peace of mind and for the protection of my family.

In my judgment, however, the decision whether to maintain or not to maintain malpractice insurance should be the subject lawyer's choice. I do not object to the requirement that any and every prospective client should be able to readily find out whether a lawyer does or does not have such insurance. But not once in over 30 years of private practice did a client or prospective client ever ask me whether I had malpractice insurance; not once in over 30 years of private practice did I ever see any indication that a client or prospective client had checked the records at WSBA to see if I had malpractice insurance (this information was, of course, only available to the public in the latter years of my practice). I do not know what is driving the push for the State of Washington to become what I believe to be only the second state to require its attorneys to secure malpractice insurance as a condition to the right to practice law. If adopted, however, such a requirement could have a significant impact on me. I retired from private practice in 2016. I continue to maintain my license to practice law, however, because I serve, on occasion, as a pro tem judicial officer in state court. Although the income that I earn from that service is not material, I enjoy the opportunity to be of service to my community and the associated costs (annual dues and CLE fees) are not prohibitive. If the Board adopts a requirement that I secure malpractice insurance as a condition to maintain my license, however, the associated cost then **would** be prohibitive, and I would no longer be able to accept opportunities to serve as a pro tem judicial officer. At a minimum, any requirement to maintain malpractice insurance should not be imposed on attorneys who are not representing clients.

Thank you for your consideration. If you are providing some kind of feedback or update to those commenting on this proposal, I will appreciate receiving it.

Very truly yours,

Carolyn Cliff

WSBA 14301

From:	Patricia Evans
To:	Mandatory Malpractice Insurance Task Force
Subject:	Limits
Date:	Thursday, February 28, 2019 8:12:23 PM

Why not make it the same as neighboring state. Idaho is 100,000/300,000. That seems to be the standard.

Thank you.

Patricia Evan's
WSB# 42878
ISB# 4831

Sent from my Samsung Galaxy smartphone.

From:	Swenson, Raymond T
To:	Mandatory Malpractice Insurance Task Force
Cc:	Swenson, Raymond T; [redacted]
Subject:	Comment on Mandatory Malpractice Insurance Recommendation
Date:	Thursday, February 28, 2019 8:36:38 PM

Dear WSBA:
February 28, 2019

I believe the scope of two of the "Recommended Exemptions" (at page 48 of the Task Force Report) are too narrow. Specifically "1. Employment as a government lawyer" and "3. Employment by a corporation or business entity, including nonprofits." I have excerpted these here, with my added emphasis:

> **Recommended Exemptions**
> Fundamentally, the recommended "exemptions," with the exception of the pro bono category, can be thought of as exclusions because these are categories of lawyers who are not in private practice and therefore not serving private clients who need the protection that malpractice insurance affords.
>
> **1. Employment as a government lawyer.** This category would include lawyers who are employed by: The U.S. Government;
>
> State of Washington;
>
> A federally-recognized American-Indian tribal government; or
>
> A county, regional, or city government or any other government body, board or commission.
>
> Governments, as well as private organizations, are often self-insured. In any event, actions by their own employees that might constitute malpractice are treated as acts of the organizations themselves. Therefore, a requirement for outside malpractice insurance is illogical for these lawyers. At the same time, if full-time government lawyers choose to engage in private practice apart from their regular work, they would be required to obtain malpractice insurance (unless they fall within one of the other exemptions, such as performing pro bono work through a QLSP).
>
> . . .
>
> **3. Employment by a corporation or business entity, including nonprofits.** A lawyer who provides legal services, solely as an employee, of a private for-profit or non-profit corporation or business entity would not be "engaged in the private practice of law." In-house lawyers are typically covered by an employer's errors and omissions policy or through the employer's self-insurance. Similar to lawyers employed by government agencies, house counsel's malpractice is treated as an act of the organization itself, so an insurance requirement is inapposite. At the same time, a lawyer who provides legal services to a private company as an independent contractor (rather than as an employee) would not be entitled to this exemption because the lawyer would be deemed to be engaged in the private practice of law.

With respect to category 1, the comment seems to be confused about who the party is who would be potential plaintiff alleging injury from attorney malpractice. When it says "Governments, as well as private organizations, are often self-insured", is this referring to a potential claim by a government entity against an attorney it has employed or engaged to provide a service to the government entity? Government entities generally have other attorneys who oversee the work of the attorneys it employs, and have significantly greater financial resources than an individual attorney to assume contingent financial risks. It would be unfair for a government entity, or any large private organization, to require attorneys it employs to purchase malpractice insurance for the purpose of guaranteeing the government's funds from contingent costs.

The next sentence states correctly that "actions by their own employees that might constitute malpractice are treated as acts of the organizations themselves", referring to a situation in which a third party, rather than the government itself, is the injured party. In the Federal realm, as part of the Federal Tort Claims Act, the 1988 Federal Employee Liability Reform and Tort Compensation Act (28 USC Section 2679) specifically provides that the Federal government will be substituted for a Federal employee who is being sued for negligence. This includes Federal attorneys, both civilian and military. Government entities "as well as private organizations" are responsible according to standards of *respondeat superior* for the negligence of their employees, so it would be absurd for a government entity to sue its own attorney to recover the costs of a tort suit against the government entity by an injured party. I fully agree with the Report that employees of government entities should not be expected to pay for malpractice insurance, because, as the general principle stated in the heading to the Recommended Exemptions explains, government entities are not "private clients who need the protection that malpractice insurance affords".

However, the Report fails to address the fact that government entities frequently perform their functions by engaging private contractors. When a government entity engages an attorney to provide legal advice, it does not need to look to the private attorney to insure it against contingent risks arising from the circumstances that created the need for legal advice. For some of the same reasons that government entities should not be looking to their own employees to assume financial risks, they should not look to a private attorney to insure the government entity against contingencies. Government entities have their own lawyers who will interface with outside counsel, and evaluate the advice given by the contracted attorney. Government entities are more sophisticated in hiring outside counsel. The Federal government has contractual remedies under the False Claims Act and other statutes to protect itself against intentional, fraudulent action by a contracted attorney, and does not need to bring a malpractice action, nor does legal malpractice insurance protect an attorney against such contract-based claims for damages. A private attorney who contracts to work for the Federal government who is forced to buy legal malpractice insurance would find himself paying for insurance that does not protect him against these real risks.

For these reasons, I believe the exemption for "government lawyers" should include private attorneys performing work under contract to government entities. Such attorneys would tend to not be performing general legal services for the public, but providing specialized advice in specialties, such as government contracts, public lands, utilities regulation, and environmental law. This would not apply to law firms that offer their services to the general public and business community, who already have malpractice insurance costs as part of their business risk management plan.

With respect to exemption 3, "Employment by a corporation or business entity, including nonprofits", I also agree that attorneys employed by such entities should be exempted for the same reasons that attorneys employed by government entities should be exempted. Corporations are also unlike "private clients who need the protection that malpractice insurance affords", because they have the resources to protect themselves against loss if an attorney they hire makes a mistake. However, the logic of the report breaks down when it denies this exemption to an attorney working for the corporation as "as an independent contractor (rather than as an employee)". The Report says that a contract attorney "would be deemed to be engaged in the private practice of law." But this makes no sense. If an attorney is generally offering services to the general public, including individuals, then the malpractice insurance he purchases for the risks of that work will still be with him if he takes on a corporate client. But if an attorney confines his work to consulting with corporations and government entities, in a specific specialty, and does not offer services to the general run of clients who need protection against his potential negligence, he should have no more duty to buy malpractice insurance to protect his sophisticated corporate clients than the attorneys who work directly as employees for one of those clients. The entire purpose of malpractice insurance is to protect clients against the malpractice risk, but corporations and government entities have other means to manage such risks, and have no more need to collect malpractice claims against their contractors than they do against their employees.

Indeed, we are all familiar with the vagueness of the legal boundaries between the status of "employee" and of "contractor". The complex rules used by courts to determine where the dividing line lies should not be introduced into WSBA procedures for enforcing mandatory legal malpractice insurance coverage. If an attorney confines his legal practice to government entities and corporate entities that engage him for specialized legal advice, there is no harm being done to exempt him from the malpractice insurance requirement, except for those who want more money put into the fund, especially from attorneys who will never have to claim against the fund. Where on the line are attorneys who volunteer their services to not-for-profit organizations, such as environmental advocacy groups? Can they be employees if they are not paid? A proper extension of exemptions 1 and 3 will not harm clients, but will directly benefit attorneys in these narrow practice areas.

I speak as an attorney who worked in the Air Force JAG Corps for 20 years, and for the last 20 years have been a member of the WSBA employed as corporate counsel for major companies working under contract to the US Department of Energy to cleanup nuclear waste sites. Attorneys exclusively performing work under contract for government agencies and for corporations do not need to buy malpractice insurance to protect their sophisticated clients.

Raymond Takashi Swenson
Lt. Colonel, USAF JAG Corps (Retired)
Senior Counsel
WSBA # 27844

CH2M HILL Plateau Remediation Company
Richland, Washington
[redacted] Office
509-713-0966 Smartphone
509-376-0334 Fax
Raymond_T_Swenson@rl.gov

From:	John Ziegler
To:	Mandatory Malpractice Insurance Task Force
Subject:	Mandatory Malpractice Insurance Will Exclude Me From My Pro Bono Practice
Date:	Thursday, February 28, 2019 9:18:23 PM

JOHN G. ZIEGLER
New Address:
[redacted]
zieggie@hotmail.com
[redacted]

February 28, 2019

Washington State Bar Association
Malpractice Insurance Task Force
1325 Fourth Ave., Suite 600
Seattle, WA 98101-2539

re: Mandatory Malpractice Insurance

Dear Task Force Members,

I was admitted to the WSBA in October 1974 and "retired" in November 1997, meaning that I still practice law but have not charged or accepted a fee from any client for more than 21 years. Each year I donate over 1,500 hours of *pro bono* representation. Most of my time is devoted to assisting criminal defense attorneys, primarily public defenders, with legal advice and mentoring, but I have paid my Bar Dues so that, when called upon, I can represent poor people and criminal defendants regardless of their income. With a Social Security income of only $804 per month, I will not be able to afford malpractice insurance and will no longer be able to represent the needy.

Many great attorneys assisted and encouraged me as a young lawyer, and I have spent nearly half of my "legal life" giving advice, encouragement and mentoring freely back to members of the Bar Association. If the WSBA Board does adopt mandatory malpractice insurance, I implore it to provide an exception for those of us who provide half or more of our practice hours to *pro bono* service.

Thank you for your attention and consideration.

Very Truly Yours,

/s/

John G. Ziegler
Attorney at Law
WSBA # 5875

From: Don Elliott
To: Mandatory Malpractice Insurance Task Force
Subject: RE: Take Note: Malpractice Report, Bar Act Legislative Update, Board Openings and Elections
Date: Friday, March 1, 2019 8:29:27 AM

March 1, 2019

Hello WSBA:

I would like to have no mandatory malpractice insurance.

For several years now, I have been slowly winding down a solo law practice. I have only a few probate cases left to complete, but some probate cases take a long time to finish. I sometimes do minor legal tasks for friends and relatives, such as a power of attorney, directive to physicians, or a simple will.

I have never had to pay a malpractice claim to anyone, nor have I had a malpractice claim filed in court against me in over 45 years of law practice. I have money and assets enough to cover any error that I make that can't be corrected.

The cost of insurance probably would make my complete retirement essential. I would rather not retire completely yet.

Thanks.

Don Elliott
954

From: Washington State Bar Association [mailto:noreply@wsba.org]
Sent: Thursday, February 28, 2019 5:03 PM
To: donald.e.elliott@gmail.com
Subject: Take Note: Malpractice Report, Bar Act Legislative Update, Board Openings and Elections

WSBA Take Note!

WSBA News and Updates

- **Mandatory Malpractice Report:** The Mandatory Malpractice Insurance Task Force has completed its report,

Hands on with Fastcase

which recommends malpractice insurance as a condition of licensing for lawyers, with specified exemptions. The task force will present its report and recommendation at the next Board of Governors meeting on March 7. The 18-member task force has met since January 2018 and considered more than 580 comments from members and the public. The board will consider the recommendation and decide whether to propose a mandatory malpractice-insurance rule change to the Washington Supreme Court. More information can be found here. Members can provide comments to the Board of Governors via insurancetaskforce@wsba.org and/or during public comments at the March 7 meeting.

- **Legislative Update:** As is common during most state legislative long sessions, several bills have been introduced to modify the State Bar Act. One, Substitute House Bill 1788, is gaining some traction; last week, it moved out of the House Civil Rights and Judiciary Committee with a unanimous vote and now goes to the House Rules Committee. The proposed bill's biggest change would be to strike the majority of the State Bar Act by recognizing the Court's inherent plenary authority: "The Legislature recognizes the inherent plenary authority of the Washington Supreme Court to regulate court-related functions, including the practice of law and administration of justice." WSBA leaders are closely monitoring the bill.

- **Take Your Solo Practice to the Next Level:** Come and learn from experienced practitioners how they got through the lean times and built a successful and sustainable business. The next WSBA MentorLink Mixer will be held from 11:30 a.m.-1:30 p.m., March 20, at the WSBA offices in Seattle. The networking event and a free 30-minute CLE (Networking with Authenticity: Creating Your Personal Brand) will be held in partnership with WSBA's Solo and Small Practice Section. If you'd like to attend, please RSVP by March 8.

- **Nominate Before It's Too Late:** WSBA is still seeking nominations for the 2019 APEX (Acknowledging Professional Excellence) Awards. These awards honor exemplary members of the legal community, including legal professionals, judges, and members of the public. Please complete a 2019 APEX Nomination Form, along with supporting materials, to barleaders@wsba.org by March

March 4. Webinar
Register to attend

Sexualized Atrocities during Genocide: Personal and Legal Implications
March 6. Webinar
Register to attend

The Washington Law & Practice Refresher
March 7 & 8. Seattle & webcast
Register to attend

Fastcase v. Google Scholar
March 11. Webinar
Register to attend

Legal Writing Workshop
March 13. Seattle & webcast
Register to attend

15. The awards will be presented at the Annual APEX Awards Dinner in Seattle on Sept. 26.

On Board

- **The Board of Governors is scheduled to hold an** emergency meeting executive session from 3-4 p.m., March 1, via teleconference to update on personnel and litigation matters, and discussion re legislative strategy. The Board will also have a special executive session meeting via teleconference from 12-1 p.m., March 4, to discuss and take action regarding the pending notice of tort claim and to consider the recent proposal as framed by Governor Grabicki.

- **The Board will hold a regular meeting** from 8 a.m.-5 p.m. on March 7 at the Hotel RL in Olympia.

- **Rock the Vote:** WSBA members living in Congressional Districts 9 and 10 are encouraged to vote in the Board of Governors elections, March 15-April 1. Watch your email for a link to your electronic ballot. Learn more about the districts' candidates.

- **Three More Years:** Congratulations to WSBA Governor Carla Higginson, who ran unopposed and continues on the Board of Governors in the District 2 position for an additional three years.

- **New Board Seat Available:** An opening is available to WSBA members who live in Congressional District 1 to serve on the Board of Governors. The application deadline is March 15. For more information, visit www.wsba.org/elections.

Service Opportunities

- **Apply for a Committee, Board, or Panel by March 1:** Applications are now being accepted from members interested in serving on the WSBA's committees, boards, and panels. Committee service gives you an opportunity to contribute to the legal community and your profession, a chance to get involved with issues you care about, and a way to connect with other lawyers around the state. There are over 20 committees, boards, and panels seeking new members, including the Court Rules and Procedures Committee, Judicial Recommendation Committee, and

Character and Fitness Board. Please apply by March 8 at myWSBA. Click here for more information. If you have questions, email barleaders@wsba.org or call Pam Inglesby, WSBA Bar Services Manager, at 206-727-8226.

- **State Committee Opportunities:** Interested in serving as a WSBA representative to the state courts' Washington Pattern Forms Committee or the state Legislature's Statute Law Committee? The application deadline for both positions is March 15. Visit the Represent WSBA page to learn more.

Member Resources

- **Fastcase for Members:** In addition to Casemaker, WSBA members now have complimentary access to Fastcase. WSBA member benefits with Fastcase include primary law research, reference support, and industry-leading technology. Access Fastcase and Casemaker by clicking on the Legal Research box on the upper-right corner of wsba.org, or log in to myWSBA directly. Fastcase offers a free, weekly CLE-accredited webinar, with advanced webinars available for purchase in March to help utilize the tool for your Washington state legal-research needs. If you have questions or feedback about this new option, contact legalresearch@wsba.org.

- The Member Wellness Program offers job search groups and consultations; educational programming on attorney self-care and mental health; web resources; trainings for peer advisors; and support for those concerned about an attorney.

Essentials

- From Printed Page to Sliver Screen: A Legal Primer on Taking Comics to Hollywood in 2019
- Red Light Malfunctioning? Bill in this State Would Allow you to Run It
- 'Meh': Apparent Note-to-Self Makes It Into Published Federal Decision
- Legal Recruiters Say Niche In-House Counsel Roles Are Hard to Fill

Job Listings

- Gonzaga University School of Law Lecturer-AT, Fellow-

Center for law, Commerce, and Ethics

- See current job listings at the WSBA Career Center

Our mailing address is:
Washington State Bar Association
1325 4th Ave., Ste. 600
Seattle, WA 98101

From:	mjbeyer mjbeyer
To:	Mandatory Malpractice Insurance Task Force
Subject:	mandatory malpractice
Date:	Friday, March 1, 2019 10:09:50 AM

I am sure members have commented about these concerns but I will state them anyway. I do not support mandatory malpractice.

1. There has to be some sort of scale or exception based upon income earned from the practice of law;
2. I do mostly collections and must comply with the FDCPA. If the client screws up, I get sued simply because the client agency or individual has made an error. They have the defense of bona fide error under federal law. I would say that 99.9% of this cases settle. The risk is very small because of the regulations and compliance. Mandatory increases the expenses for me and the fee charged the client.
3. The expense is always going to be passed on to the client and fees will climb and people will not be able to afford an attorney.
4. What about the attorneys who do wills and probates? My understanding is their risk is small. Will they pay the same as others?
5. Is the cost different based upon the risk or is there going to be a shared pool?
6. I believe and have talked to attorneys who have small practices. This is going to put them out of business and the public will have to go to the big firms.
7. What are the statistics? Are there that many claims that we need mandatory insurance? Who is going to run it? Who is being hurt with no insurance? Who benefits, the insurance companies and big firms that put the small one out.
8. Right now, the client can choose between someone with insurance and one without, whats wrong with that system?
9. Is the bar looking for a problem that does not exist and attempting to limit practice for only the elite?
10. I believe there should be an educational endeavor to let the bar members know if there really is a problem.

Michael J. Beyer 9109

From: Karen
To: Mandatory Malpractice Insurance Task Force
Subject: Mandatory Malpractice Insurance
Date: Friday, March 1, 2019 12:14:41 PM

I have reviewed the Task Force report. It is not clear where I will fall within the proposed mandatory coverage requirement or exemption from coverage status.

I currently maintain Active practice status. I do not desire to change to Retired status even though I am retired from practicing. I intentionally do not have any clients. Yet, I continue to comply with the Active status CLE requirements, as I desire staying current with aspects of the law in which I have a personal interest.

My path to becoming an Active practicing attorney was long and at times difficult. I had to overcome challenges posed by my disabilities. Thus I am very proud of my accomplishment and do not desire giving up that Active status. When I was actually practicing, as a government attorney, I had malpractice coverage through my governmental entity employer. Thus I fully understand the need for such protection when clients are involved.

For those of us maintaining Active status while intentionally retired from practice, we need to have our decision to retain our Active respected and appropriately recognized. If this requires a certification of non-representation on an annual basis, so be it.

Finally, I strongly suggest requiring a greater number of ethics CLE credits. Throughout my years of actually practicing, I was stunned by the number of attorneys I encountered who were on ethical "thin ice". Even more stunning was their respective ignorance as to the RPC's applicable to their practice.

Respectfully,

Karen Carlson Gulliver
WSBA # 21370

Sent from Mail for Windows 10

From:	stanley bonner
To:	Mandatory Malpractice Insurance Task Force
Subject:	re: mandatory malpractice insurance
Date:	Friday, March 1, 2019 1:19:59 PM

Dear Sir or Madam:

Malpractice insurance should not be mandatory. At the very least, all members of the WSBA should have the opportunity to vote on a measure of this magnitude.

Sincerely,

Stanley D. Bonner, WSBA #22604

From: George Kolin
To: Mandatory Malpractice Insurance Task Force
Subject: Mandatory liability insurance
Date: Friday, March 1, 2019 2:35:04 PM

Bad idea. Enforce the RPCs. This simply shifts the burden and punishes members who work at or below reasonable pay levels in order to help those in society who cannot afford a $300/hour attorney.

From: Donald H Graham
To: Mandatory Malpractice Insurance Task Force
Subject: Tone of Insurancee Report "Establish minimum" NOT "Impose mandatory"
Date: Saturday, March 2, 2019 12:40:46 PM

Committee Members and Board Members:

I object to the tone of the malpractice insurance report. It is just as substantive to use the words "establish minimum" insurance requirements as it is to insultingly use the words "impose mandatory" insurance requirements. We are a professional association and members should be treated so. The vast majority of members do not commit malpractice, are covered by insurance and are overwhelmingly compliant with Bar Association expectations. So why treat us as non-complying wayward souls that need to be "compelled".

The same goes for "Mandatory" continuing education that could just as properly be "Minimum" continuing education. In fact, minimum standards would imply additional activity is encouraged while manadatory hardly creates an expectation that additional will be forthcoming.

A quick word processing search and replace of the two words would fix this issue. It might be good to find out who would opposed the change in tone and why.

By the way, I have always carried malpractice insurance for over 25 years so this is not about being disgruntled with the report. Although I do have some substantive issues that I will share in another email.

Respectively submitted,

Donald Graham
#22554

From:	Debra Rhinehart
To:	Mandatory Malpractice Insurance Task Force
Subject:	Comment on recommendation
Date:	Sunday, March 3, 2019 9:05:21 AM

I am a licensed but not actively in practice attorney and public servant. After nearly 12 years, I still struggle under a mountain debt against a loan system that is determined to keep me enslaved. As I'm not young and willing to work 90 hours a week, I've little chance of being hired in a traditional firm even if I had litigation experience. On good days when I cling to the idea that there was some reason for me to graduate and pass the bar and then plunge into the Great Recession, I hope to hang on long enough to retire in two years so I can volunteer for legal aid work. No one pays for my license or the fundraising scheme called CLE. I hope the bar is serious about exemptions for government work, pro bono and perhaps sliding scale assessment or there will be no one willing to do legal work that is not high paid and glamorous. Why enrich more insurance companies? Why not consider a risk pool for those of us who can barely make the license fees? What happens to the bar when so many attorneys abandon their license because they cannot or will not bear another cost without a decent chance of compensation through good work? Respectfully but on the verge of giving up,

Debra Rhinehart

From: Courtney Lewis
To: Mandatory Malpractice Insurance Task Force
Subject: Mandatory Malpractice Insurance
Date: Monday, March 4, 2019 9:36:01 AM

For the committee's consideration:

I am an out of state lawyer that maintains an active Washington license because Washington state does not authorize inactive status for licensed attorneys who are active in another state. I commented during the task force's comment period that mandatory insurance I will never use while I am out of state is a financial burden for me. I understand this situation was considered but not recommended for an exemption, and the recommendation of the task force was I surrender my Washington license instead because it's "too difficult" to determine if I'm practicing in Washington. I strenuously disagree -- I work for the State of Alaska and am not counsel of record for any Washington case so it is very easy to ascertain that I do not currently practice in Washington. My situation is not unique. Further, Washington's ethics rules would never authorize me to hide practicing in Washington from the bar so there is already a remedy.

I maintain a Washington license because my husband is from Washington and we may wish to relocate to Washington. I am licensed in four states -- Alaska, Colorado, Texas, and Washington -- so I am familiar with how several states manage their professional licenses. Washington is the only one that makes me maintain an active -- and therefore a substantially more expensive -- license because I'm active elsewhere. If Washington adopts mandatory malpractice insurance then I urge Washington to also authorize inactive status for out of state lawyers with Washington licenses. It is unfair to penalize lawyers who cannot afford the continued high cost of maintaining a Washington license or ask us to continually sacrifice our finances just to maintain a professional license. I work in the public sector, and I anticipate many public sector and nonprofit attorneys will be pushed out of Washington because we cannot afford the cost. That does not make a diverse bar nor is it necessary to ensure professionalism/protect the public. As noted by this entire controversy, almost no states have mandatory insurance to begin with.

Thank you,

Courtney Lewis

From: Julie Shankland
To: Executive Management Team
Subject: FW: Report of the Malpractice Insurance Task Force
Date: Monday, March 4, 2019 11:11:22 AM
Attachments: image001.png

FYI.

Julie Shankland | General Counsel | Office of General Counsel
Washington State Bar Association | 206.727-8280 | julies@wsba.org
1325 Fourth Avenue, Suite 600 | Seattle, WA 98101-2539 | www.wsba.org

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From: Athan Papailiou <Athan.Papailiou@pacificalawgroup.com>
Sent: Monday, March 4, 2019 10:54 AM
To: Julie Shankland <julies@wsba.org>
Subject: FW: Report of the Malpractice Insurance Task Force

From: Stan Sastry [mailto:stan_sastry@frontier.com]
Sent: Monday, March 04, 2019 10:53 AM
To: 'Bill Pickett'; 'Rajeev Majumdar'; 'Dan Bridges'; 'Carla Higginson'; kyle.s@millernash.com; 'Dan Clark'; 'PJ Grabicki'; BHMTollefson@outlook.com; 'Paul S'; jkang@smithfreed.com; 'Kim Hunter'; meservebog@yahoo.com; Athan Papailiou; rknight@smithalling.com; 'Alec Stephens'
Subject: Report of the Malpractice Insurance Task Force

To the Board of Governors:
As a Washington lawyer I am writing my response to the Final Report of the Malpractice Insurance Task Force. I am opposed to the imposition of Mandatory Malpractice insurance for personal reasons, and for reasons that the Final Report is not an unbiased analysis of Washington State situation right now with respect to solo practitioners, who bear the brunt of the negative impact by the recommendations of the task force.

My personal objection to carrying malpractice insurance: I am an intellectual property-patent lawyer. I simply cannot afford malpractice insurance. I just don't make enough money to buy malpractice insurance. Clients have become so cost-conscious that they simply expect bargain basement prices for my services. Even small businesses will not pay my hourly rate. If I were to buy malpractice insurance, the premium per year would be 30-50% of my revenue. Malpractice insurance for patent practice is almost impossible to get if you are a solo private practitioner. Even if I give a flat fee for clients, my actual hourly rate is less than $15 for the amount of work I put in for each patent case. If I add the cost of all the CLEs, business cost, Bar

dues, taxes etc., there is practically very little revenue left for profit. This is quite untenable. The recommendation of Malpractice Task Force is unworkable in my practice. It is either buy malpractice insurance and go broke or quit.

Remarks on the Final Report of Malpractice Insurance Task Force:

1. The sample size of the law firms examined is statistically insignificant compared to the total number of solo and small firm lawyers in the state of Washington. According to task force numbers (Page 8, item 1) 59% (19,813/32,189) of active WA layers are in private practice. However, the Task Force gives only 3 examples of malpractice insurance policy premiums for Firms A-C. This is a statistically insignificant sample of the cost of buying malpractice insurance. Clearly, the task force is cherry picking or is unwilling or unable to collect a broader demographic and statistically significant data. As a result, the cost of malpractice insurance is skewed toward a lower amount. Ideally, the task force should have presented a more unbiased statistics of malpractice insurance cost in Washington based on practice areas and firm size *vis-a-vis* cost of insurance.

2. The task force's approach is flawed because nowhere in the report it affirmatively makes a case for need to mandate malpractice insurance at this time. What has changed in the practice of law in Washington that requires a change in the court rule to mandate malpractice insurance? In other words, what is the new problem that has arisen which is solved by mandatory malpractice insurance? Instead, the Task Force makes pithy high falutin conclusory virtue-signaling assertions like:
"Lawyers in private practice who do not carry malpractice insurance pose a significant risk to their clients" See Page 3.
"Lack of malpractice insurance is, fundamentally, an access-to-justice issue, and the Task Force has concluded that it is more than appropriate for lawyers to ensure their own financial accountability." See page 3.
No independent concrete proof is offered as to the veracity of these assertions or to back up these assertions with evidence such as statistical number of Washington malpractice cases that have been decided by the Supreme Court where a sanctioned lawyer without malpractice insurance actually did not comply with the Court order to compensate the injured client. Instead, we are supposed to believe these assertions as self-evident truths because, otherwise we should feel guilty

3. Furthermore, the Report claims "A license to practice law is a privilege, and no lawyer is immune from mistakes." This is another example of an unexamined virtue-signaling statement (more like an aphorism) designed to tug at your heart and elevate the "nobility" of the profession. Firstly, a license to practice law is NOT a privilege. A license by definition is a PERMISSION to do something (Contacts 101). A license to practice law is hard EARNED and NOT simply granted by a fiat, like in a monarchy. In our profession, a license as a lawyer is EARNED by going to law school, earning a law degree, passing the bar, paying bar dues etc. Secondly, if the license to practice law is a

PRIVILEGE, why are there 32,189 practicing lawyers in WA, and growing by 800-1000 every year! Shouldn't a PRIVILEGE by definition be conferred on a few only?

4. The practice of law is not a "privilege". It is an EARNED RIGHT to a career path to make money (a property right), like any other employment career. It a fundamental property right under the Fifth Amendment of the United States Constitution (No person shall ---- be deprived of life, liberty, or property, without due process of law). By mandating malpractice insurance as a condition of licensing, the WSBA would be imposing a prior restraint on a Fundamental Right to earn money (property), in my humble opinion. The WSBA's mission statement includes client (public) protection. In this sense, if WSBA (a quasi-governmental organization) mandates malpractice insurance as a precondition for licensing, it is taking my property right under the Fifth Amendment and using my property for public use because WSBA is in the business of public client protection i.e., public use. This is a violation of the Fifth Amendment due process.

5. The malpractice insurance task force report states that its recommendation is consistent with the "client protection" mission of the WSBA." The Washington Supreme Court and the WSBA have a duty to protect the public and maintain the integrity of the profession." See Page 2. If so, the WSBA should raise money from the public for the public's own protection (from lawyers-good or bad) and <u>not</u> mandate the lawyer dues for client protection. It is like robbing Peter to pay Paul. This whole idea of "client protection" needs a closer examination. It is based on the false premise that clients are unsophisticated and can be easily led by the nose by an unscrupulous lawyer. Nothing could be farther from the truth. In my experience, the average client who walks into my office is a shrewd intelligent person who knows what she wants and knows that there are many options available. The idea of ""protecting the client" as a raison d'être for the existence of Bar Associations is a figment and is outdated The real way to protect clients is to ensure that ONLY very high quality lawyers are licensed. This starts with drastically cutting down the law school admission numbers, have very high standards for law school accreditation and admissions, and have not more than one law school per state, make the bar exam so tough to pass that only a few hundred takers per year will pass the bar exam. That is the right way to ensure "client protection" because only highly qualified and motivated lawyers will be allowed to practice. Mandatory malpractice insurance will not reduce the number clients injured by lawyers facing disciplinary action.

6. Elsewhere the Task Force makes another indefinite assertion: "Solo and small firm practitioners represent a disproportionate share of the malpractice claims. " Page 18. If the highest number of malpractice claims were on solo and small firms nationwide, that is because the highest numbers of lawyers are in solo and small firms. How is that a "disproportionate share of the malpractice claims" against solo and small firm lawyers? Quite the contrary, it is to be expected! In Washington, if only 14% of lawyers are uninsured (page 11), that

means most of the malpractice claims are against the 85% that are insured. This means that the small fraction of uninsured lawyers i.e., 14% DO NOT contribute "disproportionately" to the total number of malpractice victim claims. This also means that lack of malpractice insurance has no bearing on malpractice claims. The corollary is that lack of malpractice insurance makes the lawyer more cautious in taking on clients.

7. The Task Force recommended that "The required minimum coverage should be $250,000 per occurrence/$500,000 total per year ("$250K/$500K")". Page 45. "In Washington, for all claims, its average loss payment was $60,548 and average loss expense to defend those claims was $20,406." "Nationally, 89.1% of malpractice claims are resolved for less than $100,000 (including claims payments and expenses)". See Page 17. This statistic shows that the Task Force recommendation on minimum coverage for malpractice insurance is over-inflated by a factor of 2.5-4. The Task Force appears to have presented its "$250K/$500K" minimum coverage arbitrarily without a rationale or evidence. Where is the evidence that such highly inflated malpractice coverage is warranted? This is again an example of capricious and/or lack of reasoning displayed in the task force report.

8. Testimonial evidence in the task Force report is limited to a Law Professor, (who does not really practice law on a daily basis), an insurance industry person (lobbyist) and a state bar executive (may be a non-practicing bureaucrat). No testimonial evidence has been presented in the report from Washington solo and small practice attorneys (with or without malpractice insurance), who will be highly impacted by the Task Force Recommendations.

9. CONCLUSION: My assessment of the malpractice Insurance Task Force report is that the report is an advocacy document. It is not a comprehensive and objective analysis of the two key questions: Why is there an urgent and imminent need for all lawyers in Washington to carry malpractice insurance. Why we should change the existing APR or Court rules regarding malpractice insurance as a condition for license to practice law in Washington. On these two key questions the task force report is unfortunately not convincing in its analysis. The Report has some interesting statistics. But the conclusions of the report do not come from these statistics. The report is heavily biased in favor of mandating insurance coverage because it is supposedly a virtue ("access-to-justice issue") and an obligation ("privilege to practice law", "client protection") as a good lawyer to have malpractice insurance. It never addresses the core question: Why <u>now</u> have mandatory malpractice insurance? The Report pretends to be comprehensive by padding itself with large amounts of facts and figures in terms of statistics; bombastic and virtue-signaling grandiose and aspirational statements (some I have referenced above); and has conclusory statements that are not derivational but assertive. I RESPECTFULLY URGE THE BOARD OF GOVERNORS TO REJECT THE RECOMMENDATIONS OF THE MALPRACTICE TASK FORCE.

Stanley Sastry

WSBA# 36391
The Law Office of Stan Sastry PLLC
http://stansiplaw.com/
[redacted]
Mill Creek, WA [redacted]

Phone/FAX 425-357-6241

To: Bill Pickett <Bill@wdpickett-law.com>
Subject: WSBA Task Force on Mandatory Malpractice Insurance

Dear Bill,

I have attached a letter to you on the subject (again) of the Bar Task Force on Mandatory Malpractice Insurance. I was disappointed to read the report, in that it touted the "public welfare" as the paramount concern, then adopts an approach which is not supported by the necessary data, or economic analysis, but rather with non sequitur logic premised on solo practitioner disciplinary data. If the experience of the national health care paradigm put in place by Congress several years back suggests any lesson, reliance on the private insurance industry does not enhance broad affordability of health care nor broad public benefit. In the legal malpractice field, mandatory insurance could just as easily drive up insurance costs for the entire legal profession (presuming, as did the Task Force Report, that those who currently are uninsured (small firms) are the greater risk pool, that claims against them will be greater and that the insurance industry will raise the premiums on all its risk classes in order to cover the greater claims exposure they will have in the small firm sector). As the Task Force has presented absolutely no data on the risk/claim history of Washington practitioners (either by size of claim, substance or size of practice), I do not see how the Board, or later the state Supreme Court, can evaluate the advisability of the proposed course of action. I see no documented certainty of delivering public benefit. And I emphasize again that we, as practitioners, look to the bar association to responsibly qualify and discipline members of our profession as a manner of sustaining the public's interest, rather than to the insurance industry.

Please submit this e-mail and the attached letter to the Board's record of consideration of the proposed report.

With respect and thanks,

Jim Davenport

--
Jim Davenport
PO Box 297
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(509)969 2141

James H. Davenport

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Washington State Bar # 7879
jhdavenportllc@gmail.com

March 1, 2019

William D. Pickett
President, Washington State Bar Association
917 Triple Crown Way Ste 100
Yakima, WA 98908-2426

Re: WSBA Proposal for Mandatory Malpractice Insurance

Dear Bill,

On October 12, 2018, I wrote you with my questions about the process then underway to evaluate whether the WSBA should require that all Washington lawyers carry malpractice insurance. On February 28, the WSBA published notice that the Mandatory Malpractice Insurance Task Force will present its final recommendation to the WSBA Board of Governors on March 7. Without adequate documentation of public harm, the Task Force premises its decision singly on the theoretical notion of "protection of the public."

> "The Board of Governor's decision whether to recommend action on uninsured lawyers, and the Court's ultimate decision on this matter, must be approached overwhelmingly from the perspective of what is good for the public and what is good for clients—not what might be convenient or desirable for lawyers themselves." Report, p. 5

In my October 12, 2018 correspondence to you, I asked the following questions:

"Has the WSBA collected any:

> "1. statistics on the total annual number of malpractice claims against WSBA members over any extended period of time?
>
> "2. statistics showing the number or nature of malpractice claims made against insured and uninsured WSBA members, respectively?
>
> "3. statistics on the dollar amount of collection on judgments against insured and uninsured WSBA members, respectively, found to have engaged in malpractice?

> "4. statistics on the number of malpractice claims related to particular forms or subject matters of practice?
>
> "5. statistics on the amount of profit (premiums paid minus claims paid) enjoyed by malpractice insurance companies doing business in Washington?
>
> "Has WSBA compared any of the above statistics against states where malpractice insurance is mandatory?" See comment # 346 in Comments-received-by the-mmi-task-force.pdf, pp. 7, 561-562/1165.

Although the Task Force has not answered these questions, the answer to all of them obviously is "no." Dodging these questions, the Task Force categorizes my questions as "other" and begs off on insufficient funds. The Task Force states at page 7 of its Report:

> "As a volunteer-driven and WSBA-funded project, the Task Force was charged with developing a recommendation and report with limited resources, so it focused much of its research and analysis on available sources and studies, the experience of other jurisdictions, and the perspective of industry professionals. Given the fiscal limitations and its reporting deadline, the Task Force did not perform the types of research and analysis that would have required the services of independent consultants and data analysts. However, through targeted outreach, the Task Force received a great deal of information, including comments from WSBA members, that filled in some of these gaps and informed the Task Force's thinking on many key decision points." Report, p. 7

The Task Force apparently did listen to:" experienced insurance industry professionals, including insurance brokers and underwriters," and a "legal malpractice plaintiff's lawyer," Report, p. 7, and relied upon American Bar Association data accumulating information received from insurance companies. These parties are necessarily biased, as they and the insured are the beneficiaries of the requirement, not the public. It doesn't appear that the Task Force listened much to WSBA membership.

You may want to note that the basis for the Nevada Supreme Court's denial of a similar proposal was "inadequate detail and support . . .demonstrating that the proposed amendment . . . is appropriate." (Comments-received-by the-mmi-task-force.pdf, 670/1165).

Will the Bar Association's final record of decision in this matter, subject of course to the State Bar Act (Ch. 2.48 RCW) and Washington State Administrative Procedures Act (Ch. 34.05 RCW), reflect the data necessary to conclude that Washington's public is in fact injured by 14 % of the bar membership not currently carrying malpractice insurance?

The fallacy of the Task Force' argument from statistics is just so glaring as to be somewhat embarrassing. They report, from the ABA Profile of Legal Malpractice Claims (2012-2015) that 66% of all claims relate to lawyers in law firms sized 1-5, which consort represents 64% of the total number of practitioners. Report, p. 15. This is essentially a one-to ratio, an

equivalence of number of claims to number of lawyers. Yet the Task Force concludes that "Solo and small firm practitioners represent a disproportionate share of the malpractice claims." And it should not be overlooked that the cited data reflects only those attorneys with insurance, including those in jurisdictions where insurance coverage is mandated. If anything, the data suggests that mandated insurance doesn't make a difference, that solo and small firm lawyers aren't any greater risk and that the incidence of malpractice by uninsured lawyers is no greater than those with insurance.

The Task Force Report lists total Washington Bar membership in 2017 at 32,189, 19,813 of whom were in private practice (Report, p.8). 85% of them (16,842) were insured; 14 % of them (2,752) were not. Report, p. 11. 6,799 of the 19,813 lawyers in private practice (34%) were solo practitioners. Report, Appendix A, p. 75, "Members in Firm Type".

The Task Force Report states that 14 % of the Bar's private practitioners reported being uninsured (Report, p. 11) but that 28 % of solo private practitioners reported being uninsured. (Report, p.11) At these percentages, 2,774 of the total 19,813 private practitioners would be uninsured, 1,904 of whom would be solo private practitioners (28 % of 6,799 solo practitioners). While 34% of all private practitioners (6,799/19,813) thus represent 69% of the total uninsured (1,904/2,774), no evidence is presented that solo practitioners engage in any more malpractice than others.

The Task Force Report admits that "the correlation between public disciplinary information and APR 26 insurance disclosure information might not accurately reflect whether the population of uninsured lawyers is more likely to make errors or become subject to malpractice claims. . . ." Report, p. 11. It also admits that whether "an individual lawyer does or does not obtain insurance will not necessarily affect the likelihood that the lawyer might violate the Rules of Professional Conduct." Report, p. 12. As a matter of fact, a lawyer's choice not to carry malpractice insurance may induce him/her to be more conscientious of error avoidance (he/she being a self insurer) than those who are insured.

In the absence of demonstrative evidence, and notwithstanding it's admissions, the Task Force Report argues *non secuitur* (stating a conclusion that does not follow from its premises) that a correlation of the number of could-be malpractice claims if malpractice insurance coverage were mandated with the number of solo practitioners follows from disciplinary data argued to be correlated with solo practice . That criminal maybe has blue eyes. Therefore, all blue-eyed persons are criminals. The Task Force Report falsely relies on disciplinary data to make its point, pinning the blame on solo practitioners:

> "most attorney misconduct grievances and disciplinary actions also involve solo and small firm practitioners. Of the 211 lawyers disciplined between 2014 and 2017, 101 reported maintaining a solo private practice as of the last time they reported voluntary demographic information to the Bar during the annual licensing process. Of the 101, 55 reported that they did not carry malpractice insurance. As of October 2018, only 62 of the total number of lawyers disciplined during that period had an active license to practice law and were in private

practice, and 22 of those individuals reported being uninsured. Eighteen of those uninsured actively licensed lawyers reported maintaining a solo private practice. Report, p. 12 (all premised on WSBA staff research of member-reported data).

No mention was made whether the discipline related to any client or public fiscal harm. Based on this data, however, 70 lawyers were disciplined per year on average (211 lawyers in 3 years (2014-2017)), 34 of them (101 lawyers in 3 years) were in solo private practice. (49%) Thus, we can calculate that 0.537% of non-solo lawyers (70/13,014) were disciplined and that 0.500% of solo practitioners (34/6,799) were disciplined each year (less than 1% is both cases). It does not appear that solo practice demographics bear any significant correlation with discipline or, at least from this data, that discipline bears any significant correlation with malpractice insurance coverage. Comparison of data for those not carrying malpractice insurance (14%) and those being disciplined (less than 1%) suggests that the two variables are not highly correlated. Neither does the data reflecting solo practitioners' 69% share of the total uninsured practitioners market (above) suggest anything other than the largest potential gain for the insurance industry. The Task Force Report contains no data on Washington State malpractice insurance claims history or analysis of it by market sector.

The data provided by the Task Force Report does permit some economic analysis, however. Only 6 (18/3) of the 70 lawyers disciplined each year, or 8.5 %, would arguably be different had they been licensed and mandated to purchase malpractice insurance. 3 of them (46%) would be solo practitioners. Half of these (1½ solo practitioners) would be "resolved without payment." (Report, p. 17). Presuming that every discipline case represented a malpractice case, a clearly questionable presumption, then the other half (1½ solo practitioners) would have an average loss payment of $60,548 plus a defense costs of $20,406 (Report, p. 17), or a total economic benefit of $121.431. If all of Washington's 2,752 uninsured practitioners' made claims on malpractice insurance policies in a single year (half of them "resolved without payment"), an absurd possibility, the total economic benefit would be $83,314,048 ($60,548*2,752*.5).

On the other hand, if all 2,752 of Washington's uninsured practitioners were mandated to purchase insurance, at $2,500 to $3,000 per year (Report, pp. 10, 30), the economic cost would be $6,880,000 to $8,256,000. It would take a minimum of 226 to 272 successful claims per year to recover the total costs. The economic benefits (public benefits) simply do not justify the costs. And more likely, the number of lawyers disciplined who had foregone their licenses altogether would increase (some, at least, giving up their license rather than purchasing malpractice insurance).

The Task Force Report does not compare the aggregate annual number nor amount of malpractice claims made or settled in Washington. Nor does it sort those amounts in terms of claims covered or not covered by malpractice insurance. Nor does it identify the aggregate amount of malpractice claims made in Washington against solo and larger law firms respectively. Neither the "Percentage of Claims by Practice Area" nor the "Years in Practice and Claims Rate" (Report, p. 15) reveal that the stated rates are proportionate or representative of the

membership distribution of Washington' bar association membership, or successful malpractice claims.

The Task Force Report does not document a single case of lawyer-injured clients whose recovery is barred by insufficient lawyer wealth together with lack of malpractice insurance coverage, although it does suggest a chilling effect on potential claims. Report, p. 21 The lack of lawyer wealth has more to do with lawyer qualification and discipline, for which the State Bar is responsible than the presence of third-party insurance. And the insurance disclosure requirement already in effect is sufficient to apprise would-be clients of this risk.

The Task Force Report clearly reflects an urban, large firm bias denigrative of small, and often small town or rural law practice. Yet, at least according to the ABA's numbers, this is still the practice format that a majority of lawyers choose. Why, do you suppose? Because they want to be helpful, responsive and close to their clients—the same reason that they care about the quality of their work and the cost of it to their clients, as well as about the intellectual challenge they enjoy. The Task Force recommendations will drive them out of the practice of law—to no advantage of the public to whom the Task Force states such an unswerving allegiance.

The Task Force Report is a smear of solo practitioners, suggesting that they are less competent than lawyers in large, corporate style law firms. It favors big city style over country/rural practitioners. And it injures the public—not everyone lives in the city, or wants to pay big-city law firm fees.

I again respectfully propose that the idea of mandatory malpractice for WSBA members be dropped. If the device must be utilized, use it only as a disciplinary sanction or condition of reinstatement.

Sincerely,

James H. Davenport

James H. Davenport
Attorney at Law

From: Mary-Anne Linden <[redacted]>
Sent: Friday, March 1, 2019 4:57 PM
To: Sciuchetti, Kyle <Kyle.Sciuchetti@MillerNash.com>
Subject: comment re: Mandatory malpractice insurance

Hi Kyle,

I would like to express a concern about the upcoming decision of the WSBA regarding malpractice insurance. I am totally in favor of requiring attorneys to carry malpractice insurance. However, the WSBA may be unaware of the difficulties Washington attorneys encounter in seeking coverage if they are employed by out-of-state firms.

I am licensed in Washington (WSBA #41553) and work for an Oregon firm. The firm represents clients in both states. I was hired specifically to represent our Washington clients. Here is the problem: Everybody else in the firm I work for is insured through the Oregon State Bar mandatory professional liability fund (PLF), which insures individuals. I cannot be insured through the Oregon PLF because I'm a Washington attorney. Washington insurers cover only firms, not individuals. In order to get malpractice insurance in Washington, my employer would have to buy insurance for the whole firm in Washington. Of course, she does not need double coverage nor double expense. This dilemma leaves me uninsured at the present.

Ideally for me and for others similarly situated, the WSBA would establish a professional liability fund similar to that in Oregon. I'm aware that many WSBA members oppose this idea, but I'm not sure why. This model is very simple and efficient and not, as far as my inquiries indicate, more expensive that malpractice insurance available for Washington firms.

I hope that, as my representative on the Board of Governors, you would ensure that this problem is part of the discussion and decision about mandatory malpractice insurance!

--
Mary-Anne Linden
[redacted]
www.WiscarsonLaw.com

From: Donald H Graham
To: Mandatory Malpractice Insurance Task Force
Subject: Malpractice Insurance Report Recommendations
Date: Monday, March 4, 2019 2:48:40 PM

Board Members and Committee Members;

I am writing in response to the general WSBA invitation to comment on the report recommending mandatory malpractice insurance. I have been in private practice for over 30 years, been continuously insured, had no malpractice claims and am not planning to be uninsured. Nevertheless, I have followed the development of this report and submitted comments from time to time in response to invitations to comment. I continue to find the report could be significantly improved..

First, the WSBA should consider using a private professional consulting firm to confirm the findings of the committee. The report confirms that the volunteer committee did not have resources to use independently develop data and could not afford a professional consultant to support analysis. The WSBA has an almost 18 million budget, and, specifically as a 2 million dollar reserve doing nothing in the bank. For a topic that will affect thousands of members and cost millions of dollars, it seems amateurish. To use an article about three East Coast states that do not require insurance seems inadequate if not almost irrelevant. Using scraps of information from here and there really seems inappropriate when the association is considering imposing millions of dollars on parts of it membership.

Secondly, to "boldly assert and plausibly maintain" that this problem is one of public protection is really passing the buck. The actual problem is attorney competence and discipline, which is the main responsibility of the WSBA. Washington had 62 bad actors without insurance out of 32,000 members. It is the fact that many clients seek and obtain services from small firms due to prices charged by large firms. Clients actually do have access and do obtain legal services and therefor access the justice system. The issue is therefore do clients obtain quality services. Competency is at issue. Insurance will only secondarily address this actual problem. More practical would be a requirement to provide clients with clear notice about lack of insurance after clients have been injured. Clients will continue to feel that incompetent lawyers deny them justice even if they lawyer is insured. It appears that continued harm to clients is acceptable if plaintiff attorneys are compensated and clients may be "made whole" by money payments. Probably only lawyers think money damages makes up for a sense of justice provided by competent attorneys. Money rarely makes the client whole after first damages from original error and suffering a lapse of time and suffering continued emotional distress during the malpractice litigation or settlement phase. Justice continues to be elusive for many. And with currently uninsured attorneys having to pay millions more insurance costs, the cost of engaging attorneys to seek services will continue to go up and justice will be even more elusive. Implementation of clear and specific warnings can be implemented much faster than selling insurance. The warnings would dissuade clients from risking using low cost private practitioners rather than high priced large practices. It might better than continuing to be injured in the first place and suffering damages and then being made whole later. Is this type of justice worth the access? Clients do not want to be damaged and then fixed, they want competent help in the first place. Requiring insurance, of course, will have a welcomed and immediate benefit to malpractice plaintiff attorneys and insurance companies

Thirdly, there is a fiction in the report that government, corporate and non-profit organizational attorneys are insured by their organization and the lawyers do not occasionally if not regularly provide "moonlighting" services to friends, family, acquaintance and perhaps even local service agencies. Surely, even if not paid, government lawyers, for instance, do not tell their relatives that

they cannot talk about, for example, what is community property. The relative is going to rely on the trusted family member. Quite simply, every lawyer gets hit up for free legal advice in one way or another and refusing to answer is not always possible. Surely, every lawyer knows this. Often this is considered pro-bono work or some necessary part of overhead in being a lawyer. This issue is essentially ignored or dismissed in the report, including when it indicates that retired attorneys who are involved in even very small legal issues must carry insurance.

Many of these proposed exempt attorneys will be in violation. It is unlikely that an attorney will break away from a lunch conversation with a low income acquaintance to buy malpractice insurance (retroactive coverage is never provided) when asked about a non-work related legal issue. I have practiced law for over 30 years and I know of no lawyer, except judges, who disqualifies themselves based on their employer. Do we really want to say that corporate lawyers can talk, if they choose, about any random legal topic even beyond their corporate practice, while private practitioners must have insurance?

Fourthly, apparently one concern is that malpractice plaintiff attorneys do not find it financially viable to prey on low income lawyers. Perhaps the WSBA efforts to encourage pro-bono work could be focused in-part on addressing claims against “judgment proof” attorneys. The report almost makes it sound like judgement proof attorneys plan to avoid malpractice claims by unethically maintaining a low economic lifestyle. There is no evidence of such activity.

Finally, what to do? Private clients could be asked to agree in writing after clear and obvious notice, before engaging services from uninsured attorneys. This would enable people to seek small firms to avoid cost of large firms. Potential clients should be informed that insurance coverage is not available and they assume the risk at their peril.

Is access to justice improved by mandating cost increases on small firms that are the only ones available to poor clients? The WSBA is establishing minimum overhead costs for law practice in Washington. It would seem to the proposed minimum cost to call oneself an active private practice attorney would be close to $3, 000 annually including dues, insurance and CLE.

Other less costly and more relevant approaches to assuring competence of the membership should be explored. Clients should not be protected simply by relying on after-the-fact monetary compensation for attorney errors.

On a personal note, as I approach full retirement, I do appreciate the recommended exemption to allow retired attorneys to still call themselves lawyers without spending thousands on insurance. It does seem a pity that even if I pay active bar dues and having decades of well-practiced experience, I will have to tell grandchildren they cannot rely on what I tell them about the law and they should go find themselves a real lawyer.

Thank you for your consideration.

Donald Graham
#22554

JOHN G. ZIEGLER,
Attorney at Law
New Address:
[redacted]
zieggie@hotmail.com
[redacted]

March 2, 2019

Washington State Bar Association
Malpractice Insurance Task Force
1325 Fourth Ave., Suite 600
Seattle, WA 98101-2539

re: Mandatory Malpractice Insurance

Dear Task Force Members,

I was admitted to the WSBA in October 1974 and "retired" in November 1997, meaning that I still practice law but have neither charged nor accepted a fee from any client for more than 21 years. Each year I provide over 1,500 hours of *pro bono* representation.

Most of my time is devoted to assisting criminal defense attorneys, primarily public defenders, with legal advice and mentoring, but I have paid my Bar Dues so that, when called upon, I can represent poor people in civil cases and criminal defendants regardless of their income. With a Social Security income of only $804 per month, I will not be able to afford malpractice insurance and will no longer be able to represent the needy.

Many great attorneys assisted and encouraged me as a young lawyer, and I have spent nearly half of my "legal life" giving advice, encouragement and mentoring freely back to Bar members. If the WSBA Board does adopt mandatory malpractice insurance, I implore it to provide an exception for those of us who devote a significant portion of our practice hours to *pro bono* service.

Thank you for your attention and consideration.

Very Truly Yours,

John G. Ziegler
Attorney at Law
WSBA # 5875

cc. WSBA Board of Directors

From: Margaret Shane
To: Thea Jennings
Subject: FW: Mandatory Malpractice Insurance
Date: Tuesday, March 5, 2019 11:40:54 AM
Attachments: image001.png
Importance: High

HI Thea –

Please post Mr. Anderson's email on the "Comments to the Board of Governors" link on the Task Force webpage.

Thank you!

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Margaret Shane | Executive Assistant
Washington State Bar Association | 206.727.8244 | fax 206-727.8316 | margarets@wsba.org
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From: Bill Pickett [mailto:Bill@wdpickett-law.com]
Sent: Tuesday, March 05, 2019 11:39 AM
To: Margaret Shane
Cc: Paula Littlewood; Julie Shankland; [redacted]
Subject: FW: Mandatory Malpractice Insurance

Margaret,
Please include Mr. Anderson's email in the late materials for the Board to review in advance of this week's meeting.

Thank you Martin. I enjoyed speaking with you and appreciate your thoughtful comments. I look forward to your ongoing input and/or participation as a member of WSBA.
As always, call with any questions.

Peace,
Bill WSBA President

Work Cell [redacted]

Bill Pickett
Trial Lawyer
The Pickett Law Firm
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Fax: 509-972-1826

From: Martin W. Anderson [redacted]
Sent: Tuesday, March 05, 2019 11:01 AM
To: Bill Pickett <Bill@wdpickett-law.com>

Subject: Mandatory Malpractice Insurance

Hi Bill,

Thanks so much for speaking with me this evening and for sharing your thoughts about the WSBA's proposal to require mandatory malpractice coverage for private practice attorneys. I enjoyed our conversation, and I appreciate your willingness to share your thoughts and to hear mine, even if we don't necessarily agree on every point.

I understand that the WSBA is considering adopting a rule requiring mandatory legal malpractice insurance for attorneys who are in private practice, and I would like to share several thoughts on the idea with the WSBA. I have no opinion on whether the WSBA should or should not impose a requirement of carrying legal malpractice insurance, at least in the abstract. I think that there are very good arguments on both sides of the issue. However, if the WSBA adopts a mandatory malpractice insurance requirement, I do have some thoughts on how the requirements should be structured:

1. If the goal of adopting mandatory malpractice insurance is to protect clients from errant lawyers, then the WSBA should not adopt a one-size-fits-all approach to coverage limits. Rather, the limits of coverage should depend entirely upon the scope of a lawyer's potential liability.

I handle lemon law cases involving automobiles. The average car costs around $35,000. I avoid taking cases involving cars that cost more than $100,000, because that is the maximum amount for which I can self-insure and I currently do not carry malpractice insurance. Any requirement that I carry malpractice insurance with more than $100,000 of coverage per incident would be wasteful and unnecessary. Conversely, if another attorney handles personal injury cases involving $10,000,000 claims, the goal of protecting the public would require that he carry sufficient coverage to protect the entirety of that claim.

I have chosen not to have malpractice insurance coverage because I can easily self-insure for the risk that I assume. I have received quotes for malpractice insurance coverage with rates starting at round $4,000 for the first year and increasing to about $8,000 for the fifth year forward. Over my 24 yours of practice, I would have paid more than $100,000 for insurance coverage - which I would never have used.

2. If the WSBA adopts a mandate that private attorneys obtain insurance through the private marketplace, the WSBA will be allowing insurance companies to decide which risks will be insured. By extension, that means that private insurance companies (and not the WSBA) will have the power to decide not to allow certain types of practice in Washington at all, simply by refusing to issues policies covering those types of practice. Insurance company underwriting practices will likely also impose other requirements on attorneys that are traditionally things that are considered and adopted by bar associations. For example, if insurance companies choose not to offer discounted rates to attorneys who only work part-time, or who handle only *pro bono* cases, then those types of practices may disappear.

This concern is not merely a hypothetical. I have a friend who handles cases similar to mine. She has never had a malpractice claim. However, she was sued for malicious prosecution several years ago after she lost a case at trial. The malicious prosecution claim was dismissed on the merits. However, her malpractice insurance carrier cancelled her policy. She was required to obtain insurance through Lloyd's of London. Thereafter, she paid $18,000 a year for malpractice insurance, even though her typical claim, like mine, involves about $35,000.

3. If the WSBA adopts a mandate that private attorneys obtain insurance through the private marketplace, the WSBA will be allowing insurance companies, and not the WSBA, to decide how to spread the risks associated with legal malpractice. If the WSBA believes that mandatory malpractice insurance is appropriate in order to protect clients, then the WSBA, and not private insurance companies, should decide how to spread those risks. Should attorneys who handle higher value claims bear more the risk? Or should attorneys who earn more money each year do so? What about part-time attorneys? What about attorneys who have had prior claims? What about attorneys who have never had a claim? If the WSBA doesn't make these decisions, the free market will. It may not do so in a manner that is fair to WSBA's members. In addition, because the cost of malpractice insurance will ultimately be passed along to clients in the form of higher fees, the fairness of these decisions is ultimately part and parcel of WSBA's obligation to protect clients.

For these reasons, I believe that if the WSBA chooses to require mandatory malpractice insurance, it should either (1) adopt the Oregon PLF model or (2) negotiate an agreement with a single provider that ensures that any lawful practice can receive coverage and that ensures that the risks are spread in a fair and equitable manner, rather than through the whims of private insurance companies.

As you may know, the Oregon PLF currently charges each attorney $3,300 per year for $300,000 of malpractice insurance, and excess coverage is available. Members may participate only if they have their principal office in Oregon. OSBA members whose offices are outside of Oregon are not allowed to participate, and are not required to have malpractice insurance unless they practice in Oregon. As I noted above, the cost of PLF in Oregon is roughly 1/3 of the cost that I would pay for similar coverage in the private marketplace in California.

I understand that the WSBA has rejected the Oregon PLF model because WSBA views the mechanism as too complex and too expensive. While I agree that setting up an insurance company is complicated, I see it as part and parcel of the decision to require malpractice insurance. If the WSBA is requiring malpractice insurance in its capacity as *parens patriae* to clients who would otherwise hire a lawyer without insurance, then the WSBA also has the responsibility to its members and to their clients to ensure that the risk is spread in a fair and equitable manner, that the client's interests are fully protected, and that members are protected from the whims of the free market.

Because every participating member must pay premiums, the expense of setting up an insurance company will be paid by WSBA members (and ultimately their clients), either to a WSBA sponsored PLF-like organization or to a private insurance company. By having a single, state-run provider, the Oregon PLF has dramatically reduced the administrative costs that its members must pay and allows Oregon to control the decisions on how to spread the risks. In the case of Oregon's PLF, Oregon has chosen to have every member share the risks equally. WSBA could set-up a PLF-like system but choose to spread the risks differently. If the WSBA adopts a private insurance model, then WSBA should negotiate a single contract with a single insurer that addresses the issues that I discussed above. Merely requiring attorneys to obtain malpractice insurance with a fixed limit, without addressing the issues that I discussed above, constitutes an abdication of WSBA's obligations to protect both the public **and** its members.

Finally, any mandate should exclude those active members who, like myself, do not actually practice law in Washington.

Again, thank you very much for speaking with me last night and for passing these concerns on to the Board.

Martin W. Anderson | Attorney | The Anderson Law Firm
Tel: (714) 516-2700 | Fax: [redacted]
2070 N. Tustin Ave., Santa Ana, CA 92705

From: Margaret Shane
To: Thea Jennings
Subject: FW: Your Update Email
Date: Tuesday, March 5, 2019 3:10:15 PM
Attachments: image001.png

HI Thea –

Please post Mr. Neal's email on the "Comments to the Board of Governors" link on the Task Force webpage.

Thank you!

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From: Bill Pickett [mailto:Bill@wdpickett-law.com]
Sent: Tuesday, March 05, 2019 3:08 PM
To: Margaret Shane
Cc: Paula Littlewood; Julie Shankland; Chris Neal
Subject: FW: Your Update Email

Hi Margaret,

Please include the following email string from member Chris Neal in this week's materials for the governors to review. Chris has a number of points that he would appreciate consideration of in advance of the mandatory malpractice insurance discussion. I know this is late material, but I would greatly appreciate it being added to everything being considered.

S_____

Chris ccing you on my email to WSBA. Thanks again for your comments. I am a trial lawyer, and suspect that I have been accused of having a "plaintiff's bias" on more than one occasion. That being said, please know that all comments are both welcome and appreciated when it comes to matters of consideration before WSBA.

Thanks and Peace,
Bill

Bill Pickett
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From: Chris Neal [redacted]
Sent: Tuesday, March 05, 2019 12:30 PM
To: Bill Pickett <Bill@wdpickett-law.com>
Subject: Re: Your Update Email

Bill,

Thanks for the prompt response. Please do share my comments with anyone in position to affect the outcome of this issue. My Bar No. is 25685 and my wife's is 25686.

I see you identify yourself as a Trial Lawyer, which term frequently suggests a plaintiff bias. If that is the case with you, please know that I do not mean to impugn the motives of that group - each type of practitioner has his/her place in the arena and I respect all of them, even the ones who prosecute legal malpractice cases - everybody's got to eat. That said,I forgot to mention another concern I have - the likelihood of an increase in frivolous claims/suits against lawyers filed by clients disappointed with their outcome, who want to get something back from the lawyer's E&O carrier with a sweetener for their E&O lawyer's efforts, all of which will come at the (potentially) innocent lawyer's expense.

From my 30+ years experience, some of which I spent as a plaintiff's lawyer, I know there will be lawyers to take those cases, but the impact on decent hardworking lawyers will be huge, even if they committed no harm, and even if the cases settle early. The affected lawyers will see E&O premium increases, their names on court dockets, their personal credit ratings will take a hit, some good home/auto companies (eg Amica) won't even take people who have been sued for any reason, a claim/suit will impact their getting future clients, affect their credibility with courts and opposing counsel, employers, neighbors, etc. - the beatdown goes on. Non-legal folk won't know the claim/suit was just a shakedown for quick cash - they'll just a lawyer who was sued and assume the worst. That will hurt, not help, the profession. Good lawyers may exit claim-prone practices to avoid frivolous claims, reducing the number of available lawyers to the public. All to fix a problem that the WSBA has not managed to convince me, or my brethren (per surveys and letters I've seen in NW Lawyer), even exists.

The last issue concerns the availability of suitable insurance products. I carried individual E&O coverage for my work as a part-time lawyer doing insurance coverage work. Several years ago, I obtained my coverage through a broker in Tacoma who handled lots of E&O insurers. Do you know how many offered a part-time program for my area of legal work?

One (Zurich), and it wasn't clear at the time they would continue to offer it. I'm sure if the E&O folks get their foot into Washington via mandatory insurance that they'll offer more "products," but it's less clear whether there would be sufficient competition to keep Washington's lawyers from being victimized on that end, as well. Incidentally, I was paying $800/yr for my coverage then (2012), and the number I'm hearing bandied about lately is $3,000 per lawyer (so $6K from our household), which, with already outsized health insurance premiums ($14K/yr) and high ($5K per) deductibles, is simply a bridge too far for this retirement-horizen couple.

I very hope much hope the WSBA does not force mandatory insurance on Washington's lawyers. If it does, my back-up hope is that lawyers in my and my wife's position who limit their practices to work done for others under their policies will be allowed to keep their law licenses lit. If not, we might have to fold up shop in Washington, sell our home, and move back to Texas, one of the 48 states that does not mandate insurance, where we're both licensed - nothing like starting over in your 60s, but it shouldn't have to end that way when we've been good/loyal legal soldiers in Washington for more than 20 years. We've spent our entire adult lives working to get to this point, and forcing us into insurance will simply pull the rug out from under me and my wife, just as we're trying to thread the retirement needle at the same time we're also heading into the infirmaries of old age while also trying to avoid being ground up by the medical insurance/expense machine. Nobody's saying it should be easy, but, after 30+ years of blemish-free legal practice, it just shouldn't be this hard at the end.

Thanks again for the response, and for listening.
- Chris Neal

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On Mar 5, 2019, at 11:42 AM, Bill Pickett <Bill@wdpickett-law.com> wrote:

Thank you Chris. Good point and know that I appreciate your comments.
I will hope to include more issues in any future bar message.

With your permission I would like to relay your email to the full board for their consideration as they prepare to this week's meeting. Let me know.

As always, feel free to email and/or call with any questions or concerns. Again, your comments are well taken and appreciated.

Peace,
Bill

Work Cell [redacted]

Bill Pickett
Trial Lawyer
The Pickett Law Firm

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From: Chris Neal [redacted]
Sent: Tuesday, March 05, 2019 10:38 AM
To: Bill Pickett <Bill@wdpickett-law.com>
Subject: Your Update Email

Mr. Pickett,

This email address may not be the most appropriate way to contact you, so my apologies in advance if that's so.

I write to express concern that your update email omitted any reference to the only thing that's on the mind of every lawyer I know - mandatory insurance. Like too many others, I will be forced into early (and underfunded) retirement if/when the rule goes into effect. My solo firm's business model anticipates I do work only for larger firms to whose own insurance I am added for the work that I do - the public is protected. So, while I do not carry my own insurance, all of the work that I do is covered by insurance. However, under the new mandatory arrangement, it appears I will not be able to maintain my law license unless I can prove I, personally, carry my own separate liability coverage. My revenue stream is reduced as I head toward retirement, so that's not possible, and I'd have to leave the Bar, and the remainder of my career/income. As mentioned, many are in my boat, including my wife, Lisa Neal. We've practiced in Washington for more than 20 years.

And, yes, I have written Comments to this effect during the input period, asking that an exemption be applied to those in my position. I do not know the status of that request, and I received no response.

So far as I know, all of WSBA's polling shows Washington's lawyers are overwhelmingly against the mandatory insurance requirement for several reasons, including that WSBA has failed to make its case that the public has suffered in any way from the absence of mandatory insurance, even anecdotally. Cynically, this looks to me like an effort by the malpractice lawyers and E&O insurance industry (which has a seat at the table that I help pay for) to bring money in from the sidelines to further their own economic agendas at the expense of the very lawyers who want, and pay for, the WSBA to watch out for their interests, in addition to the public's.

For these reasons, I am surprised and disappointed your update email made no reference to the status of this important issue.
- Chris Neal

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From: Kary Krismer
To: Mandatory Malpractice Insurance Task Force
Subject: Exemptions From Mandatory Malpractice Coverage
Date: Tuesday, March 5, 2019 3:13:44 PM

I was sad to see that the report on mandatory malpractice insurance did not even give a mention of the exemption I requested. My situation is hardly unique. I am a licensed attorney, not actively practicing, and also licensed as a real estate broker. I have held this status for over 10 years and have not once during that time charged for my legal services. Part of my practice as a real estate broker though arguably covers the practice of law (drafting forms, explaining forms to clients, etc.)

It would be meaningless for me to buy malpractice insurance because the malpractice carriers would exclude any coverage for activities pertaining to my activity as a real estate broker. That means if you do not provide the exception I am requesting my choices would be:

1. Resigning as an attorney.

2. Paying for insurance that does not provide anyone any coverage.

As I mentioned above, there are a number of attorneys who are similarly situatuated. We should not be forced to make the choice of quitting the bar or paying an insurance company for what would effectively be no coverage.

--

Kary L. Krismer
206 723-2148

From: Margaret Shane
To: Thea Jennings
Subject: FW: Analysis of the Mandatory Malpractice Insurance Task Force Report
Date: Tuesday, March 5, 2019 5:50:40 PM
Attachments: image001.png

HI Thea –

Please post Michael's email on the "Comments to the Board of Governors" link on the Task Force webpage.

Thank you!

_____

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From: Dan Bridges [mailto:dan@mcbdlaw.com]
Sent: Tuesday, March 05, 2019 5:38 PM
To: Michael J. Cherry
Cc: Bill Pickett (bill@wdpickett-law.com) (bill@wdpickett-law.com); Rajeev Majumdar (rajeev@northwhatcomlaw.com); Margaret Shane; Paula Littlewood; Hugh Spitzer (spith@uw.edu); P.J. Grabicki (pjg@randalldanskin.com)
Subject: RE: Analysis of the Mandatory Malpractice Insurance Task Force Report

Michael, thank you so much for that very detailed and thoughtful discussion. I am including some others here so they can have the benefit of your input and, although I suspect it is too late to be included in this specific Board book, hopefully we can capture this input so it is not lost.

Thank you so much for your time ! I hope things are going well.

Don't be a stranger.

DB

Dan'L W. Bridges
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From: Michael J. Cherry <mikech@lexquiro.com>
Sent: Tuesday, March 5, 2019 4:17 PM
To: Dan Bridges <dan@mcbdlaw.com>
Cc: Michael J. Cherry <mikech@lexquiro.com>
Subject: Analysis of the Mandatory Malpractice Insurance Task Force Report
Importance: High

Dan,

I am writing about the Mandatory Malpractice Insurance Task Force (Task Force), "Report to the WSBA Board of Governors" (Report), which you will be considering at the March 7th meeting of the Board of Governors (BOG). I spent considerable time researching this matter before resigning from the BOG for health reasons. I attended many Task Force meetings. And I have reviewed the draft and final Report, and my analysis is that the BOG *should not support* the Task Force recommendation because the Report is inadequate in several areas, which are outlined in this letter.

Rather than supporting a requirement for mandatory malpractice insurance please consider requiring attorney's report their insurance status to the WSBA (a requirement already in place), combined with a new requirement of mandatory disclosure of malpractice insurance status in all communications between an attorney and their clients. The Task Force can then monitor the effectiveness of disclosure over an adequate period to make a more informed decision about the need for mandatory malpractice insurance. The combination of mandatory reporting and disclosure will accomplish the goal of the Task Force of protecting the public, without introducing damaging unintended consequences to the profession.

I understand, the Task Force spent a lot of time on the Report. However, they had limited time and money, and could not afford to perform extensive or custom research. The Report's conclusion calls for a big and irreversible step. The goal of protecting the public can be achieved with the intermediate step of mandatory reporting and disclosure. If the intermediate step of mandatory disclosure and reporting does not work, the BOG can always implement mandatory malpractice coverage. But the reverse will be virtually impossible. If I am correct, and mandated malpractice insurance has unintended consequences, it cannot be easily reversed to repair the consequences.

In consideration of your time, I have attempted to keep this letter on point. I am available to discuss the individual points with you, however; due to medical

appointments I cannot reschedule, I may not be available when this matter comes up on Thursday's agenda. Please call me at your convenience before the meeting if you wish to discuss my conclusions.

My issues with the Task Force Report are:

Impact of Insurance Companies on the Profession. The Task Force Report appears to ignore the impact of mandatory malpractice insurance on how lawyers practice law. Consider that rising rates for Ob-Gyn doctors have resulted in these doctors changing how they practice, including withdrawing from providing services.[1] In other cases, which I have encountered in my struggles to battle a chronic illness, health insurers employ a variety of strategies to control their expenditures, including one that is common but has received relatively little attention: step therapy.

Step therapy programs require patients to try less expensive treatments and find them to be ineffective or otherwise problematic before the insurer will approve a more high-priced option.[2] When used, step therapy involves the insurance company telling the doctor how to practice their profession. Insurance companies may think of similar practices they demand we as attorneys use in place of our ability to decide with our client's wishes how to handle a matter.

It is feasible that insurance companies could have similar impacts on our profession. Not that they will tell us what to do, but, behavioral economics suggests lawyers will be nudged in the direction the companies want us to go. For example, based on what I have learned studying this issue, as I am renewing my insurance, I have backed off performing any legal service that falls below 20% of my total work. I am doing this because if you only practice in an area such as real estate law below a certain percent, the insurance company may label you as a "dabbler," and you will pay larger premiums. In my case, I previously reported I engage in real estate work because a client would occasionally ask me to review a lease. I interpreted this a real estate work. Going forward I must refuse clients seeking advice about a lease because of the cost of insurance coverage and honestly reporting practice areas to my insurance company. This is a prime example of the negative impact that mandatory insurance coverage may have on a solo practitioner's practice.

It is also conceivable that under mandatory insurance, a competent lawyer could be constructively disbarred because no insurance carrier will write an affordable policy. There is no backstop or appeal process I am aware of identified in the Report should this happen.

I am not aware that the Task Force gave this serious matter any consideration. Instead they viewed the insurance industry as neutral, and an ally or friendly partner whose only interest is helping the public. This is naïve. The impact of giving the insurance industry a defacto monopoly merits review. Such an internal review could be conducted while a mandatory reporting and disclosure program is in place. It is important to highlight that without such review the State's legal profession may be at the mercy of insurance companies once mandatory insurance requirements are enforced.

Impact of Mandatory Insurance on Access to Justice. The Task Force considered the implementation of mandatory malpractice insurance would have a net positive effect on Access to Justice (ATJ). The net positive effect stems from a shift from lawyers refusing cases involving a person harmed by a lawyer to lawyers taking these cases. Such cases will become enticing because malpractice insurance guarantees a payout to the client harmed by another attorney. The lawyer representing the harmed client now has a certain financial outcome.

I submit the effect on ATJ may be overall negative. The Task Force assumes that the cost of insurance is minimal or insignificant, and that it can be easily passed on to clients. This is a false premise. Few solo practitioners can simply pass increased costs onto clients. Therefore, rising costs for legal services will likely limit the number of people who can afford a lawyer to take any case—such as the tenant side of a landlord tenant dispute, and, simultaneously increase the number of people excluded from obtaining legal services.

To illustrate this point, I created a spreadsheet documenting corporate and living costs for solo practitioners and small firms. Based on this model, without malpractice insurance, an attorney can afford to charge $120 an hour, and not lose money. Leaving all other expenses the same, but adding in $2,500 per year for malpractice insurance from the Report,[3] the same attorney would have to charge $125 an hour. The $2,500 per year is an average across all practice areas and could be to low an estimate.

In addition, considering licensing fees, continuing legal education (CLE) costs, malpractice insurance costs, business license costs, taxes, student loan payments, and health care are mandatory costs—that is a lawyer cannot choose not to pay them —adding mandatory malpractice insurance means 45% of all corporate and living expenses are mandated. And, three of these fixed costs areas will be mandated by the Bar.

Finally, consider that fixed costs increase annually, effectively marginalizing other business-related opportunities such as marketing costs and retirement funding. More important, as business costs increase, solo practitioners are less likely to volunteer valuable hours to pro bono work; instead billing clients or spending to market new clients will become paramount to business survival.

The cost of running a small business is an issue the Task Force should have examined in more detail to properly address ATJ. If a large population cannot afford legal services because the cost of legal services continue to rise, even by five dollars as my model suggests, then the public is not being “protected;” it is actually being harmed by the additional costs of legal services in part mandated by the Bar. The Idaho bar reports: “No Idaho attorneys reported an inability to obtain the required insurance … some lawyers indicated that the requirement would affect their decision to retire from practice.[4] I validated these conclusions by calling several attorneys in Idaho to inquire about their experience obtaining insurance. All the lawyers I spoke with decided to pass their increased costs onto their clients. One indicated they were retiring earlier than originally planned because of the insurance mandate.

I also spoke with an attorney newly-admitted to the Oregon Bar who is also a member of the Washington State Bar Association. Her practice is low risk for malpractice claims because she advises clients on federal regulatory matters, all of which have outside legal counsel with final oversight of work product, and work product are not a function of Oregon state law. Further, as a new lawyer in Oregon, she is struggling to establish a solid client base and keep the business operating. The cost of mandatory malpractice insurance was greater than 10% of her earned income in Oregon in 2018. This is a significant expense when added to the business costs described above, and membership in two state bar associations; a possible deterrent to remaining a solo practitioner, and an actual deterrent to pro bono work.

I can provide the spreadsheets to the BOG for its own review of these data. The data are clear that negative financial effects are realized annually by solo practitioners and small legal firms. This impact increases each year. Further, insurance costs will increase each year. The costs of insurance coverage typically double over 5 years.

As suggested, the impact of rising rates for legal services on the legal services market and ATJ (due to fewer solo practitioners, early retirements, closed practices/displaced attorneys), could be studied while a program of mandatory reporting and disclosure is in place. Monitoring the beneficial and negative effects of a disclosure requirement is a harmless financial impact on solo practitioners. But if mandatory insurance is in place, and my data are valid, there is a significant negative risk to small legal firm culture and ATJ in the state.

Too Many Exemptions. The Task Force states in several places, that “A license to practice law is a privilege, and no lawyer is immune from mistakes.”[5] Lawyers make mistakes. A license to practice law is a privilege, and no lawyer should be immune from his or her responsibility to clients because of those mistakes.”[6] If this is true, then why is this mandate restricted to “lawyers in the private practice of law” and not all lawyers?

I am not being flip. Given the Task Force is correct—Lawyers make mistakes. Then let’s consider prosecutors for example. Then prosecutors make mistakes. Such mistakes harm the public, and this is easy to prove.[7] Settlements between those harmed by prosecutors are significant, and likely paid by taxes which must reduce services in some other part of the government.

The Task Force assumes all lawyers except those in solo practice or small firms have insurance through the organization that hires them. However, if lawyers in Washington must have malpractice insurance, then all lawyers should have to show they, or the organization they work for have such insurance or funds capable to self-insure. Otherwise, if you accept the Task Force’s recommendation then the Task Force and the bar is saying to its members “solo practitioners and small firms make mistakes and only they have to take personal responsibility for their mistakes.”

Improper Statistical Analysis. Many lawyers joke they are lawyers because they are bad at math. Unfortunately, if they are bad at math, they are worse at statistics.

Admittedly, the Task Force did not have funding to conduct its own studies. It relied on the work done, including a book that attempts to summarize a variety of studies about malpractice insurance.[7]

Based on my analysis of some of these statistical studies, many use varying metrics and categories (that is, an “apples-to-apples” data comparison cannot be made). Further, none of the studies relied upon were conducted in Washington State, and therefore, there are no statistics representative of Washington State Bar conditions to make an informed decision about the impact of Washington solo practitioners on malpractice claims. Attempting to use such varied statistical methods without representative data to spot trends or decide may introduce mistakes and errors in the Report conclusions.

For example, it is not clear all studies (or other state bars) define “private practice of law” the same. Using these statistics without proper analysis may lead to faulty decisions.

In addition, in at least one case where the statistics raises a question that should be answered to ensure an informed decision, was ignored by the Task Force. The Report states “Evidence suggests that lawyers with more than ten years of practice produce a disproportionate share of claims.”[8] Rather than examining this point the Task Force makes a conclusion that maybe the fact results from burnout, and moves on.

Insurance attempts to make a party whole long after the wrong has occurred and at a point where, frankly, making someone whole is impossible. The Task Force missed a tremendous opportunity to examine what could be done before the 10-year mark to reduce or eliminate the harm.

You do not just have to take my word for this point. Ms. Inez Petersen has sent the BOG and Mr. Spitzer several messages about such potential statistical analysis errors. Her analysis of the statistical data may be more thorough than my analysis. Although her delivery of her concerns may not be easy to read, I encourage you all to look at Ms. Petersen’s concerns and ensure the statistical analysis supports the decision which the Task Force is recommending.

Further, Ms. Petersen’s comments suggest that there are Bar members skilled in statistical analyses who should have been invited to assist the Task Force with its study. A call-out for such assistance could be made while the Bar is monitoring the effects of mandatory disclosure and studying the impacts of mandatory insurance.

Again, while such a review is being conducted, and consideration into what happens at the 10-year mark is reviewed, mandatory reporting and disclosure could be put in place to protect the public, and then should the analysis support the decision than mandatory insurance could be implemented on a solid foundation of valid decision making.

Conclusion. I hope I have convinced you that although the Task Force worked hard to produce its Report, there are still sufficient unaddressed issues that require a hard

look; supporting the Task Force conclusion is premature and could have irreversible, significant negative financial and ATJ consequences.

Your choice is not to do nothing, or to require mandatory malpractice insurance. Rather, you can take steps that will garner positive results acceptable to all parties including the public and the members. You can require mandatory reporting and disclosure with subsequent WSBA monitoring and study. You can ask for disclosure statement templates be provided to Bar members. You can approve a program of public education to teach people how to hire an attorney and how to work with an attorney to stop harm before it happens. You can work with Bar members to foster law school programs to instruct new lawyers on how to properly manage a solo practice. These measures will help prevent practice issues that insurance coverage will not cure by fostering good will among Bar members and the BOG and between Bar members and the public and improving the practice of law. And you will not cede power over the profession to the insurance industry.

I implore the BOG to take these intermediate steps. You can still take the next step of mandatory insurance requirements in a year or two if adequate, reliable research demonstrate the public remains unprotected by solo practitioners. Finally, if the BOG decides it must recommend mandatory malpractice insurance, please consider putting this to a vote of the membership. This is too critical of an issue with possible negative impacts on members to avoid member input beyond commenting.

Thank you for your time and consideration of this important Bar matter. If I can answer questions, or if you wish to discuss this further, please call me.

Respectfully yours,

Michael Cherry (Bar Number 48132)

(425) 8765-8977

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[1]See American College of Obstetricians and Gynecologists, "2015 ACOG Ob-Gyn Professional Liability Survey Results," available at https://www.acog.org/About-ACOG/ACOG-Departments/Professional-Liability/2015-Survey-Results?IsMobileSet=false.

[2] See Sharona Hoffman, "Step Therapy: Legal and Ethical Implications of a Cost-Cutting Measure," Case Western Reserve University School of Law, available at https://scholarlycommons.law.case.edu/cgi/viewcontent.cgi?article=3009&context=faculty_publications

[3] Hugh Spitzer, et. al, "Mandatory Malpractice Insurance Task Force Report to the WSBA Board of Governors," 30, February 2019. (The $2,500 per year is taken from the Task Force Report).

[4] *Id.* at 24.

[5] *Id.* at 3

[6] *Id.* at 38.

[7] Mary B. McCord, Douglas Letter, "How Mistakes by State and Local Prosecutors Can Lead to Unfair Trials," The

Washington Post, May 22, 2018, available at https://www.washingtonpost.com/news/posteverything/wp/2018/05/22/how-mistakes-by-state-and-local-prosecutors-can-lead-to-unfair-trials/?noredirect=on&utm_term=.0e802c0c909a.

[8] See generally, Kritzer and Vidmar, "When Lawyers Screw Up, Improving Access to Justice for Malpractice Victims, University of Kansas Press, 2018.

[9] Spitzer *supra*, at 16.

From: weissinger@rockisland.com
To: Mandatory Malpractice Insurance Task Force
Subject: Objection from retired attorney about mandatory malpractice insurance
Date: Wednesday, March 6, 2019 9:26:33 AM

I'm already 11.5 hours in CLE credit toward my reporting which is next due in 2021. But I will certainly surrender my WSBA license to practice if you require I buy mandatory malpractice insurance.

The exemption for pro bono doesn't help. In a typical pro bono case involving litigation (say I'm defending a tenant), I'd say "I'm doing this pro bono, but if the Court awards attorneys fees against the Landlord I'm collecting that for the time I've incurred." But I couldn't do that under the pro bono exemption.

And I should be able to help out a few people here and there if I want to do that, without having to spend a few thousand dollars each year on insurance.

Have you investigated the conflicts of interest of those on the "malpractice insurance task force"? My understanding, for example, is that Mark Johnson is in the business of suing lawyers, and according to what he said in a CLE he taught, he won't take the case against those lawyers without malpractice insurance. It is offensive to me that someone with so clear a monetary interest in the outcome would have been allowed on the task force to begin with.

Sincerely,

William Weissinger
Friday Harbor, WA
360-378-5674

WASHINGTON DEFENDER ASSOCIATION

March 5, 2019

Washington State Bar Association
Mandatory Malpractice Insurance Task Force
1325 Fourth Ave., Suite 600
Seattle, WA 98101-2539
VIA EMAIL: insurancetaskforce@wsba.org

Re: Mandatory Malpractice Insurance

Dear Task Force Members:

We write in support of John Ziegler's suggestion that if the WSBA recommends a rule requiring practicing Washington attorneys to carry malpractice insurance, it make an exception for attorneys who do much of their legal work *pro bono*.

Mr. Ziegler provides a great deal of *pro bono* assistance to public defenders throughout Washington. For example, Mr. Ziegler generously shares his tremendous knowledge about the complex case law and statutes that govern writs in Washington. Writs are often the only avenue available to criminal defendants in courts of limited jurisdiction who seek pre-trial review of rulings of the court in which they are charged. Pre-trial review by a higher court can be necessary if, for example, a court of limited jurisdiction sets illegal conditions of pre-trial release from jail or incorrectly requires bail. Mr. Ziegler has shared templates for writs with numerous public defenders and coached them through the legal and procedural hurdles they must navigate before superior courts can consider their arguments. Writs are just one area of the law where Mr. Ziegler has shared his expertise. There are others, including statutory construction, contempt of court, and appellate procedure.

In assisting public defenders *pro bono*, Mr. Ziegler has helped protect the rights of indigent people accused of crimes and improved the quality of criminal defense in Washington. We hope the WSBA will recommend a rule that would allow Mr. Ziegler to continue his important *pro bono* work even though he cannot afford malpractice insurance. It would be a significant loss to the criminal defense bar statewide if he could not continue to share his knowledge and expertise.

Sincerely,

Christie Hedman

Magda Baker

Christie Hedman, Executive Director

Magda Baker, Misdemeanor Resource Attorney

cc: WSBA Board of Governors

March 6, 2019

TO: WSBA Board of Governors

From: Ronald T. Schaps, WSBA#2203

Re: Mandatory Malpractice Insurance Task Force Report

PROPOSED APR 26 (b)(2) and (3)

Proposed APR 26 (b)(2) and (3) deal with exemptions from the malpractice coverage requirements and read as proposed:

> "(2) Employment by a corporation or business entity, including nonprofits:
>
> (3) Employees or independent contractors for a nonprofit legal aid or public defense office that provides insurance to its employees or independent contractors;"

There are two problems with this language.

First, as to subsection (2), there is no explanation or analysis in the Report as to why independent contractors for "a corporation or business entity, including nonprofits" cannot, and should not, also be exempt from the malpractice coverage requirements if the corporation or business entity itself provides insurance covering the independent contractor. There is no logical or rational basis for such a distinction. In each case the independent contractor would have the requisite insurance coverage. There would also not be any additional administrative burden on the WSBA as the independent contractor would certify that he or she is providing legal services only to that entity and that the entity provides insurance.

Second, as to subsection (3), the manner in which it uses the word "or" creates an ambiguity.

It is suggested that the language of proposed APR (b)(2) and (3) be changed to read:

> (2) Employment by a corporation or business entity, including nonprofits, and independent contractors to such an entity when the entity itself provides insurance coverage for the independent contractor;
>
> (3) Employees and independent contractors for a nonprofit legal aid or public defense office that provides insurance coverage for such employee and/or independent contractor.

PROPOSED APR 26 (e)

A review of the Report indicates that the problem is not so much a matter of "collectability" of any judgment, but the fact that in virtually all civil cases (not just malpractice cases) it is difficult for a private plaintiff's attorney to economically handle claims for under $100,000 (or $150,000) particularly if it is likely that the claim will have to be processed al; the way through a trial and possibly an appeal. Note that the Report's own statistics etc. tend to focus on claims under $100,000.

This is where insurance becomes a critical factor. Insurance companies are decidedly "for profit" entities. If a case, no matter how tenuous, will cost $200,000 to defend and defeat but can be settled early for $75,000, the insurance company will want to force a settlement. Such a settlement not only allows the insurance company to save money, but it allows the insurance company to double-dip by using the settlement as a basis for increasing the attorney's premiums. If you think this is an exaggeration, please note the handling of *Schmidt v Coogan* in the article immediately following the task force's interim report in the August 2018 NW Lawyer. That Washington Supreme Court decision involved two separate issues as to the damages that could be recovered in that malpractice case – each of which was considered a major issue of first impression for the court. The plaintiff won one and lost one. There, however, was no discussion in the article on any problem with the "collectability" of the final judgment. Instead the emphasis of the article was that if there had been insurance, the insurance company would have forced a settlement and plaintiff and plaintiff's attorney would have been spared the effort and expense of litigation.

The above discussion provides a background for the fact that a common way malpractice insurance companies force a defendant attorney to consent to a settlement the insurance company wishes to make, even if the defendant attorney feels the claim is legally and/or factually unjustified, is to provide that if the defendant attorney fails to consent, the coverage limits are then reduced to the amount of the proposed settlement. For example, if the coverage limit is $500,000, and the proposed settlement that is rejected is $175,000, then the policy limits immediately and automatically reduced to $175,000 (including defense costs) for that claim.

This raises an issue as to the intent and effect of some language to be added by the proposed APR 26(e):

> "If a lawyer … fails to maintain the coverage required throughout the licensing period, the lawyer may be ordered suspended from the practice of law..."

Under the circumstances described above, where a malpractice insurance company has reduced the coverage for a particular claim below $250,000 because the defendant attorney has refused to consent to a settlement the attorney considered unjustified, has the defendant attorney now violated APR 26(e) and is subject to suspension. In other words, is the WSBA using the coercive powers of its disciplinary system to coerce a defendant attorney to consent to a settlement the attorney feels is legally and/or factually unjustified? If that is not the Board of Governors' intent, I would suggest adding the following language to APR 26 (e):

> Provided, however, an insurance carrier's reduction of coverage limits for a particular claim because the defendant attorney refuses to consent to a proposed settlement shall not constitute a violation of this APR.

<u>ALTERATIVES NOT CONSIDERED IN REPORT</u>

The Report reflects a review of alternatives that other state have already enacted, considered or rejected, but does not attempt to develop or analysis any new approach.

I would repeat a suggestion that I previously made to the task force.

Combine enhanced malpractice insurance disclosures directly to clients with a new form of fund that would simply mimic the collectability potential of the proposed claims made insurance coverage, without getting involved in claims analysis and adjudication, settlements, or extensive administration maters --- such as:

1. Claim must arise from an act of malpractice occurring after the commencement date of the fund.
2. There is no claim if at the time the act of malpractice occurred the attorney had malpractice insurance in an amount of at least $250,000.
3. There is no claim until it has been reduced to a final settlement or a final judgment no longer subject to appeal.
4. For a claim that meets all of the above three criteria, the maximum amount of the claim shall be the LESSER of the amount of the settlement or judgment or $250,000, minus ALL of the following:
    a. The amount of any malpractice insurance coverage less than $250,000 in existence at the time of the act of malpractice; and
    b. All unreimbursed defense costs incurred by the defendant attorney; and
    c. All amounts recoverable from the defendant attorney within 180 days of the settlement or final judgment.

Any amount paid from the fund would be subject to the same terms of collection and/or discipline as exist for the WSBA's current fund for the protection of client assets.

KENNETH J. PEDERSEN
ARBITRATOR · ATTORNEY AT LAW

P.O. BOX 15164, SEATTLE, WA 98115-9998
(425) 202-5835
ken@pedersenadr.com

March 13, 2019

—Via Email Attachment—

William D. Pickett, President
Washington State Bar Association
c/o The Pickett Law Firm
917 Triple Crown Way #100
Yakima, WA 98908
bill@wdpickett-law.com

re: **Representation and Right to Vote on Task Force proposals**

Dear President Pickett,

At the Board's March 7, 2019 meeting, Hugh Spitzer and Doug Ende presented the Mandatory Malpractice Insurance Task Force's report for first reading. A member from Oregon asked Professor Spitzer how many of the Task Force members were engaged in solo practice, and how many carried malpractice insurance. Professor Spitzer huddled with Mr. Ende and then claimed that three of the members were solo practitioners.

That is not correct. In fact, *none* of the Task Force members are actively engaged in the solo private practice of law. I don't know who Professor Spitzer and Mr. Ende counted, but if they included Task Force members Gretchen Gale and Lucy Isaki, both answered "No" to the question in the lawyer directory as to whether they were in private practice, and Ms. Isaki's license status is listed as "Inactive" in the directory. Who the third might be is unclear.

Why does it matter? It matters because the report itself admits that its recommendations will have the greatest impact on solo practitioners. Thus,

> "In Washington State, lawyers in private practice who practice in solo or small firms are most likely to be uninsured. According to 2017 voluntary demographic information reported by Washington lawyers as part of the annual licensing process, approximately 28% of solo practitioners reported being uninsured." (Report, 38.)

The report goes on to state that between 45% to 49% of private practitioners are solo. (Report, 42.) It is unfair that active solo practitioners were completely

unrepresented in a process resulting in recommendations which, if adopted, will have the greatest impact on them as a group. Disenfranchising nearly half the membership in the press for mandatory insurance for all is indefensible.

Second, in its initial report, the Task Force failed to mention that the Bar Association has previously considered the matter of mandatory insurance and submitted it to a membership vote. Only after the period for public comment expired did the Task Force add the following footnote, buried deep in its report to the Governors:

> In the late 1980s, the WSBA previously considered and rejected such a proposal. Specifically, in 1986, the WSBA Board of Governor's considered creating a professional liability fund and system for requiring malpractice insurance, which would have been incorporated into the former Admission to Practice Rules. *Status Report on Malpractice Insurance Coverage and Professional Liability Fund Proposal*, Wash. St. B. News, October 1986, at 27. In December 1986, by a 7-4 vote, the BOG approved the proposal for submission to the Supreme Court, subject to submission of the issue to a referendum of the membership. Carole Grayson, *Washington State Bar Newsline: The Board's Work*, Wash. St. B. News, January 1987, at 29. The membership defeated the referendum by a vote of 6,971 to 1,693. Carole Grayson, *Washington State Bar Newsline: The Board's Work*, Wash. St. B. News, March 1987, at 16. (Report, 70, footnote 218.)

I raised the matter during the Task Force's January 30 meeting, and asked whether they intended to address the subject of a membership vote in their report. Several Task Force members responded that they regarded a vote by the members as inconsistent with their conviction that mandatory insurance was a moral obligation owed to the public. Professor Spitzer summed up the thinking of the group with the remarkable comment that allowing the members of the Bar to vote on the matter of mandatory insurance would be like "appointing the fox to guard the henhouse." Mr. Ende and Governor Bridges stated that the procedural question of a membership vote was outside the Task Force's charter and needn't be referenced in the final report.

Maybe so, but the matter of a membership vote is squarely within the Board of Governor's mandate. If the Governors intend to recommend approval of the Task Force's ill-advised report to the Supreme Court, they must do so only after submission of the issue to a referendum of the membership. The recently-beleaguered but still binding State Bar Act empowers the Board of Governors to provide for matters "affecting in any way whatsoever, the organization and functioning of the state bar," and goes on to state that any new rule must be

approved "by a vote of the active members under rules to be prescribed by the board of governors."[1] Imposing a new rule requiring members to carry malpractice insurance without a vote by active members would therefore be *ultra vires*.[2] The Board of Governors in place in 1986 clearly understood this when they submitted the issue of mandatory insurance to the membership for a vote.

The Task Force shouldn't function as philosopher kings, handing down their moral imperatives to a disenfranchised membership. The Board should reject the Task Force recommendations. If it doesn't though, in order for the insurance mandate to carry any moral or legal suasion, it must be submitted to a vote by the active WSBA membership before submission to the Supreme Court.

Very truly yours,

Kenneth J. Pedersen

cc: WSBA Board of Governors (via email)

KJP/as

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[1] RCW 2.48.050(7).

[2] The WSBA staff appears to adopt the position that a membership referendum on the Task Force recommendations needn't occur. Following a letter in the January 2019 edition of the *NWLawyer* from Mr. Tom Stahl that is critical of those recommendations, the following note appears, blithely presuming out of existence the voting requirement of the State Bar Act:

> ***WSBA replies**: If the Task Force recommends that Washington lawyers be required to carry malpractice insurance, it would be in the form of a suggested court rule, which, if approved, the Board of Governors would submit to the Washington Supreme Court under General Rule 9. The Court would decide whether to adopt such a rule.*

From:	Todd Buskirk
To:	Mandatory Malpractice Insurance Task Force
Subject:	Mandatory Malpractice Insurance - opposition
Date:	Thursday, March 14, 2019 9:22:26 AM

To Whom it May Concern:

I have not had malpractice insurance for some time because of the cost. As a sole practitioner, controlling overhead is paramount.

It is naive to think that compelling attorneys to obtain malpractice insurance will do anything to help with "access to justice."

It is a source of pride, and passion, that over the course of my career, I have become a "go to" attorney for victims of domestic violence who need to get divorced. Almost all of these cases I've done pro bono or at a very, very reduced rate. I've been able to do this because I can control my overhead and am not compelled to pay for products/services (other than taxes) that I don't want, or need, to be part of my overhead.

I can guarantee that if I am compelled to purchase malpractice insurance in order to remain an attorney, my hourly rates will be increased to pay for the imposed cost and I will have to seriously reevaluate my availability to pro bono clients because I will have to focus even more on clients who can afford attorneys.

It's not a complicated analysis: increase cost of business = increased rates. I fail to see how this does anything to increase "access to justice."

--
Todd Buskirk
(360) 792-8638

From: Athan Papailiou
To: Paula Littlewood; Doug Ende
Subject: Fwd: Your Letter to Members of the WSBA and Mandatory Malpractice
Date: Friday, March 15, 2019 2:19:04 PM

Begin forwarded message:

From: Jeff Oster <jeffoster0@gmail.com>
Date: March 15, 2019 at 2:16:49 PM PDT
To: "alecstephensjr@gmail.com" <alecstephensjr@gmail.com>, "Athan.Papailiou@pacificalawgroup.com" <Athan.Papailiou@pacificalawgroup.com>
Subject: Your Letter to Members of the WSBA and Mandatory Malpractice

Dear Sirs,
I've been in California working as a part time in-house contractor this week and have been bombarded with emails about the WSBA that seems to be in crisis mode.

The issue that is driving me crazy is mandatory malpractice. I sent in comments to the task force but they are not listed and seem to have been ignored. My comments were that my practice is so eclectic and unique that there is no malpractice coverage available for my practice. Without going into the details of what I do, it is international intellectual property freedom to operate, patent enforcement defense of invalidity at administrative levels and start up company based. Yet in this field, the insurance companies look at how law firms have traditionally set up their IP practices as either (1) patent prosecution or (2) patent litigation. And yes I can choose either one for coverage, only available on a full time basis. I don't do either and only work part time outside of an in-house role for now. I also don't bill by the hour but am part of national contingency patent enforcement teams, where my role on the team is to work on Patent Office (US and Europe) administrative proceedings for challenging patent claim validity. These are neither patent prosecution nor federal district court litigation. I've done this successfully, never had a claim and even was part of the team, with my usual role on the team, that won the case in Syntrix v. Illumina, the largest patent litigation damage award in Washington history. And I didn't have malpractice insurance. I'm currently on the team for The Scripps Research Institute v. Illumina in the Southern District of Cal, where one of the inventors won a Nobel Prize. These are not off-the-street inventors where the task force seems to be worried about malpractice.

Please stop mandatory malpractice insurance or define "private practice" more narrowly as full time and taking any client. More importantly, couple mandatory insurance with a requirement that insurance policies tailored for actual practices must be available. Require insurance companies to write and tailor insurance policies to unique situations, like mine. Please also investigate if there has been undue influence

and lobbying by insurance carriers who think a windfall is coming. There needs to be much greater regulation of this marketplace if mandatory insurance is required.

No one on the task force looked at the problem of malpractice insurance not fitting a lawyers practice, or requiring mandatory tailored policies so that square pegs like mine are not required to fit into round holes. This is a big problem the task force choose to ignore. Please require the task force to go back and work on this problem, they are creating. Insurance regulatory needs to be coupled to mandatory insurance. Right now, insurance is an impossibility for me, mandatory or not, because appropriate policies do not exist.

Thank you for listening. The task force certainly didn't (my comments sent by email were not on the listed comments page of their website, and the category of no insurance available for a practice was not even noted as an issue or ever considered).

Jeff Oster
WSBA 17709

From: Athan Papailiou
To: Doug Ende
Subject: Fwd:
Date: Friday, March 15, 2019 4:47:31 PM

Begin forwarded message:

> **From:** "Ron Santi" [redacted]
> **Date:** March 15, 2019 at 4:35:53 PM PDT
> **To:** <Athan.Papailiou@pacificalawgroup.com>
>
> Thank you for elucidating some of what the rest of us WSBA members have felt with the hell-bent tumultuous regime and the out of control emails to manage all of us. As a 41 year member I feel betrayed by the rush to mandate what for many of us will be prohibitively expensive insurance. If I don't qualify for exemption I won't be able to last to my 50th anniversary. The way it was rammed through it almost felt like there were some kind of arrangements to make it happen when to date no one has demonstrated a need, let alone one costing around $2000. a year. What happened to a minimalist approach that seems to work fine in states that try it. I would say tumultuous, chaotic, and needlessly stressful describes pretty well what is going on beginning with the 10 emails a week from WSBA.
> -- Ron Santi
> #8817

From: none
To: Mandatory Malpractice Insurance Task Force
Subject: Mandatory Insurance Comment...
Date: Friday, March 15, 2019 6:28:40 PM

Dear Board of Governors,

I wanted to weigh in on the proposal to require mandatory insurance for all lawyers/members of WSBA. I oppose such a measure primarily for financial reasons. I also feel that there are sufficient safeguards to protect clients and the public. Making insurance mandatory would create a hardship for those lawyers, particularly solo practitioners, who are already struggling to meet existing mandatory annual requirements. The hardship would indeed lead to access to justice issues because practitioners who would normally be pre-disposed to offer pro-bono or moderate means services may be discouraged from doing so.

If this measure is adopted I would like to know when it would be implemented.
Thank you

Bernadette Joseph, WSBA Lawyer/Member

--

From:	Joe Chalverus
To:	Mandatory Malpractice Insurance Task Force
Subject:	Mandatory Insurance for Attorneys
Date:	Friday, March 15, 2019 6:34:28 PM

I oppose mandatory insurance.

Should it be required, it should be funded by the State since attorneys are officers of the court, necessary for the well functioning of our society.

Otherwise, Mandatory Insurance will reduce the number of attorneys to only those with a legal practice having earned to afford the insurance.

Many attorneys do not maintain a commercial legal practice. Many attorneys consider their legal efforts contributions to the community and voluntary, part of their duty to society for the privilege of representing and counseling members.

Requiring insurance as a condition for attorneys to serve our community will only reduce the number of attorneys available to the public, a number already scare. Mandatory insurance will make public access to our legal system even more difficult than it already is. I know. I've been part of our neighborhood legal for almost 35 years and hear many complaints about how unaffordable lawyers are.

Many lawyers will not be able to continue these contributions to our society in the event that insurance payments are mandatory.

Sent from my iPhone

Joe Chalverus
13449

From: Mark J. Koslicki
To: Mandatory Malpractice Insurance Task Force
Subject: RE: Mandatory Malpractice Insurance
Date: Saturday, March 16, 2019 8:26:21 PM

Dear Board Members:

I strongly oppose the proposed requirement for mandatory malpractice insurance. Rather, a disclosure statement for engagement letters should be considered.

I will be forced to change from my "active" status if the proposal is adopted as it would be much too costly for me.

The current proposal does not represent the majority of WSBA members and should not be adopted.

The WSBA is in turmoil with the firing of the executive director and the bill to repeal the State Bar Act (Substitute House Bill 1788). Yet, the Board is seriously considering the imposition of mandatory malpractice insurance without a vote of the members. Is this a last-ditch effort to inflict costly requirement onto members and further alienate members before the WSBA is radically changed?

Please reject the proposal for mandatory malpractice insurance.

Sincerely,

Mark J. Koslicki

#31640

From:	Julie Shankland
To:	Doug Ende
Subject:	Fwd: Reply to WSBA Board of Governors update
Date:	Sunday, March 17, 2019 6:26:14 PM

Julie Shankland
General Counsel
Washington State Bar Association

Begin forwarded message:

> **From:** Athan Papailiou <Athan.Papailiou@pacificalawgroup.com>
> **Date:** March 17, 2019 at 6:12:10 PM PDT
> **To:** "Julie Shankland <julies@wsba. org>" <julies@wsba.org>
> **Subject: Fwd: Reply to WSBA Board of Governors update**
>
> Begin forwarded message:
>
> > **From:** milawoff@aol.com
> > **Date:** March 17, 2019 at 11:56:24 AM PDT
> > **To:** Athan.Papailiou@pacificalawgroup.com, alecstephensjr@gmail.com
> > **Subject: Reply to WSBA Board of Governors update**
> >
> > Mr. Papailiou and Mr. Stephens:
> >
> > Thank you for your supplemental report regarding the recent Board of Governors meeting. My Governor, Peter Grabicki, does not send out any notices to me, so all I receive are the general information announcements sent by the Bar.
> >
> > I have heard rumors that Paula Littlewood, the Executive Director of the Bar, met privately with one or more of the justices at the Washington State Supreme Court regarding the efforts of the members of the bar to put the issue of the recent dues increase to a vote. Apparently, as a result of this meeting, an order was signed by the Supreme Court prohibiting the members from voting on the due increase. There has been very little written about this, so I am left in the dark.
> >
> > I have heard rumors about Ms. Littlewood's actions, but without

any factual information, this is nothing more than gossip. Clearly, if the Board voted to terminate Ms. Littlewood, there is something seriously wrong.

With regard to the restructuring of the Bar, do you know if the Bar's attempt to restructure itself is a way to avoid the U.S. Supreme Court's decision in the *Janus* case? There is so much going on behind the scenes and there appears to be so much secrecy that it is nearly impossible to determine what is actually taking place. I am reminded of what an administrative law judge once told me, "They (meaning the government) treat us like mushrooms: they feed us manure and keep us in the dark."

Concerning the task force efforts to require all attorneys to purchase E&O insurance (malpractice insurance), I am gravely concerned because it will lock out many attorneys who are unable to afford to purchase such insurance. Attorneys who work part-time, attorneys who are semi-retired, attorneys who do pro bono work (such as myself) and recent law school graduates who are carrying enormous amounts in student loan debt will likely be unable to afford to purchase such insurance.

By way of background, my husband and I are authors of seven volumes of *Washington Practice*, including four volumes of *Methods of Practice,* two volumes on elder law and one volume on probate law. My time is mainly devoted to research and writing, but I do try to help those who cannot afford to hire an attorney. I don't know if you are aware of how many people are turned away by legal service providers, but every week I receive many calls from individuals who are in dire need of legal representation and have been denied help from every agency they have contacted.

The requirement for attorneys to purchase mandatory insurance appears to be a way to cut down on the competition. Everyone knows that there are too many attorneys being produced by law schools and there are finite number of clients. Eliminating some attorneys will help the large law firms. I view this as a restraint of trade issue.

At one time my husband and I checked on E&O premiums to find out how much we would have to pay if we were to practice on a part-time basis. We were told that attorneys can do just as much damage on a part-time basis as they can on a full-time basis. If this proposal passes, then I would be put in a position that would mean I will have to pay to practice law. This is something I am not willing to do. Although the Bar consistently

and stridently asserts that all attorneys should be doing ***more*** pro bono work, requiring mandatory insurance will surely eliminate a large number of attorneys who are providing such services to the public.

I remember one retired attorney here in Spokane who spent one day each week at the courthouse volunteering to help individuals who were being evicted from the places they lived. He provided a valuable service, both to the public and to the court. He attended the unlawful detainer hearings where the judge who was hearing the cases would ask if the tenant had an attorney. If the answer was no (and it generally was) the judge would tell the person that he or she could meet with the attorney at no charge.

I don't know if you are familiar with the Delphi method, but I have seen this approach used by a large number of governmental agencies. It appears to me that the task force is using this approach. Although the intent of the Delphi method is to utilize experts in order to produce better results, this method can (and frequently is) misused and manipulated by those who wish to reach a predetermined conclusion.

Using the Delphi method, "experts" meet to discuss a situation and exchange ideas. Supposedly, through the exchange of these ideas, some persons in the group will change their minds and come to a consensus. The opinions of persons who are to be impacted are solicited and should be considered as a part of the process.

I am not sure how the members of the task force were selected, but apparently none of them is a solo practitioner. This concerns me. According to the data I have seen, between 45 and 49% of private attorneys in Washington State are solo practitioners. This means that about half of us have been cut out of the decision-making process regarding mandatory malpractice insurance.

Although the task force allowed bar members to submit comments, the task force does not appear to have factored these comments into their analysis in a meaningful manner. This seems to be a classic situation in which the old adage applies, "Don't bother me with the facts--I have my mind made up."

I am also concerned that the Bar may have relationship with the insurance industry which may not have been fully disclosed to the members of the bar or to the public. Full disclosure and

transparency should be mandatory in this matter.

The task force appears to have worked to cut off the membership from having any meaningful say in this matter. I have been an attorney for 35 years and over that period of time I have observed that the Bar has become more secretive, more autocratic, less responsive to the membership and increasingly intolerant of the views of others. There are no longer open discussions of some issues.

There has also been a marked decline in promoting an academic analysis and understanding of the law, and an increase in the Bar's view of political correctness which is constantly imposed on the membership. All of these matters are of significant concern to me because if the views and opinions of some are suppressed, everyone loses because there is no free and open discussion of the issues.

Thank you again for your update. Any additional information you have would be appreciated.

Cheryl C. Mitchell
Attorney at Law
Mitchell Law Office
24 W. Augusta Ave.
Spokane, WA 99205

Phone (509) 327-5181
email: MiLawOff@aol.com

From: Athan Papailiou
To: Doug Ende
Subject: Fwd:
Date: Monday, March 18, 2019 8:56:35 AM

Begin forwarded message:

From: [redacted]
Date: March 17, 2019 at 6:30:55 PM PDT
To: <Athan.Papailiou@pacificalawgroup.com>, <alecstephensjr@gmail.com>

Thanks to both of you for the update and your service to the Bar and justice in our state.

I wanted to comment on a current issue before the Bar. I have practiced in Wenatchee for over 27 years. For most of the last 16 years, I have had full-time non-law jobs and practiced law on a very part-time basis. It allows me to fulfill why I went to law school - to help people in our legal system. Because I don't support myself with the practice of law, I can work for who I want doing the type of law I want to do and can charge nothing or a modest amount. The cost of many legal services and proceedings is financially out of the reach of many people. I do not carry malpractice insurance. I purposely limit my practice to manage potential liability. I fear that the cost of mandatory liability insurance will force me from the practice of law, or at least increase what I charge people, to the detriment of my clients. This proposal will raise the financial burdens people face to obtain legal services in our state. I ask you to oppose this proposal.

thank you again.

Craig Larsen
Attorney at Law
509-421-2116

From: Athan Papailiou
To: Doug Ende
Subject: Fwd: WSBA
Date: Monday, March 18, 2019 8:57:03 AM

Begin forwarded message:

From: Thomas Weissmuller [redacted]
Date: March 16, 2019 at 1:00:28 PM PDT
To: Athan.Papailiou@pacificalawgroup.com, alecstephensjr@gmail.com
Subject: WSBA

Ethan and Alec:

I am distressed by recent WSBA actions and cannot fathom what might be happening at the board level. I live in Rhode Island, own a gym, and practice very little. For the most part, I mediate a handful of matters each year and serve as legal counsel for two emergency management councils located in Washington. My WSBA license is essential because I advise clients outside of my in-house responsibilities. I do not intend to surrender my license, nor should I, given my experience. I do not intend to purchase legal liability insurance unless I decide to take a case that might justify it. I am fully capable of determining when insurance might be necessary to secure my assets; I have professional liability insurance to cover non-law-related claims; and I routinely assess the risk of taking on any legal matter. As a judge, I handled many hundreds of cases and feel comfortable with risk assessments.

The new proposed rule on insurance will more than double the cost of my professional liability insurance - but it will afford me no benefit. While someone might engage me in frivolous litigation, I do not intend to take on a case I cannot handle or cannot afford in the event I were to make some error.

I am disgusted by the notion that I might be disbarred for failing to secure insurance to the WSBA's satisfaction. In anticipation of the possibility, I intend to form a working group to investigate the possibility of a class action suit against the WSBA for overreaching the authority delighted to it under the Bar Act and interfering with every attorney's independent right to contract on any case. The legislature may resolve this issue by repealing the bulk of the act this session, and reducing the WSBA to a social bar. I never thought I would welcome that possibility.

Once upon a time, I was a fan of the WSBA. I worked with the Access to Justice Project and supported many CLE programs as a writer or presenter. Today, I get the impression the board is attempting to weed out sole practitioners in favor of corporate super-firms.

As you can see, the WSBA is not a comfort to me as an attorney. It should be. It has become the subject of wild speculation and distrust. Who is it serving?

I hope you will call me and tell me what is happening. I am happy to speak with you. I hope you will tell me if you support the insurance rule and why you do or do not.

Thank you for any reply.

Kind regards,
Tom

Thomas W. Weissmuller, CJ, Ret.
(860)572-8100
[redacted]

From: Athan Papailiou
To: Doug Ende
Subject: Fwd: March 7 Board of Governors Meeting Update from Your At-Large Governors
Date: Monday, March 18, 2019 8:58:50 AM

Begin forwarded message:

From: john goodall <rugshepherd@hotmail.com>
Date: March 18, 2019 at 5:22:10 AM PDT
To: Athan Papailiou <athan.papailiou@pacificalawgroup.com>, Alec Stephens <alecstephensjr@gmail.com>
Subject: Fw: March 7 Board of Governors Meeting Update from Your At-Large Governors

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From: john goodall <rugshepherd@hotmail.com>
Sent: Saturday, March 16, 2019 2:12 AM
To: Anthan.Papailiou@pacificlawgroup.com; Alec Stephens
Subject: Re: March 7 Board of Governors Meeting Update from Your At-Large Governors

Dear Mr. Papailiou and Mr. Stephens,
I appreciate hearing your views about the current state of the WSBA.
On the other hand, I could not disagree with you more strongly.
During my forty five years as a member, I have seen the WSBA morph into a bloated self serving organiization that appears to be out of touch with the needs and interests of many of its members.

I fully support the removal of the executive director.
The fact that no explanation or reasons have been given should not obscure the fact that reasons do exist and I am surprised that you have no awareness of them.

The recent shabby handling of the mandatory liability insurance issue is one example.
The so called 'task force' hearings were led and dominated by ALPS Insurance Company, a company that stands to reap millions of dollars from the outcome and a company with whom the WSBA has an ongoing financial relationship.
ALPS is not only 'endorsed' by the WSBA, but they were give a vote on the panel. This is an outrageous confilict of interest.
Not only that , but not a single solo practicioner was allowed to be on the panel.
If you are concerned about 'reasons' for the firing of the executive director, then you should be equally concerned about the lack of 'reasons' given for the conclusions of this task force.

Liability insurance has no bearing whatsoever on my qualifications or ability to practice law and the WSBA has no busiiness making it so.

You should also be aware that some of us believe that members should be allowed to VOTE on such an issue.
If allowing members to have a say by voting is a concept that has become too radical for the WSBA then some massive changes are in order

john goodall
6152

From: Washington State Bar Association <noreply@wsba.org>
Sent: Friday, March 15, 2019 1:01 PM
To: rugshepherd@hotmail.com
Subject: March 7 Board of Governors Meeting Update from Your At-Large Governors

Washington State Bar Association

March 7 Board of Governors Meeting Update from Your At-Large Governors

These are trying times to be a member of the WSBA Board of Governors, and we wanted you to hear our take on what's been happening as a supplement to the meeting overview WSBA recently sent.

Executive Director

As you have probably heard, the Board of Governors voted to terminate the employment of the WSBA's executive director in an executive session in January. All governors were prohibited from reporting the action, which had apparently been planned and orchestrated for some time. We were unaware that the issue would be coming up for a vote. The Personnel Committee (on which we both serve) received no complaints about the executive director's performance, which is where complaints and concerns are supposed to go. No reason has been given for the termination except that WSBA wants to move in a "new direction." There has been no explanation provided by those who supported the decision what that "new direction" looks like, although we and other governors in the minority have asked the question on a number of occasions. The Board of Governors, on advice of counsel, voted again—this time in public session—with the same result (termination) but still without any explanations or reasons. Again without particulars and without basic adherence to the principles of due process, we did not and could not support termination.

The Personnel Committee recommended that the executive director stay on at least through the completion of the Court's Bar Structure Work Group process. She has a great deal of familiarity with the national-level issues causing bars to reevaluate their structures and would have been a tremendous resource at a time when the landscape for the WSBA will certainly be changing. That recommendation was rejected, on the same 9-4 vote by which the executive director was terminated.

An interim executive director will soon be appointed, and the search for a new and permanent executive director probably won't get underway until the Bar Structure Work Group makes its recommendations and the Court issues its directive regarding the status of WSBA. Even though we are troubled with what has taken place, there is reason to believe that the interim appointment will serve to stabilize what has been a tumultuous set of circumstances. We are committed to making things better.

While these may be trying times to serve on the Board of Governors, we are blessed to have a very hardworking and skilled staff who support and serve our members every day. We have been very impressed by their professionalism and dedication.

Investigations

At the last meeting, the board voted to have an investigator review the claims of Governor Dan Bridges, who has written a letter purporting a million-dollar tort claim against WSBA, the entity for

which he currently serves on the governing board. The Supreme Court has also ordered an investigation into staff claims of a hostile work environment, which has allegedly been created by the conduct of the Board of Governors.

Mandatory Malpractice Insurance

The Mandatory Malpractice Insurance Task Force has made its recommendation in favor of requiring attorneys in private practice to carry insurance. Click here to learn more. We will continue to consider this issue, which is scheduled for action in May, when the board will be meeting in Yakima.

Board of Governors Elections

Because Athan's term is expiring, we hope someone who will also champion equity and inclusion as well as access to justice in the legal system will come forward serve in the at-large position. [As the continuing at-large Governor, I, Alec, want to step out of our joint report to express my appreciation to Athan for his hard work and dedication and commitment to diversity in all of its forms, and for advancing issues that serve us all.] It is more important than ever to keep these issues front and center on the Board of Governors. The application filing deadline is April 22, and more information is online. The Board selects among candidates (there is no election). Please reach out to either one of us if you're interested in hearing about our experiences. Recall that at the beginning of this update we stated, "These are trying times to be a member of the WSBA Board of Governors." That should not dissuade you, but encourage you to step forward to share your views and your values in times of trial. Your strength in dealing with issues of diversity and inclusion and fairness and justice is what is always needed. Your voice is essential "in the room where it happens."

As for elections in the open district positions, it is unfortunate that very few members vote in Board of Governors elections, let alone research the candidates. If someone says they support the "new direction," make sure to ask them what that direction looks like—and please let us know! Above all, please vote and be heard.

Questions?

We are always happy to speak with members. Please feel free to reach out if you have questions, concerns, or complaints.

Your Diversity At-Large Governors,

Athan Papailiou
Athan.Papailiou@pacificalawgroup.com
Alec Stephens
alecstephensjr@gmail.com

From: james donohue [redacted]
Sent: Tuesday, March 19, 2019 8:57 AM
To: Mandatory Malpractice Insurance Task Force
Subject: Please DON'T adopt mandatory malpractice insurance

I left the federal bench at the end of February. I hope to engage in some form of limited pro bono practice involving political asylum practice at the SW border. I believe to do so, I must be licensed in some state, so I decided to reactivate my license after 14 years on the bench. This has already cost me about one thousand dollars for the privilege of working for nothing. To add the cost of malpractice insurance will cause me to change Plans. I believe you will be doing a disservice to the public and the poor by adding this requirement.

James P. Donohue
7426

Sent from my iPad

From:	Glenn Slate
To:	Mandatory Malpractice Insurance Task Force
Subject:	comment on mandatory insurance
Date:	Monday, March 25, 2019 9:56:02 AM

I am writing to oppose legal malpractice insurance becoming mandatory in Washington based on my personal experience in Oregon.

Oregon is a mandatory malpractice state and I was a member of the Oregon state bar for many years. I worked as corporate counsel in Oregon for close to a decade. During that time I volunteered in my free time with groups that had historically been denied access to the legal system. I spoke at events, attended legal clinics, and answered general questions but was unable to provide even the most modest legal help to individuals in those communities due to lack of mandatory malpractice insurance.

If the bar is truly committed to increasing access to justice for marginalized groups, then mandatory malpractice is a counter productive proposal. It pushes out of active legal practice those who want to practice for passion and limits legal work to only those who do so for profit.

Glenn Slate
Attorney | Heritage Family law
11105 NE 14th St., Suite 101 | Vancouver, WA 98684
E: [redacted] | **P**: 360-450-2372

From:	Joseph Ellsworth
To:	Mandatory Malpractice Insurance Task Force
Subject:	No on mandatory insurance
Date:	Thursday, March 28, 2019 5:55:09 PM

To whom it may concern,

Your argument that "lack of insurance is fundamentally an access to justice issue" is plain wrong. All lawyers know you can find facts to support any wild arguments. This is a one sided argument based on a leftist belief in the almighty insurance gods. Yes, leftist beliefs are a sort of religion that doesn't require facts or logic just belief.

I have practiced 10 years as a solo patent attorney. I write 3 patents a year and my insurance is more than I make doing my work. I had to drop my malpractice insurance because IP insurance is $9000 a year. I would not have made a cent in 10 years and my clients would be without patent protection if I quit. I have money saved away for any issues I may cause. Almost every patent issue can be resolved with a petition that costs me $1000. So, I keep $5000 in an account and hypothetically, if anything goes abandoned I can immediately petition to have it revived and off we go. (I have never had to do this.)

If I have to buy insurance I will have to quit or make my 5 inventors foot the bill...

Joseph Z. Ellsworth
Patent Attorney
(253) 797-8968
ellsworthpatentlaw.com

From:	Merry Kogut
To:	Mandatory Malpractice Insurance Task Force
Subject:	Mandatory Malpractice Insurance
Date:	Friday, March 29, 2019 3:04:33 PM

I am brokenhearted and angry that the task force recommended that an attorney in my shoes would be required to obtain malpractice insurance to keep my license. I hoped I would fall into an exemption.

I have been licensed since 1986. I have not practiced since around 2010 when I got onto Social Security Disability. I have faithfully paid my bar dues and taken CLE's. I answer one or two "quick" legal questions a year - on the order of explaining the different types of Powers of Attorney or explaining what an adult guardianship entails. I have no clients. I keep my license as an honor and a "fall-back" position.

Under the task force's proposal, unless I pay for malpractice insurance, I will be FORCED to go "inactive." Why? I have assets of $1.5 million or more. Why can't I self-insure? Was this option even considred?

I am VERY upset with the WSBA bar, and very, very hurt by your proposal.

Sincerely,
Merry A. Kogut #16153

From: Paul Majkut
To: Mandatory Malpractice Insurance Task Force
Subject: mandatory malpractice insurance
Date: Wednesday, April 3, 2019 12:43:54 AM

WSBA,
I am concerned that your draft rule omits a class of pro bono attorneys who provide advice to environmental non profits, such as the Coalition of Oregon Land Trusts and its Washington member the Columbia Land Trust, that provide malpractice insurance for those attorneys. Exception (5) is limited to qualified legal services providers:
"(5)Volunteer pro bono service for a qualified legal services provider as defined in APR 1(e)(8) that provides insurance to its volunteers. APR1(e)(8) defines "Qualified legal services provider" means a not for profit legal services organization in Washington State whose primary purpose is to provide legal services to low income clients."
Please amend your exception to apply to provision of volunteer pro bono legal services to environmental non profits that provide insurance to its volunteers. On the other hand, if providing advice to environmental nonprofits is not considered "the private practice of law," that would be an acceptable outcome. I have attached your draft rule and my prior correspondence on this issue. Thank you Paul Majkut WSBA #6523 OSBar #872900.

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(21K)

From:	Steve Cook
To:	Paul Majkut; Mandatory Malpractice Insurance Task Force
Subject:	RE: mandatory malpractice insurance--exception for attorneys working in conservation with coverage
Date:	Wednesday, April 3, 2019 8:45:37 AM
Attachments:	image001.png image002.png image003.png image004.png

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To the WSBA Insurance Task Force:

I want to second, and strongly support, the comments of Paul Majkut.

I'm the General Counsel for Columbia Land Trust, and a member of both the Washington and Oregon bars. We're a nonprofit conservation organization headquartered in Vancouver, Washington that works in both Washington and Oregon. We have to stretch and leverage resources to accomplish conservation for the benefit of both people and nature, and pro bono services from attorneys, including Mr. Majkut, have been and will continue to be invaluable to us.

This is not a small issue. We have closed roughly 200 projects and have conserved over 40,000 acres, the majority of that in Washington, over the last 20 years. Pro bono work by Mr. Majkut and other volunteer attorneys have made much of that work possible. If you want to get a sense of the work, see our website: www.columbialandtrust.org

Since we work in both Washington and Oregon, we belong to the Coalition of Oregon Land Trusts (COLT) and its counterpart in Washington. COLT operates an innovative pro bono program in which attorneys, including Mr. Majkut, can provide pro bono services to us or other COLT member land trusts for conservation projects in both Washington and Oregon and both the attorney and the land trust, as the client, receive the benefits of malpractice insurance coverage through a policy COLT pays for. At least two other land trusts work in both states and can take advantage of COLT's pro bono program to receive insured pro bono services for Washington projects--Blue Mountain Land Trust, based in Walla Walla, and the Friends of the Columbia Gorge Land Trust.

If the exception is not revised as Mr. Majkut urges, then we and these other land trusts will lose the Washington pro bono services of good attorneys like Mr. Majkut who do not have other malpractice insurance, but who **do** have malpractice insurance through the COLT program. This would lead to an unfortunate result for Washington—conservation projects in Oregon would continue to receive the benefit of these pro bono services, but conservation projects in Washington would not. That would be unfortunate for conservation in Washington, would deny attorneys like Mr. Majkut who would like to donate their legal services for such work in Washington the opportunity to do so, and would be unnecessary, since the COLT program provides malpractice insurance for this work, which is the whole point of the mandatory malpractice rule.

Thanks for considering my concerns. I would be glad to provide additional information.

Steve Cook

Stephen F. Cook | General Counsel

Columbia Land Trust
850 Officers' Row | Vancouver, WA 98661
Direct: (360) 213-1208 | Main: [redacted]
Also in Astoria | Portland | Hood River
www.columbialandtrust.org

From: Paul Majkut [mailto:paulsmajkut@gmail.com]
Sent: Wednesday, April 3, 2019 12:44 AM
To: insurancetaskforce@wsba.org
Subject: mandatory malpractice insurance

WSBA,
I am concerned that your draft rule omits a class of pro bono attorneys who provide advice to environmental non profits, such as the Coalition of Oregon Land Trusts and its Washington member the Columbia Land Trust, that provide malpractice insurance for those attorneys. Exception (5) is limited to qualified legal services providers:
"(5)Volunteer pro bono service for a qualified legal services provider as defined in APR 1(e)(8) that provides insurance to its volunteers. APR1(e)(8) defines "Qualified legal services provider" means a not for profit legal services organization in Washington State whose primary purpose is to provide legal services to low income clients."
Please amend your exception to apply to provision of volunteer pro bono legal services to environmental non profits that provide insurance to its volunteers. On the other hand, if providing advice to environmental nonprofits is not considered "the private practice of law," that would be an acceptable outcome. I have attached your draft rule and my prior correspondence on this issue. Thank you Paul Majkut WSBA #6523 OSBar #872900.
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(21K)

From:	Chad Hansen
To:	Mandatory Malpractice Insurance Task Force
Subject:	Mandatory Malpractice Insurance Task Force - Out of State Exemption
Date:	Thursday, April 11, 2019 12:18:26 PM

I strongly urge the Washington State Bar Association Board of Governors to ignore the Mandatory Malpractice Insurance Task Force's decision not to recommend an exemption for Washington licensed lawyers practicing out of state (Mandatory Malpractice Insurance Task Force, REPORT TO WSBA BOARD OF GOVERNORS, p. 52).

I submitted a comment asking that the taskforce consider such an exemption during the public comment period. Many other attorneys practicing outside Washington did so as well. The taskforce refused to recommend this exemption in their report. Their suggestion that "[i]f a lawyer in private practice is certain that he/she will not practice law in Washington, then that lawyer may wish to reconsider whether it makes sense to maintain an active license in this state" is not well taken.

I was born and raised in Washington State. I went to law school in Washington State. Until meeting my wife out of state, it was my intention to practice law in Washington State. Because of my strong roots in Washington State, I may one day wish to return and practice there. Just because I do not currently have plans to do so, does not make surrendering my law license a workable option. I would gladly switch to inactive status if that were an option, but Washington requires attorneys to maintain active status if they are practicing law out of state.

I work as an attorney in the non-profit sector. It would be untenable for me to maintain malpractice insurance. Not just because it would be cost prohibitive, but because it would not serve a purpose. There is no risk that I will commit malpractice in Washington. If I were to make the decision to practice in Washington, even for a single client/matter, I would then carry malpractice insurance for that purpose and as the WSBA adopts. Writing an exemption that would provide me with this opportunity if it were to arise, would not be difficult. Nor would it create ambiguity. It is certainly a less restrictive option that forcing out of state attorneys to surrender their licenses.

The taskforce worries that it is difficult to define where the practice of law occurs. I argue that the ethical rules assign to me the duty to be vigilant about where I am practicing law and to exhibit honesty if I do in fact find myself practicing in Washington. I would then fall outside of such an exemption for out of state attorneys.

Not creating such an exemption may force experienced attorneys licensed in Washington to follow through on the taskforce's ill-advised recommendation of surrendering their licenses. The institutional diversity and experience of the Washington bar would suffer for it.

I strongly urge the Washington State Bar Association Board of Governors to adopt an exemption to any mandatory malpractice insurance requirement for Washington licensed attorneys practicing solely out of state.

Thank you,

Chad Hansen
WSBA# 52947

From:	Paul Brain
To:	Mandatory Malpractice Insurance Task Force
Subject:	Comment on Mandatory Insurance
Date:	Thursday, April 11, 2019 2:57:49 PM

I have been in practice for 35 years and have never had a claim made. This would be equally true of most of the lawyers I have practiced with over that time period. Why would you want to provide a subsidy to the professional negligence insurance industry at the expense of practitioners like me? I am just going to pass it on in rate and make legal services that much less affordable to the public. I would think it obvious that people who cannot afford legal services are not going to be overly concerned about whether there is malpractice insurance. The end result will only be to limit the availability of legal services to that segment of the public that has a need.

From:	IGC
To:	Mandatory Malpractice Insurance Task Force
Subject:	Mandatory Malpractice Insurance comment
Date:	Thursday, April 11, 2019 7:20:54 PM

Dear Sir/Madam,

I would respectfully like to comment that I believe there should be an exemption to the proposed mandatory malpractice insurance requirement for attorneys who may object to insurance on religious grounds.

Sincerely,

Ian Clapp
WSBA #31231

From:	Hugh D. Spitzer
To:	john goodall
Cc:	Doug Ende; Thea Jennings
Subject:	RE: Mandatory Insurance
Date:	Friday, April 12, 2019 6:18:04 AM

Dear John,

Obviously not every experienced lawyer poses a risk! But when you look at the situation overall, you'll see that as a group, having 14% of all lawyers without insurance results in harm to the public. I have practiced law since 1974. I have never encountered even a hint of a malpractice problem. But I still carry insurance. it is possible to make mistakes.

Anyway, I'll pass your comments on to the WSBA staff (who are cc'd here).

Hugh

From: john goodall <rugshepherd@hotmail.com>
Sent: Friday, April 12, 2019 6:10 AM
To: Hugh D. Spitzer <spith@uw.edu>
Subject: Mandatory Insurance

Dear Mr. Spitzer
I've practiced law for nearly 50 years without liability insurance and have followed the rules of professional conduct.
I have had no complaints made against me, and Iam not the only one.

I am dismayed to see that the so called "task force" you were a part of has concluded that lawyers who have been admitted to the WSBA pose a significant risk to the public?
I think this needs to be brought to the attention of the public

I assure you of one thing, if this rule is passed I will not purchase the insurance.
If the WSBA wants to disbar me for that then so be it!

You also appear to have arrived at this conclusion without a providing any of those "supporting facts" we were taught were so important when we were in law school.

john goodall
6152

From: Josh Moultray
To: Mandatory Malpractice Insurance Task Force
Subject: I support mandatory malpractice
Date: Friday, April 12, 2019 3:04:39 PM

I am fully in support of mandatory malpractice insurance though I want to be clear that I also believe the bar should not set up too many rules for insurers, etc. let the market forces operate. Set a minimum level and tie it to inflation, let the market forces act from there.

I support for three reasons:

1. It will lower the cost for everyone by having more people participate and spread out the risk. Also invites more competition if more people are buying.
2. It protects clients—the number who actually ask if we carry insurance is almost nill, consumers should be protected from attorneys making mistakes—almost all reputable attorneys already carry insurance so this is just to make sure those on the fringe get in line.
3. It protects third parties—I had a case where an attorney made so many mistakes that were costly to his clients, to the point where it impacted my client through additional legal fees. The entirety of the case was predicated on his poor advice and his client's actions. By making false and completely baseless claims of racial discrimination by my client and advising his client to vacate a commercial lease early it harmed all parties—he apparently had insurance at one time but by the time any claim would have been ripe he had terminated his policy. That should not happen and left everyone in the case worse off because he was judgment proof.

I would also be curious if the task force is considering changing the rules such that policies are not claims made but occurrence based? Seems to me that requiring tail insurance would be hard (what are you going to do, disbar someone who retired and didn't buy tail insurance?). I suppose the other option would be to create a risk pool and fund it from bar dues that covers all retired lawyers with tail insurance—this would actually be a good use of bar dues. I am more concerned about this than I am insurance on practicing lawyers, quite frankly… the disbarred, resigned, retired lawyer is more likely to have had insurance when the mistake was made and then lapsed by the time a claim is filed--back to the fact that most private attorneys have malpractice already.

I also would find it reasonable that there is an exception for lawyers working either for government or as employees of a single client—no reason for Microsoft lawyers to buy malpractice, just lawyers in private practice—but that should be clearly indicated on their bar card and online directory—this lawyer is licensed but not authorized to engage in the private practice of law at this time—something like that.

Joshua M. Moultray
Partner
Moultray & McMahon, PS
www.Moultray.com
st

11661 SE 1 Street
Suite 201
Bellevue, WA 98005
Phone: 206-777-1435
E-Mail: Josh@Moultray.com

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From: Questions
To: Mandatory Malpractice Insurance Task Force
Subject: FW: Mandatory insurance
Date: Monday, April 15, 2019 8:57:52 AM
Attachments: image001.png

Member comment
Matt

Matt Muzio | Service Center Representative
Washington State Bar Association | ☎ 1-800-945-9722 | mattm@wsba.og
1325 Fourth Avenue, Suite 600 | Seattle, WA 98101-2539 | www.wsba.org

From: jason H [mailto:jayhatch11@gmail.com]
Sent: Saturday, April 13, 2019 12:05 PM
To: Questions
Subject: Mandatory insurance

Just writing to let you know I will never, ever pay for mandatory insurance, and that I will continue to practice law. Your belief that you can command dollars from my pocket into the pocket of the CEO of a private insurance company shows how little respect you have for the law to begin with. Get ready to sue me next year if you try to maintain this odious and untenable position. All the best.

Jason Hatch 31798

From: BallardLawOffice <ballardlawoffice@gmail.com>
Sent: Friday, March 29, 2019 2:41 PM
To: Mandatory Malpractice Insurance Task Force
Subject: recent E/O renewal and ins hearing content

Hello Doug - You were listed as the contact person for questions like this.

I left the media player running earlier this month, to listen to hearings on mandatory insurance, as I was tending to in-office tidying and replying to correspondence from my E&O carrier.
It sounded like some ball-park numbers were being tossed around w/ a hypothetical new solo atty, and a solo w/ some experience (and a developing coverage tail).
I thought I heard them use numbers in the one thousand range for new solo and numbers in the two thousand range for the experienced solo.

The renewal bid from my carrier was about four thousand - see att.
I wondered if my practice matrix was larded with info that worried the underwriter, so I went back to the spreadsheet breaking down my 2018 activities, and found that
52% of my work fit a **"quasi judicial"** description (arbitrator, mediator, trainer of mediators, hearing officer, etc)
35% was related to **modest (non-taxable) probates** and planning, and the remainder left to assisting family/friends w/ resolution of minor criminal matters, addressed in diversions.

Having access to **CNA's Loss Runs that confirmed no payments were ever made on my behalf**, I thought my micro-practice represented a pretty dull and low risk enterprise - they said otherwise.
Ultimately, I found another carrier at a little over $3k for $1M/1M coverage.

Did I mis-hear the malpractice coverage hearing testimony?
Is my practice **riskier** than I thought?
Are the underwriters Always gonna snow the customer in this **opaque risk-evaluation** process?
Can you identify **"safer" practice areas**?

All respect – David K. Hiscock

Ballard Law Office 206-789-9551
BallardLawOffice@gmail.com
Arbitration/Mediation/Pro Tem scheduling assistance:
https://tinyurl.com/Hiscock-ProTemCalendar

From:	Hugh D. Spitzer
To:	BallardLawOffice
Cc:	Thea Jennings; Rachel Konkler; Doug Ende
Subject:	Re: recent E/O renewal and ins hearing content
Date:	Saturday, March 30, 2019 9:38:50 AM

My impression is that pricing varies significantly among carriers, and it can be opaque. ALPS tells you what the criteria are, but someone ultimately makes judgement calls.

Hugh

From: BallardLawOffice <ballardlawoffice@gmail.com>
Sent: Friday, March 29, 2019 7:08:08 PM
To: Hugh D. Spitzer
Cc: Thea Jennings; Rachel Konkler; Doug Ende
Subject: Re: recent E/O renewal and ins hearing content

Thank you for taking time to respond.
Yes, I am not a new to practice solo.
I have prior acts coverage - a point addressed at about pg 33 or 34 of the report.
I was not looking for a 101 level response, but something to carry back to the broker & underwriter in a pricing experience that appears rather opaque.
Either the testifying witnesses were not entirely candid with the body they testified before (yes, I have some experience hearing witnesses provide half-truths - which is why the oath I administer asks for the Whole Truth)
Or the agent/broker and under writer were counting on an opaque pricing system.
Possibly both.

Yes, I'd welcome a call to bring up things I might not be taking into consideration.
All respect - David K. Hiscock
206-789-9551

On Fri, Mar 29, 2019, 6:50 PM Hugh D. Spitzer [redacted]> wrote:

> Hi, David,
>
> I have chaired the WSBA's Mandatory Malpractice Insurance Task Force, and I wanted to get back to you re your email to Doug Ende.
>
> Attached is a copy of the Task Force Report. There's a discussion on p. 33 et seq. of "typical" costs of ALPS policies for lawyers who are purchasing insurance for the first time. Obviously (and as discussed in the report) the actual premium costs vary depending the type of practice, number of lawyers, etc. So it's hard to know if there's something about your specific practice that causes premiums to be higher than "normal." It might be worth contacting ALPS to see what they would offer. Also, one of the appendices in the report lists all the insurers who write malpractice policies in Washington State. It makes sense to shop around--though I recently purchased a policy when I

semi-retired, and I did it straight through ALPS and it's about $1300. However, I practice on a part-time basis. And I probably purchased higher limits than I need—certainly higher than the minimum 250K/500K our Task Force recommended.

So, you didn't mis-hear. We were discussing what ALPS (the WSBA's sponsored carrier) calculates a "standard" 250/500 police to be for a "typical" newly-insured lawyer.

Hugh

Hugh Spitzer

Professor of Law

[redacted]

206-790-1996 (cell)

Papers on SSRN: http://ssrn.com/author=1514923

From:	Athan Papailiou
To:	Doug Ende
Cc:	Julie Shankland
Subject:	FW: Mandatory Liability Insurance
Date:	Monday, April 15, 2019 1:21:06 PM

From: john goodall [mailto:rugshepherd@hotmail.com]
Sent: Monday, April 15, 2019 1:17 PM
Subject: Mandatory Liability Insurance

Dear Governor,

On the advice of one of the mandatory insurance task force members I read all the minutes and the meeting materials.

The first meeting stated that the goal of the Task Force was "to gather more information concerning the correlation between grievances against lawyers and lack of liability insurance". This goal omits any reference to Washington State attorneys, and now that I have read all the materials I can see why.

The only reference to malpractice grievances against Washington State attorneys during the 13 meetings was provided by Mark Johnson during the fourth meeting.
His firm firm represents malpractice plaintiffs but his testimony does not reveal any facts concerning any specific cases regarding Washington State attorneys.
His primary claim, without any reference, was that his firm won't take a malpractice claim against an uninsured attorney. That fact alone apparently ends any further inquiry regarding whether they are or are not "judgment proof".

Likewise, during none of the 13 meetings was a single consumer heard from who had suffered due to malpractice by an uninsured attorney in the State of Washington.
The absence of even a single case of a Washington State legal client who has suffered a loss due to lack of malpractice insurance is a striking omission concerning the relevance of that topic to the determinations that followed.

Kevin Bank addressed the task force the same day as Mark Johnson and he was somewhat more explicit regarding the Client Protection Fund, but he did not touch the "key issue".
The most relevant thing he said is that "the CPS has "no evidence whether any applicants claims (claims of malpractice) were meritorious".

Looking back at the first meeting, the objective of the Task Force was describes as "to identify key issues".
But that term never showed up again in the materials.

So, during 13 meetings, the key issue, "to gather more information concerning the correlation between grievances against lawyers and lack of liability insurance" was mentioned once at the beginning and then abandoned. This is according to the minutes of the very next meeting on May 23.

Those minutes say that the panel "discussed" the "key issue" without offering a reader anything further, nothing else is revealed , such as what was said , or what further evidence, if any , was presented. Not one word .

This is significant because it was at that same May 23 meeting that the task force made a final decision.
They decided that they didnnot need to "gather" any more information.
To quote: "Now is the time to move boldly regarding the demonstrated problem of lawyers who go uninsured".

IE, they said the key issue had already been proven.
The problem I see with this conclusion is the absence of facts showing that the so called "demonstrated problem" has been proven anywhere in the minutes or materials of any of those first four meetings.

What follows, as demonstrated by the minutes, is that the task force meetings where subsequently taken over and dominated by representatives of the ALPS insurance company, the same company that the WSBA has chosen to be their recommended insurance company.

The task force reached its conclusion quickly without spending much time pursuing their stated goal of "gathering and presenting" factual data on the issue of uninsured attorneys, and then essentially turned the remaining meetings over to the insurance industry who was also allowed to cast a vote on an obviously self-serving issue.

In my opinion, more material should have been gathered and then presented to all WSBA members, followed by a Vote, as they did in Idaho.

By not allowing WSBA members to vote on this important issue, but allowing the insurance industry to dominate the proceedings as well as to vote the WSBA has effectively proven that they do not care what members think.
Considering their track record on over riding the votes of members, I am not surprised
Cordially
John Goodall

From:	Gabe Galanda
To:	Mandatory Malpractice Insurance Task Force
Subject:	Fwd: Special Board Meeting on Mandatory Malpractice Insurance April 22
Date:	Tuesday, April 16, 2019 1:42:04 PM

Please take no further Board action until the current mess that is the WSBA is cleaned up.

Gabriel S. Galanda
Galanda Broadman, PLLC
206.300.7801

Begin forwarded message:

> **From:** "Washington State Bar Association" <noreply@wsba.org>
> **Date:** April 16, 2019 at 1:33:34 PM PDT
> **To:** gabe@galandabroadman.com
> **Subject: Special Board Meeting on Mandatory Malpractice Insurance April 22**
> **Reply-To:** noreply@wsba.org
>
> insurance

From: Andre Castillo
To: Mandatory Malpractice Insurance Task Force
Subject: Feedback
Date: Tuesday, April 16, 2019 1:42:27 PM

My quick two cents: I'm a newly admitted solo practitioner attorney, currently admitted to practice in two jurisdictions (via UBE transfer). While it is difficult to break out on my own, I am able to get my start by having a few clients in each state so far. I couldn't do this with mandatory malpractice insurance. My clients are very happy even with me not having it as I am a transactional attorney and they prefer my lower cost services, which is the only way I could get any clients at all. Frankly, if Washington State requires mandatory malpractice insurance, there is a very good chance I will forfeit my bar status in the state, and focus on the jurisdictions I can practice in without it. I do intend to eventually get such insurance, I just can't afford it right now, and it has informed which jurisdictions I am practicing in.

From: Fred Cann
To: Mandatory Malpractice Insurance Task Force
Subject: Mandatory Malpractice Insurance
Date: Tuesday, April 16, 2019 1:45:44 PM

I have been a member of the Oregon State Bar since 1978 and the OSB captive insurer with mandatory coverage has been in existence for almost that entire time.

In my opinion the system works very well and is fairly priced.

I think there is one problem which is universal availability of coverage results in the PLF having some pretty serious loss centers, both as to defense and indemnity, without a way to underwrite out of them, but, that is probably a necessary tradeoff to getting mandatory coverage into place.

One thing that happened when the SUA was in place, and still happens with lawyers who don't have economically viable practices, is that they move their offices just over the state line, for instance, to Vancouver, WA. If your principal office is in Washington (or similarly just over the border in Idaho, Nevada or California), then you are not eligible for PLF coverage, but you can still practice in Oregon, at least as I understand it.

I have an office in Washington and the effect for me is that while I could (I am 65 and I don't need to live or have an office in Portland anymore), I have not made Long Beach either my principal residence or my principal place of business. This is for many reasons but one is because I would have to go into the private market for coverage, although I doubt I would have a problem being underwritten.

I assume all comments are public.

Regards,

Cann Lawyers, a professional corporation
By: Frederic Cann
[redacted] – phone Portland, Oregon
360 642 3108 – phone Long Beach, Washington
503 228 6529 – incoming fax for all offices

Portland: Mail and office: [redacted]
Long Beach - Mail: PO Box F, Long Beach, Washington 98631
Long Beach - Office: 212 Pacific Way North, Long Beach, Washington

From:	Emily Lieberman
To:	Mandatory Malpractice Insurance Task Force
Subject:	mandatory insurance for active but non-practicing lawyers?
Date:	Tuesday, April 16, 2019 1:47:43 PM

Hi, I saw your email that the bar is considering requiring malpractice insurance as a condition of licensing.

I am currently not engaged in the practice of law (I'm not working at all while I stay home with 3 kids)--but I keep my license active because I plan to start working again some year soon. I hope you will exempt non-practicing lawyers from this insurance requirement--otherwise you'll be making it a lot more expensive for a lot of moms to keep their licenses active while we take time out of the workforce to be home with kids.

Thanks for considering this.
Emily

From: Gene DeFelice
To: Mandatory Malpractice Insurance Task Force
Subject: Crazy insanity
Date: Tuesday, April 16, 2019 1:59:07 PM

This is a crazy insane and unfair proposal to have mandatory malpractice insurance.

I am a sole practitioner and most of my work is for free for poor people. I've been a lawyer for 35+ years and am a member of the bar of 5 jurisdictions. None require mandatory malpractice. The application of this requirement to me will result in me not providing any pro bono work for poor people. Nice job control freaks.

Gene DeFelice
#30829

Sent from my iPhone

From: Stanton M. Cole
To: Mandatory Malpractice Insurance Task Force
Subject: Mandatory Insurance Rates
Date: Tuesday, April 16, 2019 2:03:03 PM

Dear Sir/Madam,

I haven't read the most recent draft of the proposal for mandatory insurance, but I have contacted the WS PA earlier regarding my position. My earlier email stated the following:

I understand the need for mandatory insurance for attorneys, but I think that there are certain exceptions that should be made.

For myself, my practice is limited to probate and simple estate planning which I have done over the last 40 years. As I am semi-retired, I probably put in fewer than 10 hours a week, and I earn less than $10,000 per year. Under these circumstances I feel that mandatory insurance at the cost normally charged for attorneys is unpropitious high food an attorney in my case, Oh that although there are some insurance companies that charge much less for part-time attorneys.

I would like the Board of Governors to take the above into consideration when making a final decision decision on mandatory insurance.

****

If a proposal for mandatory insurance is passed, I would ask, based upon the factors that I have described above, that any limit on insurance coverage for semi-retired attorneys or attorneys practicing in very limited areas, be set at a lower rate, so that those attorneys need not pay the same insurance premiums charged to attorneys practicing full-time.

Thank you.

Respectfully yours,

Stanton M. Cole, WSBA 2161
2826 40th Ave. W.
Seattle, WA 98199
(206) 473-2928

From:	Rick Ockerman
To:	Mandatory Malpractice Insurance Task Force
Subject:	Why I oppose mandatory malpractice insurance
Date:	Tuesday, April 16, 2019 2:05:32 PM

As a sole practitioner who is semi-retired and headed toward retirement in another two years, I simply cannot afford malpractice insurance. Frankly, the real reason many, if not most, carry malpractice insurance is for the defense costs, not for anything that might cover an act of malpractice. Mandatory malpractice insurance would force me to retire earlier than I would like because of the cost, and after nearly 40 years of practicing law (almost 38 in the State of Washington) it seems like a very heartless thing for the Bar to do; to force me out because of the wrongful acts of a few that you want to make sure are "covered".
sincerely,
Frederick H. "Rick" Ockerman
WSBA #12248

From:	Kira Franz
To:	Mandatory Malpractice Insurance Task Force
Subject:	Opposed to mandatory malpractice insurance
Date:	Tuesday, April 16, 2019 2:07:05 PM

Hello to the Board of Governors,

I am opposed to the mandatory insurance requirement.

I have been employed by private entities for many years, and so for purposes of my work, I'll be exempt from the requirement. But I wonder how many attorneys realize that if they are required to be covered to practice outside of work (assuming that is required, which is still unclear to me after reading the published report), they won't be able to help friends and family having a rough legal time.

I volunteer for NWIRP regularly, but most of my non-work-related legal exercise happens when a friend calls me to ask about their unemployment payments, or asks for help for a friend facing eviction, or says that they are being stalked and they don't know what to do or who to turn to.

I don't get any pay for these interactions, but I do help, sometimes going so far as to appear in court with folks who would otherwise be wholly unrepresented. I always tell these friends (and friends of friends) that I don't have malpractice insurance, and that they should know that before I help them.

So now, if malpractice insurance is required of me to help these people, and my bar card is on the line if I go ahead without it, I'm going to have to tell that person whose mom is headed into major surgery without a Power of Attorney that, no, they are going to have to get on a waiting list with the Northwest Justice Project or figure it out on their own using Nolo. Good luck, friend.

If I actually made money practicing law, it would probably make sense for me to pay the $2,000-4,000/year for malpractice insurance, but I don't. But I do like helping my friends and friends of friends when time permits, and the world is a better place when those people don't have to go it alone.

I see that you've made an exception (potentially) for entities like NWIRP, but I see nothing for the person who wants to help their friend or family member with zero intention of getting paid. Do you WANT more people with no recourse to an attorney? Surely not. I realize this looks like a minor issue, but when you consider that NEARLY EVERY attorney is occasionally approached by family and friends looking for help in a crisis, it's not so minor after all.

Thank you,

-Kira

From: John Jensen
To: Mandatory Malpractice Insurance Task Force
Date: Tuesday, April 16, 2019 2:08:19 PM

While I have always carried insurance, I have not seen a need for it in the criminal defense area. We will be doing nothing but making insurance companies more money.

--
John Van Dyke Jensen Attorney-at-Law – Serving TriCities, Walla Walla, and SE WA Region
Office: 7014 West Okanogan Place, Kennewick, WA
Phone: (509) 735-8529
Website: www.JensenLawOffices.com

From: James Headley
To: Mandatory Malpractice Insurance Task Force
Subject: Insurance requirement
Date: Tuesday, April 16, 2019 2:09:21 PM

Dear Members of the Task Force,

As you consider exemptions for requiring malpractice insurance, please consider a few members that may be in my position- I am a tenured full professor with no practice and no clients, though I maintain an active bar membership. Please allow an exemption from the insurance requirement for members in my position. I like keeping an active membership, like keep the door open to one day perhaps practicing again(though unlikely), and don't want to take the bar exam again-

Thank you for your consideration.

Sincerely,

James Headley
WSBA #25178

From: Julie VanDerZanden
To: Mandatory Malpractice Insurance Task Force
Subject: Malpractice input
Date: Tuesday, April 16, 2019 2:19:54 PM

Hello,

I currently have a professional limited liability company through which I contract with companies to provide outsourced General Counsel services. This enables clients to obtain GC services on a part-time or on-demand basis.

For each client, I spend a significant amount of time understanding the business and participating in both legal and business discussions. The legal topics are the typical corporate legal issues.

I would be in favor of exempting this type of work arrangement from requiring professional liability insurance. I see it as being no different than the risks an employer takes when hiring an attorney employee. In that regard, I typically ask to be a named insured person on the client's D&O policy.

If there is any additional information I can provide, please let me know.

Thank you,
Julie VanDerZanden
+1 206-390-4621

From: Robert W. Sealby
To: Mandatory Malpractice Insurance Task Force
Subject: WSBA Insurance Task Force
Date: Tuesday, April 16, 2019 2:31:13 PM

WSBA Insurance Task Force:

Prior to my current legal position, I was in private civil practice for 27 years (and insured every year) and am very familiar with the high cost of malpractice insurance .

I adamantly oppose requiring mandatory malpractice insurance for all members of the WSBA. I would suggest, and support, a WSBA rule that requires a licensed attorney to disclose whether she/he has insurance. A prospective client can then make an informed decision whether to hire an attorney who is not insured.

Sincerely

Robert W. Sealby
Chelan County Deputy Prosecuting Attorney
Civil Division
P.O. Box 2596
Wenatchee, WA 98807
[redacted]

Robert W. Sealby
Chelan County Deputy Prosecuting Attorney
Civil Division
P.O. Box 2596
Wenatchee, WA 98807
[redacted]

From:	Wade Carolyn G
To:	Mandatory Malpractice Insurance Task Force
Cc:	"Zack Mosner"; "rknight@smithalling.com"; "alecstephensjr@gmail.com"; "athan.papailiou@pacificalawgroup.com"; "meservebog@yahoo.com"; "kim@khunterlaw.com"; "jkang@smithfreed.com"; "BHMTollefson@outlook.com"; "pjg@randalldanskin.com"; "kyle.s@millernash.com"; "carla@higginsonbeyer.com"; "Dan@mcbdlaw.com"; "rajeev@northwhatcomlaw.com"; "bill@wdpickett-law.com"
Subject:	Mandatory malpractice insurance
Date:	Tuesday, April 16, 2019 2:31:39 PM

I note that I am employed by a governmental agency and am exempt from the Oregon mandatory malpractice rule and will probably be exempt from any Washington rule as well. Nonetheless, as a member of the bar, I have an interest in its operations and compliance with constitutional limitations on restrictions of one's freedom of contract. The last time the membership voted on the concept, in 1986, it was defeated by a vote of 6,971 to 1,693. In 2016, the BOG apparently thought that 5,000 members didn't know what they were talking about, and started another workgroup designed to lead to this taskforce.

My first question about mandatory malpractice insurance is "**What problem is this rule intended to solve?**" The question isn't "Might it be a good idea for most full-time lawyers to have malpractice insurance?" which I think is the question driving the Bar, it asks if there is a recognizable problem that requires the Bar to FORCE (essentially) ALL LAWYERS to spend upwards of $3,000 per year each to retain the right, beyond their bar dues, to practice law AT ALL.

I suggest that this is an elephant gun being used to kill a mosquito. Lawyers in the large firms already have malpractice insurance, because it **is** a good idea. The Task Force itself notes that uninsured lawyers themselves constitute only 14% of Washington attorneys. Mandatory insurance will not only require that 14% to acquire insurance, it will dictate the **amount** of insurance the other 86% must carry.

Although the presentations we are receiving are full-speed ahead, suggesting that it's only common sense to impose a requirement that all lawyers be insured , it takes some digging to learn that ONLY THREE STATES require any form of malpractice insurance. Only Idaho, Oregon, and Illinois have any requirement, and the Illinois requirement is a practice-management approach, which requires those lawyers who choose not to carry insurance to undergo an on-line practice management assessment that also provides four hours of CLE credit—and if they pass, they are not required to carry insurance.

Has anyone considered the constitutional implications of such a restriction of the freedom to contract? Does not a client have a right to contract with lawyers whose rates may be lower because they choose not to purchase malpractice insurance?

The BOG does not have a roving imperative to do good. GR 12.1 sets out the purposes of the bar. Not knowing exactly what problem this rule is intended to solve—indeed, believing that there IS NO PROBLEM, just a general idea that it would be a good idea for most lawyers to have insurance—I found it difficult to identify a particular goal listed in GR 12.1(a) that is advanced by imposing an obligation on every single lawyer in private practice to purchase insurance, regardless of its appropriateness for the business model. I wonder if doing so even falls within the list of specific

activities authorized, but THERE IS NO ALLOWED ACTIVITY that describes imposing such a burden on every lawyer.

So with no particular problem that needs solving, no purpose of the bar association that is served, and no specific authorized activity permitting the restriction of one's freedom of contract, why have so many hours of time been spent chasing a goal that more than 80% of the lawyers who voted on the question last time rejected?

Carolyn G. Wade | Civil Enforcement | Civil Recovery
Senior Assistant Attorney General
Oregon Department of Justice
1162 Court Street NE
Salem, Oregon 97301-4096
(541) 686-7846 Eugene (primarily)
[redacted] Salem (Mondays, usually)

From:	Connaughton Law Office
To:	Mandatory Malpractice Insurance Task Force
Subject:	mandatory malpractice
Date:	Tuesday, April 16, 2019 2:34:19 PM

There are people such as myself who may be retiring from regular practice in a few years that would like to keep the license. How is this situation being dealt with? I would not want to pay a $3000 plus bill for insurance I should or would not need.

Connaughton Law Office
connlawoffice@gmail.com
509.249.0080
509.469.8836 fx

From:	TRACY GILROY
To:	rajeev@northwhatcomlaw.com
Cc:	Mandatory Malpractice Insurance Task Force
Subject:	Opinions of limits.
Date:	Tuesday, April 16, 2019 2:43:01 PM

Rajeev,

Been trying to reach you. I k ow you are busy. So here's the scoop:

Insurance and Dispute Resolution Ideas

1. Has it been demonstrated that there is need to require malpractice insurance?

If so, what was that demonstration?

2. The suggested limits of the required insurance are higher than may be necessary.
What is the basis for such amounts?
Wouldn't 100/300 cover most claims that the bar seeks to protect?

The insurance companies should be consulted as to the mean, median and mode of purchased liability amounts.

Did the Bar consider Self-Insurance?

I believe in having insurance, but requiring lawyers to have it may be counterproductive and creating expenses that are unnecessary to practicing lawyers.

3. Could the Bar achieve the same goals, e.g. protecting the public, by just acknowledging (with a designation) the attorneys who are insured.
Alerting the public that way seems best.

4. If the bar is going to have mandatory coverage, will the Bar negotiate coverage options for the group? And require carriers to have hotlines for advice?

5. Also, other state bars provide for Complaint Dispute Resolution via mediation and arbitration for legal fee disputes and for ethics complaints.
Does WSBA provide that service? If not, I will be glad to advise having been quite active in Missouri Bar's.

Let me know how I can help.

Tracy Gilroy
THE GILROY LAW FIRM
Stanwood, Washington
[redacted]
Sent from my iPhone

From: Robert Leen
To: Mandatory Malpractice Insurance Task Force
Subject: If your going to require malpractice ins
Date: Tuesday, April 16, 2019 2:49:40 PM

Self insure.

From: Daniel Clark
To: Mandatory Malpractice Insurance Task Force
Cc: NWLawyer
Subject: Mandatory Malpractice Insurance for Licensing
Date: Tuesday, April 16, 2019 2:54:26 PM

I have been retired from active practice for several years, but still maintain my license in order to do pro bono legal work on occasion, including petitions for remission of LFOs for clients of the Exit Homelessness Program I have organized and coordinate in Walla Walla, as well as some civil liberties work. During this period, I have never charged a fee for my work on behalf of a variety of nonprofits and low-income individuals, and I don't intend to in the future. Implementing the proposed mandatory insurance requirement would make it difficult for me to continue providing this community service as the profession, the association, and the community would like me to do.

At the very least, any such requirement should exempt licensed attorneys who charge no fees for their services.

Thanks for taking this into consideration.

Best wishes,
Dan

Daniel N. Clark
PO Box 1222
Walla Walla WA 99362
clarkdn@charter.net
509-522-0399

From:	Barbara Hoffman
To:	Mandatory Malpractice Insurance Task Force
Subject:	mandatory insurance
Date:	Tuesday, April 16, 2019 2:56:26 PM
Attachments:	image002.png

I am admitted to the Washington and new York state bar and have practiced more than forty years. I have never had a malpractice claim. I rarely practice in washington but have brought two lawsuits which wre settled in the past six years. mandatory insurance would ne financially prohibitive for me. it would mean I would have to give up my license unless exempt while out of state I maintain and meet cle requirements. New York does not require such insurance.

Sincerely yours,

Barbara T. Hoffman, Esq.
The Hoffman Law Firm
330 W. 72nd Street
New York, NY 10023
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artlaw@hoffmanlaw.org
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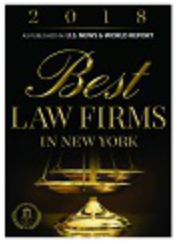

Selected to Super Lawyers: 2010-2017; Blouin Art + Auction Power 2016: 51 High Wattage Women in the Art World

From:	Martin Rollins
To:	Mandatory Malpractice Insurance Task Force
Subject:	Mandatory malpractice insurance?
Date:	Tuesday, April 16, 2019 2:57:48 PM

Good afternoon task force members.

I am requesting an exemption from the proposed mandatory malpractice insurance for the following reason. I am a licensed attorney but I don't actively practice. I am retired from county prosecutor's office practice. The only reason I maintain my license is in the off chance that I am hired in a law office in the future.

Until then, because I do not actively practice law and because I don't have any clients, I respectfully request an exemption from any proposed mandatory malpractice insurance requirement in circumstances such as mine.

Thank you for your time in this important matter.

Regards,
Martin D Rollins
WSBA #14676

From:	Patricia Halsell
To:	Mandatory Malpractice Insurance Task Force
Subject:	mandatory malpractice insurance
Date:	Tuesday, April 16, 2019 3:02:13 PM
Importance:	High

Dear Board of Governors,

Although I have changed careers to become a full-time artist, I choose to maintain an active bar license as a financial security blanket. I have not actively practiced law since 2011, but may need to accept an occasional doc review job in slow periods when I haven't sold a painting for a while.

Besides the psychological security blanket of keeping my license active, I worked hard to obtain my law degree and license, am proud of this accomplishment, so do not wish to give it up.

It would be unfair to make someone like me maintain professional malpractice insurance when I'm not directly serving clients, and the current system we've always had in place adequately addresses my circumstances, by providing a place on the license renewal form to declare that one is not currently servicing clients and doesn't maintain an IOLTA account, etc.

It's enough of a financial hardship for me to pay the annual dues to keep active a license that I'm not currently using. Yet, in this uncertain economy, I feel it would be imprudent for me to not keep my license active. Please do not put another financial burden on me by requiring that I also maintain malpractice insurance.

Thank you for your consideration.

Patricia Halsell
WSBA #14032
[redacted]
www.PatriciaHalsell.com

www.Instagram.com/pathalsell

From: Wes [redacted] Hensley
To: Mandatory Malpractice Insurance Task Force
Subject: Mandatory Mal practice insurance Comment
Date: Tuesday, April 16, 2019 3:07:03 PM

Greetings:

My name is Earl W. Hensley III. WSBA # 12137. Mandatory Mal Practice Insurance is a bad idea. On the surface it is designed to protect the consumer. But in reality it only makes the insurance companies rich and puts the consumer at more risk.

Mal Practice comes from sloppy work on the part of the attorney. If the attorney is risking his or her own fortune, indeed his or her own livelihood then one would expect them to exercise great care and thus reduce their exposure. In the end it will be the insurance company that determines who may and may not practice law. No coverage offered at a honestly reasonable rate = no practice.

I would expect that the WSBA would be as effective in policing the rate structure for insurance coverage as it has been in controlling the fees charged for CLE credits.

Big firms would be able to "self insure" but I doubt that would be offered to small or solo practices and that would of course result in fewer small and solo firms. That of course would result in all of those wonderful "socially beneficial" programs wilting away. Never happen you say. Look at the medical field. Doctors associate with huge medical corporations because they cannot afford the costs of medical malpractice.

Perhaps the answer is to require legal malpractice for certain ares of practice like S&E, tax law, or patents & copyright law. Thank you for considering my comments. Respectfully submitted, E.W. "Wes" Hensley WSBA 12137

From: MICHAEL GOLDENKRANZ
To: Mandatory Malpractice Insurance Task Force
Subject: Re: Special Board Meeting on Mandatory Malpractice Insurance April 22
Date: Tuesday, April 16, 2019 3:14:14 PM

Yes, to mandatory price effective malpractice for attorneys, other than in house, volunteer, emeritus, retired,

or others that should be exempt or self insured by their organization. The options and prices should be very competitive,

> Special Board Meeting on Mandatory Malpractice Insurance April 22On April 16, 2019 at 1:33 PM Washington State Bar Association <noreply@wsba.org> wrote:

Washington State Bar Association

All members are invited to provide direct feedback to the WSBA Board of Governors about the Mandatory Malpractice Insurance Task Force Report recommending malpractice insurance as a condition of licensing, possible exemptions, or anything else regarding the report during a special board meeting from **1-5 p.m. Monday, Apr. 22**, at the WSBA Conference Center. **Participant call in: 1-877-331-7677**. No access code is needed. Callers will be greeted by an operator and placed into the conference call. Check the board's webpage the day of the meeting to view a live webcast. Members are also invited to submit supporting materials or more information to insurancetaskforce@wsba.org. The board will possibly take action at its meeting in May on whether to require mandatory malpractice insurance for lawyers, with specified exemptions, as a condition of licensing.

WSBA seal

Washington State Bar Association
1325 Fourth Ave., Suite 600
Seattle, WA 98101-2539 | Map
Toll-free: 800-945-9722
Local: 206-443-9722

From:	Marnee Milner
To:	Mandatory Malpractice Insurance Task Force
Subject:	feedback on this issue
Date:	Tuesday, April 16, 2019 3:38:43 PM

To Whom it May Concern:

I am a member in good standing of the WA Bar but do not practice law. I am a forensic psychologist and my practice consists of evaluation work. If required to purchase malpractice insurance simply to hold an active Bar License then I will need to switch to inactive status - which would decrease the amount of revenue from me to the WSBA.

If you are to require malpractice then I urge you to have a caveat for those of us who have an active license but do not practice.

Thank you,
Dr. Marnee Milner

Marnee W. Milner, J.D., Ph.D.
Licensed Psychologist
Forensic and Clinical Psychology/Neuropsychology

PHYSICAL ADDRESS
Milner Evaluation and Consultation Services, INC
[redacted]

MAILING ADDRESS
Milner Evaluation and Consultation Services, INC
4742 42nd Ave SW, #410
Seattle, Washington 98116
Tel: 206.548.4709
[redacted]
www.drmarneemilner.com

From:	Douglas Scott
To:	Mandatory Malpractice Insurance Task Force
Subject:	mandatory malpractice
Date:	Tuesday, April 16, 2019 3:38:52 PM

Dear Task Force,
I have been practicing law in Washington for over 42 years and have had malpractice insurance as far back as I can remember. I participated at a previous call-in session on this issue conducted by the WSB. Prior to my call being heard I listened to several callers and they were ALL opposed to mandatory malpractice. My call was in favor of the current system of indicating whether the attorney was insured on their WSB profile.

Therefore, I am opposed to making it mandatory, and at the very least believe that the issue should be voted on by the entire Bar members. In the event that it becomes mandatory, then here are some, but not all, of the exceptions that need to be carved out:
1. If no longer involved in the practice of law, but still licensed and acting as an attorney for a family member, such as in traffic or collection matters.
2. If still covered by malpractice tail coverage.
3. If practicing only part time.
4. If a Judge, Judge pro-tem, mediator or arbitrator.

Truly,

DOUGLAS W. SCOTT
Rainier Legal Advocates|LLC

Eastside Office
465 Rainier Blvd. N., Suite C | Issaquah, Washington 98027 | 425.392.8550 (tel) | 425.392.2829 (fax)

Seattle Office
[redacted]

www.rainieradvocates.com f/k/a
www.davisscottlaw.com

From:	Zachary Wright
To:	Mandatory Malpractice Insurance Task Force
Subject:	Comment Regarding Mandatory Malpractice Insurance
Date:	Tuesday, April 16, 2019 3:54:25 PM

Dear Board of Governors:

I am writing to comment on the proposal for mandatory malpractice insurance. While I have had malpractice insurance continuously since admission and generally support the concept to require it, I do have one concern.

The concern is around affordability after a lawyer has unfortunately had a claim or a bar complaint. Certainly, malpractice insurance is reasonably affordable if you have no claims or bar complaints. But I have heard of instances where, after a firm has had even one malpractice claim, the annual malpractice insurance premiums are in the $35,000-$100,000 range, even for a firm of two lawyers. This may not always be affordable.

As far as I can see, the February 2019 Task Force report does not properly address this issue. For example, all of the pricing examples on pages 33-34 of the report regarding affordability cover firms with no claims or bar complaints. How much is it with one claim that resulted from, say, a staff member who made a docketing error? What about a bar complaint, even if it was dismissed? I bet the premium increase is massive. And the discussion of the issue buried on page 51 basically says "well, we haven't heard of problems in Idaho," without any further specifics at all.

At a minimum, the Bar needs to have in the public record what the average insurance premiums really are for lawyers with claims and/or discipline, before it requires insurance for them to keep working.

My suggestion would be either: (1) a cap on the premium that insurance companies can charge (this is essentially what Oregon has for their insurance pool, i.e. everyone pays the same); or (2) an "affordability" or "hardship" exception to the mandatory malpractice insurance requirement. Perhaps a lawyer would be able to obtain relief from the requirement if he/she submitted, say, three quotes from insurance companies, all of which exceeded some hefty price level, and also submitted an affidavit that he or she could not afford the premium given the current state of the lawyer's practice.

We should not be handing private insurance companies control over whether or not a lawyer can continue to practice in Washington. Nor should we be disciplining -- or even disbarring -- good lawyers simply because they had, say, a staff member who made an error, and then they cannot pay whatever massive amount their insurance company demands at the next renewal. No one benefits from that.

Thank you for consideration of these comments.

Sincerely,

Zack Wright
WSBA Bar No. 28714

Zachary A. Wright
Wright Law PLLC
701 Fifth Avenue, Suite 4200
Seattle, Washington 98104
Direct Phone: [redacted]

Main Office Phone: 206-971-3350
Facsimile: 206-577-5099
Email: zwright@wright.pro

From:	Rich Greiner
To:	Mandatory Malpractice Insurance Task Force
Subject:	perspective of a mature lawyer
Date:	Tuesday, April 16, 2019 4:08:39 PM

Greetings; although it sounds like this is a done deal and that the task force is merely going through the motions of permitting input into a done deal, I would like to render a perspective of a 65 year old who has practiced since l983. I work three days a month, mostly maintaining estate plans for existing clients; however there is occasionally a new Will or powers of attorney for a new client. I consider my practice to be very low impact and safe from the client's perspective. I enjoy the practice of law at this level and have very happy clients and fill a niche in my community.

As I read the proposed amendment, I would be required to have malpractice insurance at the same level and same costs as a full time practitioner, most likely at the same cost. I understand that with my choice of part-time there come consequences, but do not see anywhere in the articles that I have read any by the task force of a true grasp of consequences to the community. It seems to be the attitude of the task force that I probably should not be practicing if I do not choose to buy into the kool aid that the task force is mandating.

I have recently talked with at least 20 other lawyers, fine gentlemen and ladies, that I have come to know over the years in the practice of law. We are all of the opinion that the proposal is designed to squeeze us part -timers out and will in fact squeeze us out of practicing law. This is too bad because it does affect the community. As part-timers we are able to offer our services at a lesser price than someone who is full time, due to our reduced overhead; one major component of which is malpractice premiums. I can represent that most of us will simply no longer practice, thus denying the community of a value service and denying the WSBA of our contribution to it's top line.

What bothers us most is that the task force is not being honest with the legal community or public. If the true intent is to protect the public then the public should be given options to make the decision of whom they want to deal with.

One suggestion is to require an attorney who chooses to not have malpractice insurance clearly notify at the onset of representation any potential client of the lack of insurance. This should be in writing and signed by both the client and the attorney. This would give the client the option of hiring whom they wanted, rather than restrict the client's options.

Again, I suspect this will fall upon deaf ears, but it is worthy of consideration.

Thank you. Richard Greiner – WSBA 13230

From: Shannon Underwood
To: Mandatory Malpractice Insurance Task Force
Subject: Opposition to malpractice insurance
Date: Tuesday, April 16, 2019 5:35:23 PM

Task Force, I am a solo practitioner. Though I generally limit my work to my own real estate development firm, I will occasionally advise a friend on legal matters within my area of expertise. I've also done significant pro bono work. If this malpractice requirement is approved, I intend to give up my license.

This proposal seems short sighted and I think it will hurt many of those most in need of low cost or free legal services.

Best regards,

M. Shannon Underwood
[redacted]
Bar No 20087

Sent from my iPad

From: Kathleen Holt
To: Mandatory Malpractice Insurance Task Force
Subject: Mandatory malpractice
Date: Tuesday, April 16, 2019 5:37:17 PM

Greetings,

I am licensed in WA and CT. I have practiced Medicare public interest law in CT for the past five years, but maintain active bar membership in WA as I practiced in WA for over twenty years. My CT office maintains CT malpractice insurance although no IOLTA since we do not typically charge to help individuals and when we do it is post service delivery.

If required to carry malpractice insurance in WA, I will no longer remain an active member of the bar, although I wish to maintain membership in the event I would practice again in WA in the future. Thank you for consideration of out of state active bar members.

Sincerely,
Kathleen Unger Holt
WSBA#23,843

From: Joel Gilman
To: Mandatory Malpractice Insurance Task Force
Subject: Mandatory malpractice insurance
Date: Tuesday, April 16, 2019 6:18:27 PM

Dear Task Force,

I am absolutely opposed to mandatory malpractice insurance for Washington attorneys.

The report reads like marketing literature from the malpractice insurance industry. It appears to rely only on "anecdotal evidence" of the problems arising from the 14% of WSBA members who do not carry such insurance. Surely you can do better than "anecdotal evidence" if you are going to impose yet another mandatory cost on all lawyers.

Idaho and Oregon are the only other states in the US that require malpractice insurance. Oregon does so under the authority of state legislation. Oregon also provides insurance through the bar association. The report discourages this approach, extolling the virtues of the "free market" approach as used in Idaho.

So on the basis of one other state, Idaho, the report now recommends Washington require all attorneys to have malpractice insurance, and to impose this requirement without authorization from the state legislature, and to require lawyers to seek out such insurance from the "free market".

It sounds like another feel-good public relations exercise that will be paid for by members. The beneficiary will be the insurance industry, not law clients. Frankly, I am surprised that the Board of Governors would even consider doing this without a vote of the members and/or state legislation.

At the very least, please hold off on this decision until after the restructure project is complete. Imposing mandatory malpractice insurance raises serious anti-trust issues.

Regards,

Joel Gilman
13322

From: Ted Gathe
To: Mandatory Malpractice Insurance Task Force
Subject: mandatory malpractice insurance issue
Date: Tuesday, April 16, 2019 6:40:29 PM

I strongly suggest the WSBA Board of Governor's get their own house in order before making any further major policy decisions. The pending bill in the State Legislature is further evidence of that.

Theodore H. Gathe
WSBA 5632

From: Ron Phillips
To: Mandatory Malpractice Insurance Task Force
Subject: Mandatory insurance requirement
Date: Tuesday, April 16, 2019 7:02:32 PM

Dear fellow counselors,

As a part time practitioner I definitely support some degree of mandatory insurance for lawyers, however the current proposed one-size-fits-all minimum policy caps doesn't make sense where the attorney is not a full time attorney. This would definitely impact e.g. largely-pro-bono practitioner handling cases part time.

I hope you will consider this in your discussions.

Respectfully,

Ron Phillips
Wsba 44605
Wisbar 1051311

From:	Ron Santi
To:	Mandatory Malpractice Insurance Task Force
Subject:	thoughts on insurance
Date:	Tuesday, April 16, 2019 7:03:25 PM

The Bar could charge every attorney $100 annually which would generate about $2,500,000 that the Bar could use all or part of to buy a pool policy of say $50,000,000 covering all attorneys. Not only would this be much less oppressive than having to buy individual coverage, but would insure the adequacy of coverage. Only a handful of attorneys generate any claims in an entire career so the rest should not be punished with burdensome mandates. Mandatory expensive insurance seems like a remedy in search of an ailment. It will certainly up the depression factor for many of our colleagues.
--Ron Santi
#8817

From: edwin.b.sterner@gmail.com
To: Mandatory Malpractice Insurance Task Force
Subject: Mandatory malpractice insurance - April 22 special hearing
Date: Tuesday, April 16, 2019 7:03:39 PM

I strongly believe that mandatory disclosure (maybe even disclosing whether or not you have a net worth over $XXXX which might be whatever the mandatory minimum insurance coverage would be) rather than mandatory insurance is the way to go.

So this feedback does not get labeled in the "unclear position" category, let me be clear. I oppose mandatory insurance. Here is why.

I have plenty of net worth to make it worth suing me. However, in the one time someone was looking at the possibility of suing me, when he learned I did not have insurance, so it would not be some "faceless" deep pocket covering the litigation costs and any resulting judgment or, more likely, a deep pocket to do the "calculation" and just write a check to make the matter go away, since he knew the the case had no real merit and I would fight it, that disappeared.

If someone commits real malpractice and there is merit to the case, that attorney should be sued whether or not he/she has insurance and most attorney's would be good for a meritorious claim of fairly good size even if it might be a bit painful to come up with the money.

I have the feeling that insurance simply justifies the bringing of unjustified malpractice actions on the "bet" the insurance company will write a check rather than go to the expense to defend. That definitely would have been the case in my one experience.

If someone chooses not to sue merely because the attorney does not have malpractice insurance, then that is a strong indication that they do not really think such a suit is justified. If they think the suit is justified, insurance should have nothing to do with it.

All of my clients know very clearly that I do not carry malpractice insurance and as a result I can charge them less than I otherwise would. All mandatory insurance will do is cause my clients to pay more for something they are not interested in paying for.

Sincerely,
Edwin B. Sterner
WSBA No. 9420

From:	Bree Hamilton
To:	Mandatory Malpractice Insurance Task Force
Subject:	Opinion on mandatory malpractice ins.
Date:	Tuesday, April 16, 2019 7:06:46 PM

Good evening:

I just wanted to provide some feedback on Washington State Bar's decision about malpractice insurance.

While I can see how it protects clients against attorneys who make reckless mistakes, I still think it should be optional.

I believe such a requirement is cost prohibitive and that if an attorney can't afford the cost, or if they were for some reason denied coverage under an open market, then the private insurance companies are the ones deciding who gets to practice law instead of the State bar.

It would also be logical to assume that if insurance is indeed mandatory, then the number of claims would likely increase.

I do hope it remains optional.

Breann Hamilton Cortes, Esq.

From:	Steve G
To:	Mandatory Malpractice Insurance Task Force
Subject:	Opposition to mandatory insurance
Date:	Tuesday, April 16, 2019 7:39:17 PM

I have no personal stake in this, as I've been a government lawyer for most of my career. But, I'd like to add my voice to the "no" votes on this issue. If the Bar wants to mandate something related to this issue, it should require attorneys to inform potential clients in writing whether they do or don't have insurance.

--
Steve Gross
Port Townsend, WA

From: Ioana Hyde
To: Mandatory Malpractice Insurance Task Force
Subject: Mandatory Malpractice Insurance
Date: Wednesday, April 17, 2019 12:46:33 AM

Dear Sir or Madam:

I am a WSBA member in active status practising US immigration law outside the USA in the United Kingdom.

With regards to the proposed mandatory malpractice insurance for WSBA members, kindly please be aware that US attorneys practising outside the USA have extremely limited options for malpractice insurance. To the best of my knowledge, there is only one provider for non-US based attorneys which is Complete Equity Markets, Inc. I will enclose the contact details for them at the bottom of this email.

To the extent that WSBA adopts minimum requirements for malpractice insurance for members, I would urge WSBA to either provide an exemption for non-US based attorneys or otherwise ensure that Complete Equity Markets offers insurance products meeting the minimum requirements.

Thank you in advance for your consideration.

Sincerely,
Ioana Hyde
WSBA#37079

Complete Equity Markets, Inc.

[redacted]

Ioana Hyde | Attorney At Law

+44 (0)208 611 2826 www.ailawoffice.com

88 Wood Street, 10th Floor, London EC2V 7RS
United Kingdom

From:	George Purdy
To:	Mandatory Malpractice Insurance Task Force
Subject:	Mandatory malpractice insurance is LONG OVERDUE
Date:	Wednesday, April 17, 2019 3:48:22 AM
Attachments:	image001.png

George A. Purdy

999 Third Avenue, Suite 2525, Seattle, WA 98104
Telephone (206)382-2600 | [redacted]
www.sksp.com

From:	Wendell Dyck
To:	Mandatory Malpractice Insurance Task Force
Subject:	mandatory malpractice insurance
Date:	Wednesday, April 17, 2019 7:12:41 AM

There needs to be an exemption for those of us who aren't quite ready to go inactive, but who aren't actually practicing law.

Wendell Dyck

massage for seattle inc.

206.660.9139

From: Patrick Vane
To: Mandatory Malpractice Insurance Task Force
Subject: NO ON MANDATORY MALPRACTICE INSURANCE.
Date: Wednesday, April 17, 2019 8:29:14 AM

The board should put this question to a direct vote of the members who will be most affected by this proposed effort.

Mandatory insurance amounts to an unwanted tax on an already over taxed membership. WSBA annual dues are too high already. The WSBA does almost nothing for its members except publish a magazine which contains articles which mostly congratulate themselves on their fancy dinners and various “board meetings” and which look like boondoggles designed to pat themselves in their own backs.

In over 30 years of law practice I’ve never had a claim filed or a even bar complaint. So why should I have to pay for malpractice insurance I don’t want or need.

The WSBA has fallen victim to the lobbyists and scavengers of the insurance industry who are looking to make a buck on premiums.

How much of the WSBA budget has been spent so far trying to get this passed and imposed on a membership which does not need or want mandatory insurance?

How much money has been spent by the insurance companies to provide “studies” to the WSBA who no doubt are rubbing their hands together anticipating all those premiums being paid?

Forget the Board deciding on this bogus issue. Put this issue to a direct vote by the members it affects most and stop spending our dues on expensive studies and meetings for something most members don’t want.

Surely you have better things to do with our money and your time, like improving the pro-bono system for indigent clients or developing a meaningful solution to the homelessness crisis gripping our state..

Patrick Vane
WSBA # 8006
Sent from my iPhone

From: Beth Picardo
To: Mandatory Malpractice Insurance Task Force
Subject: Mandatory Insurance comments
Date: Wednesday, April 17, 2019 8:46:07 AM

When considering exemptions to any mandatory insurance requirement, please consider those of us who continue to maintain our licenses but do not actively practice. There should be a specific exemption for those of us in that category.

Beth Picardo

From:	Patrick Vane
To:	Mandatory Malpractice Insurance Task Force
Subject:	Exemption for experienced lawyers who have never had a claim filed against them.
Date:	Wednesday, April 17, 2019 9:14:39 AM

Here's a simple suggestion:

If the purpose of MP insurance is the protect the public from lawyers who make mistakes, why not have an exemption from mandatory coverage for lawyers who have never had a claim filed against them for malpractice.

I've been practicing for 35 years.

There has never been a claim filed against me for MP.

I've demonstrated by my 35 years of actual claim free practice that I am at no risk of malpractice by the best measure possible: A perfect 35 year no claim record.

Lawyers like me, who have a 35 year perfect record of no claims, present no risk to the public.

Why can't such a lawyer be exempt?

I recommend that a simple exemption be inserted into the rule, should one be adopted, that lawyers who present no threat to the public because they can demonstrate a perfect "no claim" record for a designated number of years, be exempt from any mandatory MP requirement.

Patrick Vane
WSBA # 9006

Sent from my iPhone

From:	Richard Peyser
To:	Mandatory Malpractice Insurance Task Force
Subject:	comment
Date:	Wednesday, April 17, 2019 9:14:52 AM

I am a retired lawyer who keep up bar membership in case I want to go back to practice one day. The bar should not require malpractice insurance from active members who are not actively practicing. This would be an extrememe hardship. best regards Richard Peyser

From:	Pilar Tirado Murray
To:	Mandatory Malpractice Insurance Task Force
Subject:	Comment on proposed, mandatory malpractice insurance
Date:	Wednesday, April 17, 2019 10:55:15 AM

I practice primarily in New Mexico, but maintain my bar membership in the states of Washington and New York. As a solo practitioner, Class of 1995, University of Puget Sound/Seattle University SOL, with a primarily criminal defense practice, I let my malpractice insurance coverage lapse after 20 + years in February of this year. Despite practicing in three states I have never had a claim, the continuing expense is better spent on improving office technology with encryption software, and coverage for the bulk of my practice is provided through my contract with the New Mexico Law Office of the Public Defender.

For the occasional employment, personal injury or civil rights case that I choose to accept, I post notice in my office advising my clients that I am self-insured. This meets the requirements of the NMBA and I trust, will meet WSBA's as well.

Thank you.

Pilar Tirado Murray
Murray Law Firm
[redacted]
P.O. Box 26085
Albuquerque, NM 87125
T: (575) 779-7054/ F: (575) 613-7270
Graduate, Gerry Spence Trial Lawyers' College (2006)
Admitted in Washington, New York and New Mexico

From: jean schiedler-brown
To: Mandatory Malpractice Insurance Task Force
Subject: Mandatory Liability Insurance
Date: Wednesday, April 17, 2019 11:38:06 AM

I have practiced for 40 years ,and carried malpractice insurance since shortly after starting my own practice in the 1980's. I also assisted the City of Seattle to re-write its regulatory code for occupations during the 1970's.

The debate about requiring insurance balances the interest of the public and the rights of business people. Occupations that require malpractice insurance have traditionally done so to discourage competition, since it increases the start-up costs of new, younger members of the occupation. On the other hand, in some occupations, like taxi drivers, collisions are so common that any regulatory scheme will require insurance to protect customers.

How often are there violations by lawyers that will result in a valid malpractice claim? While the likelihood of finding counsel to represent a person in a motor vehicle collision is high, I submit that the likelihood of finding counsel to spearhead a malpractice litigation is low. That is because of the difficulties in proof, the need for expensive expert testimony, the fervent defense that most lawyers will present for their license, and the legal elements that create a need to essentially "try a case within a case". I wonder if it would serve the public more to expand what the Bar has now--a client relief fund. If Bar members could be assessed the expense of buying insurance whether they want to or not, then they could be assessed the expense of contributing more to a client relief fund whether they want to or not.

Second question: How many practicing lawyers do not have insurance? If almost everyone has insurance, then the impact on the profession of requiring it would not be great in any event.

I do not have this data. I assume the committee has it. I would guess, however, that more relief to clients and faster relief, results from a relief fund than a universal insurance requirement. If that is so, then the function of insurance is only to reduce competition from new entries into the professional practice.

Thanks for listening,

Jean Schiedler-Brown, Attorney at Law
Law Offices of Jean Schiedler-Brown and Assoc.
606 post avenue, Suite 103
Seattle, WA 98104
206 223-1888
FAX 206 622 4911

From: Jonathan Parramore
To: Mandatory Malpractice Insurance Task Force
Subject: Opposed to Mandatory Malpractice Insurance
Date: Wednesday, April 17, 2019 10:41:45 AM

Good Morning,

I'm writing to echo many of my fellow attorneys opposing mandatory malpractice insurance. The modern practice of law is too varied impose a blanket rule like the one proposed. Additionally, I agree with another commenter that a rule of this magnitude must be put to a vote of the members.

Jonathan Parramore | Data Scientist II

o: [redacted]

e: [redacted]

Avalara | Tax compliance done right

From: mpmillen@aol.com
To: Mandatory Malpractice Insurance Task Force
Subject: Mandatory insurance
Date: Wednesday, April 17, 2019 10:26:05 AM

I oppose mandatory insurance. The only rule that should exist is that an attorney must disclose in writing to each client whether do or do not have insurance.

Please oppose his rule, as it will only drive up the cost of legal services.

From:	Paul Kanter
To:	Mandatory Malpractice Insurance Task Force
Subject:	Mandatory Malpractice Insurance
Date:	Wednesday, April 17, 2019 1:08:52 PM

I am an out of state member with an active license in Washington . I am in private practice in California with no clients in Washington. I keep an active license in Washington because some day I may move to Portland and it will make me more marketable to be licensed in Washington as well as Oregon.

If an attorney could go inactive and then activate at any time in the future, then I would do that. It would save me a great deal of money. However, Washington does (or at least may) require passing the bar exam if you have been in inactive status of more than three years. That is not an acceptable option for me.

The task force report states that it considered, but rejected, an exemption for attorneys in private practice who do not practice law in Washington. It states that if an attorney is in that position he or she should consider whether he or she needs to be licensed at all.

The obvious response to that comment is my situation which I assume is not unique. I have the active license so that if I move to Portland I can practice in Washington as well as Oregon. I already pay a significant fee for that privilege. I pay the active dues and comply with all CLE requirements. It makes no sense to require me to comply with malpractice insurance requirements to keep an active license that will only be needed if and when I move to Portland.

The report states that it may be difficult to determine whether someone is practicing law in Washington. It may be that for some people there are grey areas (for the most part that would be transactional work that involves Washington residents), but there are no grey areas for attorneys like myself. I can say with 100% certainty that I do not practice law in Washington.

Oregon has a box on its dues that makes me certify that I do not practice law in Oregon a majority of the time. Washington can similarly require that attorneys certify they do not practice law in Washington. If an attorney so certifies but that is not true, I assume that could be the basis for discipline.

I just wish convey to the WSBA that it would be unjustifiable burden to require attorneys who do not practice at all in Washington to obtain malpractice insurance. For me, it would almost certainly mean going inactive and losing the ability to practice in Washington without taking the bar examination.

I appreciate the WSBA's consideration of this comment.

Paul Kanter
WSBA #35194.

From:	Toby Thaler
To:	Mandatory Malpractice Insurance Task Force
Subject:	Mandatory malpractice is bad for low income public interest attorneys
Date:	Wednesday, April 17, 2019 2:41:19 PM

I have been engaged in public interest law for over 40 years. See https://www.linkedin.com/in/tobythaler/

When I was at legal services I had malpractice coverage. However, when working for individual clients and non-law firm non-profits, I have never had coverage.

In my experience the type of legal work I do does not warrant malpractice coverage. The type of cases I handle rarely involve matters with a potential for errors that would result in monetary harm.

I did look into getting coverage a few years ago. The premiums were ridiculously high.

I suggest that the system you have in place for attorneys who steal from clients (Client Protection Fund) could be extended to compensate for clearly proven instances of harm caused by malpractice. I would gladly pay a modest increase in bar dues for such a program.

--
Toby Thaler, WSBA 8318
PO Box 1188
Seattle, WA 98111-1188
206 697-4043

From:	Kenneth Coleman
To:	Mandatory Malpractice Insurance Task Force; Tony Russo
Subject:	RE: Mandatory Malpractice Insurance
Date:	Thursday, April 18, 2019 11:49:13 AM

I am a solo practitioner nearing the end of my career. I do not accept or carry any cases independently, and currently only act as co-counsel (i.e. second chair) on four medical malpractice cases. I am a physician as well which makes my participation helpful on these medical malpractice cases.

The cost of mandatory malpractice insurance would be prohibitive for me and would force me to not participate on these cases, which would be to the detriment of the clients.

Further, a requirement for malpractice insurance reduces the number of attorneys available to the public and therefore falsely assumes that the public is better served. Therefore, the arguments in favor of mandatory malpractice insurance are one-sided and ignore the adverse effects of such a requirement.

Sincerely,

Kenneth H. Coleman, M.D., J.D.

From:	Gerald Steel
To:	Mandatory Malpractice Insurance Task Force
Subject:	WSBA Board of Governors Should Not Support a Requirement for Mandatory Malpractice Insurance
Date:	Thursday, April 18, 2019 6:56:24 PM
Attachments:	4-18-19 League Letter to WSBA Board of Governors for 4-22-19 Meeting.pdf

Board of Governors:

Please find attached the 4-18-19 League Letter to the WSBA Board of Governors for the 4-22-19 Meeting. I will not otherwise participate in the meeting but ask that all Board Members review the attached letter.

Gerald Steel PE
Attorney at Law
7303 Young Rd. NW
Olympia WA 98502
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April 18, 2019 Sent by email to: insurancetaskforce@wsba.org

WSBA Board of Governors
1325 Fourth Ave., Ste. 600
Seattle, WA 98101

Re: April 22 Board Meeting: WSBA Board of Governors Should Not Support a Requirement for Mandatory Malpractice Insurance

Dear Governors,

I submit this letter on behalf of my Client, Attorneys for Access to Justice League ("League"). We request that this Board not send the 2/2019 Draft Revised APR 26 to the Supreme Court for adoption. The Mandatory Malpractice Insurance Task Force ("Task Force") Report ("Report") does not have sufficient evidence or analysis to justify the Report's recommendation.

The Report at 3 concludes, "Lack of malpractice insurance is, fundamentally, an *access-to-justice* issue." But the Report does not adequately address the more significant "*access-to-justice*" issue caused by mandatory malpractice insurance. The Report at 20, Note 110 cites to a December 18, 2018 NORC Survey ("Survey") for the State Bar of California. This Survey found 28% of the general public would not support a law requiring mandatory malpractice insurance for attorneys if it would raise hourly attorney fees by $10.[1] This additional cost will prevent "*access-to-justice*" for people who cannot afford this additional cost. On March 27, 2019, the California Bar Board of Trustees sent a letter to the California Supreme Court that includes this analysis:

> One of the principal arguments against mandatory malpractice insurance is that it would impose an unnecessary financial burden. This financial burden could negatively impact access to justice for the low income population that requires legal services, since low/pro bono lawyers might reduce provision of those services or might have to increase their fees to cover the cost of insurance. These claims were supported in a presentation made to the MIWG[2] by San Joaquin School of Law Professor Andrew Kucera. Professor Kucera discussed his "Practice 99" course, which provides practice management guidance for law students who wish to serve clients with incomes that preclude them from eligibility for pro bono services, but who cannot afford to hire attorneys at prevailing hourly rates (the"99%"). Professor Kucera includes malpractice insurance

1 http://www.calbar.ca.gov/Portals/0/documents/reports/Malpractice-Insurance-Report_Summary_and_Supreme-Court-Cover-Letter.pdf at 16 and 42.

2 Malpractice Insurance Working Group established by the California Bar Board of Trustees.

among the expenses that may be unnecessary and can therefore be eliminated, thereby reducing practice costs.[3]

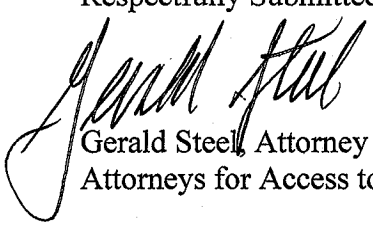
Mandatory malpractice insurance will primarily impact uninsured sole practitioners whose focus is serving low income clients (and it will impact their clients). None of the Task Force members are uninsured sole practitioners. Pages 61 and 62 of the Report list 21 people on the Task Force. Only 9 are active attorneys in private practice (Spitzer, Bachofner, Bridges, Grabicki, Masters, McCauley, Pierce, Pinkham, and Startzel). None of these attorneys are uninsured and most are not sole practitioners. In our opinion, this Task Force does not have representation from those attorneys who will be most impacted by the proposed rule and does not have adequate information concerning the interests of these attorneys' clients. This Board should not recommend mandatory insurance.

The Report at 7 admits that the Task Force was not funded to be able to get professional services of "independent consultants and data analysts." This is not acceptable. The Report at 11 states that in 2017, 2,752 lawyers in private practice were uninsured. At a minimum, all Washington lawyers in private practice should be surveyed and they should be encouraged to contact some of their clients to find out if their clients would want to pay higher hourly fees for malpractice insurance. We believe that their clients would rather minimize their costs to be able to keep some legal services.

There are only two (OR and ID) out of 50 states that are said to have any mandatory malpractice insurance. Only one state requires practitioners to have private insurance (ID). When the federal government mandated health insurance, the price of this insurance skyrocketed. The price for Washington attorney malpractice insurance is also likely to skyrocket if the Supreme Court mandates attorney malpractice insurance. This Board should not recommend such mandatory insurance.

It is understandable that the Task Force is recommending mandatory insurance. All attorneys in private practice on the Task Force have insurance and so they naturally, being competitive, would want all other attorneys to have such insurance. These Task Force attorneys appear to be more interested in getting malpractice suits against currently uninsured attorneys rather than protecting attorney-access to low-income people who need low-fee attorneys. Mandatory insurance defeats "*access-to-justice*" more than it benefits "*access-to-justice*" and so mandatory insurance should be rejected. More information must be collected before any mandatory insurance can be approved. We ask this Board to not recommend any rule that requires mandatory insurance. Other options used by other states should be given greater consideration to provide more protection to the public.

Respectfully Submitted,



Gerald Steel, Attorney
Attorneys for Access to Justice League

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3 Same cite as for Note 1 at 16-17.

From: [redacted]
To: Mandatory Malpractice Insurance Task Force
Subject: RE: April 22, 2019 Special WSBA Board Meeting on Mandatory Malpractice Insurance
Date: Thursday, April 18, 2019 9:27:49 PM

TO : WSBA Insurance Task Force
WSBA Board of Governors

RE: April 22, 2019 Special WSBA Board Meeting on Mandatory Malpractice Insurance

Thank you for the opportunity to provide input on this matter actively considered by the WSBA Board of Governors.

I write from the perspective of a WSBA attorney member (from District 2) who is retired , and who does not practise law . I sincerely hope that the Committee/Board consider granting exemption to this category of attorney members.

The programs of WSBA and other institutions are intellectually enriching. I have enjoyed these opportunities to be informed in the diverse, evolving role of law in society and in civilisations in the world.

If mandatory malpractice requirement without exemption for retired attorney members comes into effect, I will have to reluctantly consider resigning from WSBA. I hope this does not happen.

Sincerely,

Annie Wong Daly

WSBA attorney member (District 2)

From:	Chris Homer
To:	Mandatory Malpractice Insurance Task Force
Subject:	Reasons to Vote Against Mandatory Malpractice for WA Bar Licensing
Date:	Friday, April 19, 2019 11:54:30 AM

Good morning,

I am emailing you to voice my strong opposition to mandatory malpractice insurance for bar licensing. This issue disproportionately impacts newer attorneys, both due to their hardship in absorbing the cost and the lower percentage of claims filed against.

Based upon the responses, this is obviously not a popular "solution" with WA attorneys. A more reasonable approach would be the option discussed to incorporate mandatory disclosure.

Further, the "Task Force" thoroughly represents insurance, malpractice, and established "big law" interests, but there is a dearth of newer, solo practitioners. This begs the question, who's interests are being represented in this report?

I have discussed this with my friends and colleagues and most agree that we will vote against members of the Board of Governors who support this and urge our friends and colleagues to do so as well.

A final note, there are many dues-paying attorneys who are working full-time and practicing law part time, or minimally, who would prefer to remain active, but will be forced out and will not pay their bar dues because of this.

I urge you to read these comments and represent the attorneys who you were elected to represent by voting against mandatory malpractice insurance for WA Bar Licensing.

We are watching your votes, please choose correctly!

Thank you,

Chris

From:	Athan Papailiou
To:	Doug Ende; Hugh D. Spitzer
Subject:	FW: Mandatory Malpractice Insurance-BOG special meeting
Date:	Friday, April 19, 2019 1:07:25 PM

From: Stan Sastry [mailto:stan_sastry@frontier.com]
Sent: Friday, April 19, 2019 12:03 PM
To: 'Rajeev Majumdar'; 'Dan Bridges'; 'Carla Higginson'; kyle.s@millernash.com; 'Dan Clark'; 'PJ Grabicki'; BHMTollefson@outlook.com; 'Paul S'; jkang@smithfreed.com; 'Kim Hunter'; meservebog@yahoo.com; Athan Papailiou; rknight@smithalling.com; 'Alec Stephens'
Subject: Mandatory Malpractice Insurance-BOG special meeting

Respected Board of Governors,

I am strongly opposed to the imposition of mandatory malpractice insurance as condition of law practice. My opposition stems from: (1) personal financial hardship because of the limited nature of my law practice; (2) very hard to get low cost malpractice insurance as a solo practice patent lawyer; (3) because the Task Force Report is unconvincing as to the need to impose malpractice insurance (see below my analysis); and (4) my law practice will undoubtedly take a major financial hit from the imposition of malpractice insurance, which could shorten my ability to serve independent garage inventors and small businesses at lower cost.

At various times, including this, I have written my opposition to this issue to the BOG, the Task Force and its Chair. I have nothing more to add to what I have already written, which means there is nothing to call in or say in person at the special meeting. My various letters speak for themselves. It is now up to the BOG to show objectivity and vote down this ill-conceived mandatory malpractice insurance recommendation by the Task Force.

Thank you for your attention.

Stan Sastry
#36391
The Law Office of Stan Sastry PLLC
PO BOX 13069
Mill Creek, WA 98082

Phone/FAX 425-357-6241

Letter to the Board of Governors:

As a Washington lawyer I am writing my response to the Final Report of the Malpractice Insurance Task Force. I am opposed to the imposition of Mandatory Malpractice insurance for personal reasons, and for reasons that the Final Report is not an unbiased analysis of Washington State situation right now with respect to solo practitioners, who bear the brunt of the negative impact by the recommendations of

the task force.

My personal objection to carrying malpractice insurance: I am an intellectual property-patent lawyer. I simply cannot afford malpractice insurance. I just don't make enough money to buy malpractice insurance. Clients have become so cost-conscious that they simply expect bargain basement prices for my services. Even small businesses will not pay my hourly rate. If I were to buy malpractice insurance, the premium per year and future increases in premiums would be 30-50% of my revenue. Malpractice insurance for patent practice is almost impossible to get if you are a solo private practitioner. Even if I give a flat fee for clients, my actual hourly rate is less than $15 for the amount of work I put in for some patent, trademark or copyright cases. If I add the cost of all the CLEs, business cost, rents, bar dues, taxes etc., there is practically very little revenue left for profit. This is quite untenable. The recommendation of Malpractice Task Force is unworkable in my practice. It is either buy malpractice insurance and go broke or quit.

Remarks on the Final Report of Malpractice Insurance Task Force:

1. The sample size of the law firms examined is statistically insignificant compared to the total number of solo and small firm lawyers in the state of Washington. According to task force numbers (Page 8, item 1) 61.5% (19,813/32,189) of active WA lawyers are in private practice. However, the Task Force gives only 3 examples of malpractice insurance policy premiums for Firms A-C. This is a statistically insignificant sample of the cost of buying malpractice insurance. Clearly, the task force is cherry picking or is unwilling or unable to collect a broader demographic and statistically significant data. As a result, the cost of malpractice insurance is skewed toward a lower amount. Ideally, the task force should have presented a more unbiased statistics of malpractice insurance cost in Washington based on practice areas and firm size *vis-a-vis* cost of insurance premiums per year and rates of increases in premiums per year.

2. The task force's approach is flawed because nowhere in the report it affirmatively makes a case for need to mandate malpractice insurance at this time. What has changed in the practice of law in Washington that requires a change in the court rule to mandate malpractice insurance? In other words, what is the new problem that has arisen which is solved by mandatory malpractice insurance? Instead, the Task Force makes pithy high falutin conclusory virtue-signaling assertions like:
   "Lawyers in private practice who do not carry malpractice insurance pose a significant risk to their clients" See Page 3.
   "Lack of malpractice insurance is, fundamentally, an access-to-justice issue, and the Task Force has concluded that it is more than appropriate for lawyers to ensure their own financial accountability." See page 3.
   No independent concrete proof is offered as to the veracity of these assertions or to back up these assertions with evidence such as statistical number of Washington malpractice cases that have been decided by the Supreme Court where a sanctioned lawyer without malpractice insurance actually did not

comply with the Court order to compensate the injured client. Instead, we are supposed to believe these assertions as self-evident truths because, otherwise we should feel guilty

3. Furthermore, the Report claims "A license to practice law is a privilege, and no lawyer is immune from mistakes." This is another example of an unexamined virtue-signaling statement (more like an aphorism) designed to tug at your heart and elevate the "nobility" of the profession. Firstly, a license to practice law is NOT a privilege. A license by definition is a PERMISSION to do something (Contacts 101). A license to practice law is hard EARNED and NOT simply granted by a fiat, like in a monarchy. In our profession, a license as a lawyer is EARNED by going to law school, earning a law degree, passing the bar, paying bar dues etc. Secondly, if the license to practice law is a PRIVILEGE, why are there upwards of 32,189 practicing lawyers in WA, and growing by 500-1000 every year! Shouldn't a PRIVILEGE by definition be conferred on a few only?

4. The practice of law is not a "privilege". It is an EARNED RIGHT to a career path to make money (a property right), like any other employment career. It is a fundamental property right under the Fifth Amendment of the United States Constitution (No person shall ---- be deprived of life, liberty, or property, without due process of law). By mandating malpractice insurance as a condition of licensing, the WSBA would be imposing a prior restraint on a Fundamental Right to earn money (property), in my humble opinion. The WSBA's mission statement includes client (public) protection. In this sense, if WSBA (a quasi-governmental agency created by the WA State Bar Act) mandates malpractice insurance as a precondition for licensing, it is taking my property right under the Fifth Amendment and using my property for public use because WSBA is in the business of public client protection i.e., public use. This is a violation of the Fifth Amendment due process.

5. The malpractice insurance task force report states that its recommendation is consistent with the "client protection" mission of the WSBA." "The Washington Supreme Court and the WSBA have a duty to protect the public and maintain the integrity of the profession." See Page 2. If so, the WSBA should raise money from the public for the public's own protection (from lawyers-good or bad) and <u>not</u> mandate the lawyer dues for client protection. It is like robbing Peter to pay Paul. This whole idea of "client protection" needs a closer examination. It is based on the false premise that clients are unsophisticated and can be easily led by the nose by an unscrupulous lawyer. Nothing could be farther from the truth. In my experience, the average client who walks into my office is a shrewd intelligent person who knows what she wants and knows that there are many options available. The idea of "protecting the client" as a raison d'être for the existence of Bar Associations is a figment and is outdated. The real way to protect clients is to ensure that ONLY very high quality lawyers are licensed. This starts with drastically cutting down the law school admission numbers, have very high standards for law school accreditation and admissions, and have not more than one law school per

state (except for large states like CA or TX), make the bar exam so tough to pass that only a few hundred takers per year will pass the bar exam. That is the right way to ensure "client protection" because only highly qualified and motivated lawyers will be allowed to practice. Mandatory malpractice insurance will not reduce the number clients injured by lawyers facing disciplinary action.

6. Elsewhere the Task Force makes another indefinite assertion: "Solo and small firm practitioners represent a disproportionate share of the malpractice claims." Page 18. If the highest number of malpractice claims were on solo and small firms nationwide, that is because the highest numbers of lawyers are in solo and small firms. How is that a "disproportionate share of the malpractice claims" against solo and small firm lawyers? Quite the contrary, it is to be expected! In Washington, if only 14% of lawyers are uninsured (page 11), that means most of the malpractice claims are against the 85% that are insured. This means that the small fraction of uninsured lawyers i.e., 14% DO NOT contribute "disproportionately" to the total number of malpractice victim claims. This also means that lack of malpractice insurance has no bearing on malpractice claims. The corollary is that lack of malpractice insurance makes the lawyer more cautious in taking on clients.

7. The Task Force recommended that "The required minimum coverage should be $250,000 per occurrence/$500,000 total per year ("$250K/$500K")". Page 45. "In Washington, for all claims, its average loss payment was $60,548 and average loss expense to defend those claims was $20,406." "Nationally, 89.1% of malpractice claims are resolved for less than $100,000 (including claims payments and expenses)". See Page 17. This statistic shows that the Task Force recommendation on minimum coverage for malpractice insurance is over-inflated by a factor of 2.5-4. The Task Force appears to have presented its "$250K/$500K" minimum coverage arbitrarily without a rationale or evidence. Where is the evidence that such highly inflated malpractice coverage is warranted? This is again an example of capricious and/or lack of reasoning displayed in the task force report.

8. Testimonial evidence in the task Force report is limited to a Law Professor, (who does not really practice law on a daily basis), an insurance industry person (lobbyist) and a state bar executive (may be a non-practicing bureaucrat). No testimonial evidence has been presented in the report from Washington solo and small practice attorneys (with or without malpractice insurance), who will be highly impacted by the Task Force Recommendations.

9. CONCLUSION: My assessment of the malpractice Insurance Task Force report is that the report is an advocacy document. It is not a comprehensive and objective analysis of the two key questions: Why is there an urgent and imminent need for all lawyers in Washington to carry malpractice insurance. Why we should change the existing APR or Court rules regarding malpractice insurance as a condition for license to practice law in Washington. On these two key questions the task force report is unfortunately not convincing in its

analysis. The Report has some interesting statistics. But the conclusions of the report do not come from these statistics. The report is heavily biased in favor of mandating insurance coverage because it is supposedly a virtue ("access-to-justice issue") and an obligation ("privilege to practice law", "client protection") as a good lawyer to have malpractice insurance. It never addresses the core question: Why now mandatory malpractice insurance? The Report pretends to be comprehensive by padding itself with large amounts of facts and figures in terms of statistics; bombastic and virtue-signaling grandiose and aspirational statements (some I have referenced above); and has conclusory statements that are not derivational but assertive. I RESPECTFULLY URGE THE BOARD OF GOVERNORS TO REJECT THE RECOMMENDATIONS OF THE MALPRACTICE TASK FORCE.

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Mill Creek, WA 98082

Phone/FAX 425-357-6241

From:	A. Stevens Quigley
To:	Mandatory Malpractice Insurance Task Force
Subject:	Malpractice Insurance Issue
Date:	Friday, April 19, 2019 1:34:05 PM

Dear Sir or Madam ~

I am a member of the bar.

I wrote earlier to advance the position that a “retired” member of the bar, who chose to retain active membership, should not be required to carry malpractice insurance if he or she does not have private clients.

I also think that it is premature to enact a rule on malpractice insurance at this time. The state Supreme Court is studying bar structure in light of the Janus decision. It seems to me that the malpractice insurance issue should be tabled until the Court determines what should be the contours of the bar. Until we know the framework of the bar, it is difficult to know what can and should be mandated.
~ A. Stevens Quigley, #5787

From:	Ryan Lee
To:	Mandatory Malpractice Insurance Task Force
Subject:	Mandatory Malpractice Insurance for Bar Licensing - Comments
Date:	Friday, April 19, 2019 3:21:33 PM

Hello, I am writing to comment on the required malpractice insurance as a condition of bar licensing.

I believe this is an important issue and I am glad it is being addressed by our bar association. My argument boils down to whether or not there will be a centralized insurance carrier for WA attorneys to use. I strongly advise extensive research into the system that the OR state bar uses. Simply speaking, they have mandatory malpractice insurance in order to be licensed, but they also provide a company with which to accomplish that in a cost effective way.

I do not feel that one should exist without the other. As a new attorney, we are the primary group damaged by this requirement. Long practicing attorneys who have established themselves already should absolutely be required to carry malpractice insurance to maintain their license. For those of us starting out, however, we may not have the ability to front the cost at the beginning of our careers.

I would propose a system similar to the state of Oregon. Thank you for your time.

Best regards,
Ryan Lee
WA License #: 54160
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Ryan Lee
Attorney at Law
[redacted]

From: Cameron Collins
To: Mandatory Malpractice Insurance Task Force
Subject: Mandatory Malpractice Insurance Comment
Date: Friday, April 19, 2019 5:27:46 PM

To Whom It May Concern:
I am writing to express my opposition to adopting a mandatory malpractice requirement for licensing. As an attorney who works primarily with individuals who cannot afford large legal bills, forcing me to earn most of my money as an adjunct professor, the requirement would essentially end the practices of attorneys who are trying to help those who cannot afford the exorbitant prices most attorneys in our state charge. Our entire profession is built on a pricing model that is not sustainable for the average individual. There is already a significant access to justice issue with the law for the common person in our state, and this requirement would only create an even larger gap.

Cameron J. Collins

Rain City Law, PLLC

www.raincitylaw.com

From:	M Buttermilk
To:	Mandatory Malpractice Insurance Task Force
Subject:	Issue of Mandatory Malpractice Insurance
Date:	Saturday, April 20, 2019 11:17:36 PM

Dear Task Force Members:

Thank you for the opportunity to provide input on the issue of mandatory malpractice insurance.

1) Our profession is highly regulated. In order to become a member of the Washington State Bar, each of us had to go through an extensive background check to sit for the bar exam, then pass the Rules of Professional Conduct exam and the Washington State Bar Exam. Subsequently, we take continuing legal education courses, including ethics education. We pay for the expenses of being members of the Washington State Bar as well as the expenses of the continuing legal education courses, and the significant expenses of a law practice.

There are many challenges in running a law practice. We have to make practical decisions about finances virtually every day. If we foul up on the ethics side of the practice, we can be disciplined by the attorney regulation authority, including the potential of losing our licenses. If we foul up regarding our legal services to a client, we can be found accountable financially. WE ARE FINANCIALLY ACCOUNTABLE WHETHER WE CHOOSE TO HAVE MALPRACTICE INSURANCE OR NOT. Does malpractice insurance make the attorney practice more competently and diligently? No. In reality, it might have an opposite effect. I will do right by my client, period, and not because of an insurance policy. The public interest is still protected. Let the attorney make this decision in his or her own prudence and wisdom.

I am opposed to "mandatory" malpractice insurance.

What if the members of the Washington State Bar in its collective wisdom are allowed to vote on this issue? It is quite possible that the requirement of malpractice insurance would fail. Of all the information provided at this time via the task force, there is not compelling concrete evidence to require malpractice insurance, while there is abundant speculation about how its serves the public interest.

2) As a member of other state bars, not all require malpractice insurance. They do require you to report annually if you carry it or not. In those bars that do require malpractice insurance, the insurance is only required if you are "ENGAGED IN THE ACTIVE PRACTICE OF LAW IN THAT STATE." This provision makes common sense in those states with the requirement of malpractice insurance, as otherwise the requirement can be deemed an overreach and impose an undue financial burden on those attorneys, for example, who are "active" bar members of the state, but are not "actively engaged in the practice of law in that state."

Thank you for your consideration.

Sincerely,

Michael

Michael S. McNeely
WSBA No. 43658

From: Piroozmandi (US), Farid
To: Mandatory Malpractice Insurance Task Force
Subject: proposal to require malpractice insurance as a condition of bar licensing
Date: Sunday, April 21, 2019 1:20:10 AM

Dear colleague,

As with regard to the WSBA special board meeting to hear final comments regarding a task force proposal to require malpractice insurance as a condition of bar licensing, I would like to bring to your attention the following points.

1- Solo patent attorneys focusing on preparation and prosecuting of patent applications would have difficulty getting malpractice insurance coverage at a reasonable cost, if at all they can get insurance coverage.

2- Attorney members of WSBA who are employed by a non-legal corporation and do not practice law will have no reason to get malpractice insurance, even though they want to maintain their good standing as members of the WSBA for future practice of law.

Regards,

Farid Piroozmandi
WSBA ID: 39612
Boeing Intellectual Property Management
[redacted] Office
[redacted] Mobile

From: Mark E Allen
To: Mandatory Malpractice Insurance Task Force
Subject: Mandatory Malpractice Insurance
Date: Sunday, April 21, 2019 10:56:44 AM

Task Force Members

I am a retired attorney, having been engaged in the private practice of law for over forty years. During those years of practice there was never a malpractice claim made against me, nor was I ever the subject of a disciplinary action initiated by the WSBA.

Even though I am retired, I remain an active member of the WSBA. I have occasion to offer advice to friends and acquaintances, usually relating to contracts review and estate planning matters. I also provide pro bono services to several non-profits I have been associated with for many years. And finally, I have a very modest contract with the Squaxin Island Tribe to provide estate planning services to Tribal members. Last year I reported less than $10,000.00 to the IRS as income from the practice of law, and approximately $1,000.00 of that went to the WSBA for membership dues and CLE expenses.

Mandatory malpractice insurance will force me to give up the practice of law - completely. It will deprive those that I do represent of what I like to think of as competent legal advice at a bargain rate, or no rate at all.

Please explain to me how I am a threat to the legal profession, and how those that I do represent will be better off when people like me are no longer allowed to practice.

Perhaps an exemption would be in order for those who, by affidavit or otherwise, state: (1) they are 65 or older; (2) they are not actively engaged in the practice of law (no office/no listings or advertisements); (3) they expend less than a certain amount of hours per month or year in providing legal services; and (4) they make less than a threshold amount from practicing law.

My first choice is there be no mandatory malpractice mandate unless the Task Force can come up with compelling evidence and arguments as to why such a mandate is needed. And if a mandate is adopted, then there should be an adequate exemption that would allow attorneys like me to continue to offer counsel for people in need.

Respectfully

Mark E. Allen
WSBA #13849

From: Hriste Stojanovski
To: Mandatory Malpractice Insurance Task Force
Subject: Re: Mandatory Malpractice Insurance
Date: Sunday, April 21, 2019 12:59:20 PM

Dear Board of Governors,

I'm writing to voice my opposition to the task force recommendation to make malpractice insurance mandatory. I've read the task force report and found it unpersuasive. I'm a soIo practitioner and currently do not maintain malpractice insurance for financial reasons. I have been licensed since 2010 and started my career with malpractice insurance. My yearly number of clients is relatively small as are the total fees I collect; thus, a $2-3k yearly insurance fee on top of bar dues, other business expenses, and student loan payments is significant for me and other similarly situated members of the bar. Since I have a small client base, the chances of my making a mistake are greatly reduced, and I have never had a client file a malpractice claim against me. I represent my clients to the best of my ability with or without malpractice insurance as I'm sure the overwhelming majority of uninsured attorneys do as well.

I take issue with the task force's negative characterization of solo practitioners. The people of Washington are better served with a large pool of solo practitioners to choose from than a legal landscape dominated by larger firms. The current disclosure system and free market forces are sufficient to safeguard clients and reduce the total number of uninsured attorneys. If I regularly represented more clients, I would get malpractice coverage again because then it would make financial sense and the risk of my making an error would increase.

If the Board decides a mandatory malpractice system is the best way forward, I ask the Board carve out an exemption for low volume practitioners.

Sincerely,
Hriste Stojanovski #42472

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Sincerely,
Hriste Stojanovski
H. STOJANOVSKI, PLLC
(206) 905-1174

From:	john goodall
To:	Mandatory Malpractice Insurance Task Force
Subject:	Mandatory Insurance decision was made after only four task force meetings
Date:	Sunday, April 21, 2019 8:08:31 PM

A jury,picked by a hidden hand, came to the conclusion that was intended by that hand by claiming that it's decision was motivated by a desire to protect consumers.
Yet not one single "consumer" was interviewed, and the decision to "go boldly ahead" and approve mandatory insurance was made, according the the minutes, during the 4th of 13 meetings.

The first meeting specifically stated that the "key issue" of the Task Force was "to gather more information concerning the correlation between grievances against lawyers and lack of liability insurance", but this was never accomplished, and was abandoned after cursory testimony during one meeting in May.
The only reference to malpractice grievances against Washington State attorneys came during the that one meeting and was provided by Mark Johnson who specializes in representing malpractice plaintiffs. Unfortunately, his testimony does not reveal any facts concerning specific cases regarding Washington State attorneys.
Not only that, but the minutes and materials do not show what facts he presented , if any, or what his testimony was.

Kevin Bank was somewhat more explicit regarding the Client Protection Fund, but he did not really touch the "key issue" and is quoted as saying the CPS has"no evidence whether applicants claims (claims of malpractice) were meritorious".

All the other presentations regarding the " key issue " came from other states and were equally vague and inconclusive.
Then, the minutes show, this topic was abandoned on during the 4th meeting when the task force made a final decision.

To quote from the minutes of May 23: "Now is the time to move boldly regarding the demonstrated problem of lawyers who go uninsured".

The obvious problem is that so called "demonstrated problem" has not been demonstrated anywhere in the minutes or materials.

After that, the task force meetings where taken over by representatives of the insurance industry who were allowed to vote, whereas the members of the WSBA have been denied anything more than "commentary" that probably goes in the WSBA trash can.

This entire process has been odiously shameful and inherently flawed.

john goodall

From:	Linda Patterson
To:	Mandatory Malpractice Insurance Task Force
Subject:	Concerns re the February 2019 Report Issued by the Mandatory Malpractice Insurance Task Force
Date:	Sunday, April 21, 2019 10:39:43 PM
Attachments:	2019.4.21 Comments to the WSBA BOG.pdf

To The Board of Governors:

Please see the attached letter, which expresses some of my concerns regarding the February 2019 Report issued by the Mandatory Malpractice Insurance Task Force.

I appreciate your consideration and would be happy to answer any questions you may have.

Regards,

Linda Patterson
WSBA #25947

April 21, 2019

Via email to insurancetaskforce@wsba.org

RE: Concerns about the Report Issued by the Mandatory Malpractice Insurance Task Force

To The Board of Governors;

As a member of the WSBA, I'm writing in response to the "Mandatory Malpractice Insurance Task Force Report" that was submitted to the Board of Governors in February 2019 (the "Report"). Like other WSBA members, I received an email just last week informing me of the Board of Governors meeting scheduled for Monday, April 22, 2019—the day after Easter weekend—to discuss the Report. Due to the short notice, I have previous obligations scheduled for Monday and am therefore unable to join the meeting. In lieu of participating in the meeting, I'm submitting this correspondence setting forth some serious concerns about the Report.

The Report Acknowledges that the Task Force Failed to Perform a Comprehensive Analysis

The Task Force acknowledges it was not sufficiently equipped to perform a comprehensive analysis of the matters at hand. As the Report specifically states at page 7:

> **[T]he Task Force was charged with developing a recommendation and report with limited resources**, so it focused much of its research and analysis on available sources and studies, the experience of other jurisdictions, and the perspective of industry professionals. **Given the fiscal limitations and its reporting deadline, the Task Force did not perform the types of research and analysis that would have required the services of independent consultants and data analysts**. However, through targeted outreach, the Task Force received a great deal of information, including comments from WSBA members, that **filled in some of these gaps and informed the Task Force's thinking on many key decision points**. (Emphasis added.)

While this candor regarding the limits of the investigation is commendable, it renders the Report deficient on its face. Given the breadth of proposed changes to the status quo—and the potential impact of these changes on members of the public in need of legal services, and on members of the Bar who provide such services—the admittedly anemic analysis in the Report is stunning. Even assuming the Task Force did the best job possible with the limited resources it was apparently given, its investigation and conclusions are clearly incomplete.

Nevertheless, the Task Force members "concluded that they should move boldly and not shy away from difficult proposals" (Report at page 2). It would be one thing to move "boldly" with "difficult proposals," if they were supported by rigorous research, as opposed to an investigation burdened by insufficient resources. It's hard to comprehend how a Bar Association with about 40,000 members would accept such a low standard of review with regard to the contemplation of significant rule changes.

No Proof Presented that Direct Insurance Disclosure Requirement Would be Ineffective

The current version of APR 26 provides that Washington lawyers must disclose to the Bar whether they maintain malpractice insurance, and the information is made available to the public through the WSBA website. In its Report, the Task Force expresses concern that "it is not reasonable to assume that most consumers check the WSBA website to ascertain whether their prospective lawyer has a malpractice insurance policy" (page 41). It seems that this concern could be addressed by adopting a rule similar to the recently enacted California Rule of Professional Conduct 1.4.2 regarding "Disclosure of Professional Liability Insurance":

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

The approach adopted by California seems to strike a reasonable balance between protecting the public and permitting individuals to make informed decisions regarding their legal representation. As set forth at page 42 of the Report, the WSBA Task Force considered, yet rejected, a similar direct disclosure requirement adopted in South Dakota in 1999:

> **Impose More Extensive Insurance Disclosure Requirements**
>
> This approach would be based on South Dakota's RPC 1.4(c) requirement that every lawyer without at least $100,000 in malpractice insurance disclose, on the lawyer's letterhead and in every written communication to a client, that "This [lawyer][firm] is not covered by professional liability insurance." As a rule of professional conduct, the potential consequence of noncompliance is professional discipline.

According to the Report, "South Dakota's disclosure approach **is low-cost from an administrative standpoint and it appears to have reduced the number of uninsured lawyers**" (*Id.*) The Task Force nevertheless rejected the provision adopted by South Dakota, opining as follows:

> At the same time, South Dakota, with a much smaller population and less diverse economy, has a much smaller number of lawyers than Washington. **It is difficult to assess whether this type of disclosure approach would be as effective here**. Many nonlawyers do not know how to find and engage a lawyer, and nonlawyers are often unskilled at reading engagement letters and even less able to evaluate the risks involved in hiring an uninsured lawyer. Finally, notwithstanding South Dakota's disclosure requirement, there are still many uninsured lawyers practicing in that state, and when incidences of malpractice occur with damaging consequences, the clients of uninsured lawyers can suffer serious adverse consequences. (*Id.*)

Given that South Dakota's disclosure rule has been in place since 1999, it's difficult to access *why it would not be effective in Washington*.

Page 41 of the Report states that "anecdotal information received by many Task Force members suggests that **most of the general public** (and indeed, many lawyers) assume that all lawyers carry malpractice insurance." This "anecdotal information" conflicts with page 20 of the Report, which states in part:

> On December 13, 2018, the non-partisan and objective research organization, NORC at the University of Chicago, issued a survey of California members of the public regarding legal malpractice insurance and public perceptions regarding whether lawyers should carry malpractice insurance. The survey revealed that **almost one in four members of the public (23%) believe that lawyers are currently required to carry malpractice insurance,** with only 10% believing they are not required to do so and 65% unsure. (Citations omitted.)

First off, 23% of the public is not "most," as claimed by the Task Force's "anecdotal information." Moreover, the Report provides no suggestion why Washingtonians and Californians would differ with regard to their impressions regarding malpractice insurance.

The Report further states as follows with regard to the NORC survey: "Of those surveyed, 78% believed that legal malpractice insurance should be required in order to practice law. Of those who believed that lawyers should be required to carry malpractice insurance, 86% agreed that lawyers should be required to do so even if that means that lawyers might charge higher fees to cover the cost of premiums" (Report, page 20). **There is, however, no indication that the NORC survey asked respondents whether they would be satisfied with a direct disclosure requirement regarding malpractice insurance**.

Moreover, the Report specifically states that "**data shows that decisions about whether to hire a lawyer would likely be impacted by whether the lawyer is insured**" (Report, page 20). If this is in fact the case, then it would seem the best option would be to *disclose* to consumers whether an attorney is insured, and to then let consumers make a decision regarding the impact of that information on their hiring choices.

The Proposed Exemptions are Inconsistent with Regard to Independent Contractor Attorneys

Among the proposed exemptions to mandatory malpractice insurance is the following at page 48: "Employee or **independent contractor** for a **nonprofit** legal aid or public defense office **that provides insurance to its employees or independent contractors**." However, there is no similar exemption proposed for independent contract attorneys, such as me, who work with **for-profit** law firms that provide malpractice insurance coverage for independent contract attorneys.

As I explained to the Task Force in an email dated, November 16, 2018, with regard to the Interim Report dated July 10, 2018:

> According to the Interim Report and the Brochure, the primary purpose of mandatory malpractice insurance is to protect the public. **Notably, the malpractice insurance policies maintained by the law firms I work with include coverage for the activities of freelance attorneys like me, as the policies include language such as "an Insured is defined as, amongst other persons . . . any non-employee independent-contractor attorney to the Named Insured."** To require freelance attorneys to obtain malpractice insurance is therefore not only unnecessary to protect

> the public, such a requirement would provide a windfall to insurance carriers who would collect multiple premiums for effectively the same coverage.

I did not find such an exemption in the Report. Nor did I find any explanation regarding why my proposed exemption was not included in the Report along with the non-profit exemption for contract attorneys. In both the non-profit and for-profit contexts, the point is that the firm "**provides insurance to its** employees or **independent contractors.**" Providing an exemption for independent contractors who work with for-profit law firms would neither pose "a distinct risk to clients" nor create an "access-to-justice problem." It would simply prevent a windfall for insurance carriers and an unnecessary burden on independent contractors.

The foregoing is far from an exhaustive summary of my thoughts regarding the Report, but given time constraints I focused on some key areas. I appreciate your consideration of my concerns and I'm happy to answer any questions you may have.

Regards,

Linda Patterson
WSBA #25947

From:	larry mancuso
To:	Mandatory Malpractice Insurance Task Force
Subject:	Mandatory Insurance exceptions- out of state members - Laurance L. Mancuso
Date:	Monday, April 22, 2019 5:17:21 AM

Laurance L. Mancuso 18103

I have been a WA Bar mbr since 1988.
However, I have not practiced law in WA State since 1994.
I have not had any WA clients since 1994.
I have resided in Florida since 1994.
I practice law in Florida and do not have any WA clients.
The Florida firm I work for does not have any WA clients.
We do have malpractice insurance for Florida.
If mandatory insurance is imposed by the WA Bar, please make an exception for those of us who are WA members but do not have WA clients.
Thank you.

Laurance L. Mancuso
LLMancuso@yahoo.com
407-688-1913

From:	T.K. Chang
To:	Mandatory Malpractice Insurance Task Force
Subject:	Submitted Opinion on Mandatory Malpractice Requirement
Date:	Monday, April 22, 2019 6:07:27 AM

Dear Sirs,

I would like to advocate for an exception to the mandatory malpractice insurance requirement, because I am unable to obtain malpractice insurance, due to the fact that my law firm is affiliated with a law firm in the People's Republic of China, and insurance companies refuse to provide reasonable coverage due to their perceived risks relating to China.

I have been admitted in New York since 1984, and was admitted to Washington in 2019. I am a lawyer at Zhong Lun Law Firm LLC in New York, which has an affiliation with Zhong Lun Law Firm LLP, a firm of over 1900 lawyers based in China.

It is impossible for me to obtain reasonable malpractice insurance due to the litigation risks perceived by insurance companies relating to China.

I respectfully request that any mandatory malpractice insurance requirement be coupled with an exception for lawyers, especially those affiliated with or related to foreign law firms, who are unable to obtain reasonable malpractice insurance.

Yours sincerely,

Takuang Chang
Washington Bar #:54823

From: Keri Olson
To: Mandatory Malpractice Insurance Task Force
Subject: Mandatory Malpractice Insurance
Date: Monday, April 22, 2019 10:34:45 AM

Even though I currently fall into a category that appears to be an exemption, I would no longer be able to offer my pro bono services to clients outside of my company should this become a requirement. I am heartily opposed to this, and, as another commenter has stated, the "WSBA has failed to make its case that the public has suffered in any way from the absence of mandatory insurance, even anecdotally."

Do not do this. You encourage pro bono work, but you would force many of us to quit offering this valuable service if you proceed.

Keri Olson, Esq.
WSBA # 49653
Attorney and Counselor at Law

From:	Susan Barley
To:	Mandatory Malpractice Insurance Task Force
Cc:	Susan Barley
Subject:	Feedback on Mandatory Malpractice Insurance-in-house corporate exemption-cover contractors
Date:	Monday, April 22, 2019 12:06:39 PM

Good morning:

1. First to avoid confusion, I am opposed to the proposal as currently structured.
2. Second, if the proposal is to move forward, I strongly advocate for an enhanced exemption for in-house company attorneys that does not require that the attorney be an "employee". To the extent there is a defensible position that mandatory insurance provides consumer protection and that such protection is not needed in an in-house company counsel situation, the exemption for in-house company attorneys should not be dependent on the technical "tax" status of the in-house lawyer: employee or 1099-MISC (contractor status).
    a. It is no surprise that in-house company lawyers are part of the gig economy; many are short-term; many are hired as contractors so the companies do not need to provide benefits. Regardless of the reason (nearly always outside the control of the lawyer), these lawyers should be exempted from any requirement of mandatory malpractice insurance for EXACTLY the same reasons as the employee in-house company lawyers are exempted.
    b. Requiring mandatory insurance for lawyers who ONLY provide in-house company services (but are contractors rather than employees) provides no added public benefit protection. These companies know they are not hiring outside attorneys, are not seeking lawyers covered by malpractice insurance and indeed, have no intention of paying the expenses of malpractice insurance when they price the services of in-house contract attorneys.
    c. It is my recommendation that the exemption as proposed read: "Employees or independent contractors of a corporation or business entity, including nonprofits;".

Some thoughts:

1. Do not assume that all attorneys want to be employees when they are in-house. Do not assume that it is always preferable to be an employee. Do not assume WSBA can somehow "force" corporations to act "responsibly" by offering benefits and employee status. It is very important that we not make [paternal] assumptions about this on behalf of our membership.
2. There are myriad reasons why corporate in-house attorneys are hired as contractors. No bar association and no rules on malpractice insurance will change how corporations decide to staff up. Many young lawyers are hired on a contractor basis for a trial period; many lawyers (including myself) choose to

provide limited duration in-house services to have a flexible schedule to raise a family and meet family obligations.

3. **Contractor in-house work will not be a viable choice for attorneys if malpractice insurance is required. Lawyers seeking in-house jobs will be put in an impossible situation: forced to pay for insurance if they wish to be hired as a contractor…or if the corporation requires contractor status.**
4. **It will chill opportunities if corporations can no longer hire in-house attorneys as contractors.**

TAKEAWAY: The report highlights "risk to clients" and "access to justice" issues. **NEITHER CONCERN IS IMPLICATED OR ADDRESSED,** WHERE IN-HOUSE CORPORATE ATTORNEYS WHO ARE CONTRACTORS ARE REQUIRED TO HAVE INSURANCE AND EMPLOYEES PROVIDING EXACTLY THE SAME SERVICES ARE NOT.

Please understand that my comments are not intended to address a situation where a lawyer or law firm serves multiple corporate clients in a situation more akin to outside GC legal services. My comments are solely focused on situations where a contractor lawyer is indistinguishable from an in-house employee lawyer as to duties, but has the technical tax situation of receiving a 1099-MISC income form rather than a W-2.

I am happy to respond to any questions.

Thank you.

Susan Barley
WSBA #13411
Susanbarley27@gmail.com
[redacted]

From: dgraham@1stcounsel.com
To: Mandatory Malpractice Insurance Task Force
Subject: Malpractice insurance
Date: Monday, April 22, 2019 12:23:59 PM

Malpractice insurance does not an access to justice issue. By the time someone needs to pursue malpractice insurance, justice has already been violated or denied. It is a quality of practice issue which is the purpose of WSBA cle, testing, enforcement and monitoring.

Why use the word “mandatory”? A “minimum” level of insurance would communicate the standard required.

Why set $250k/500k insurance level? Let attorneys obtain what they think they need (100/300 for example) and require that the amount be disclosed to potential clients…Either way if clients know the amount, law suits are invited.

Possibly set levels of insurance based on an the general level of revenue…ie 100/300 for under 500,000; 250=500 for over 500 but under 2 million etc.

Why should WSBA act as an outlier to the common practice other bar associations…. Only 3 states have the requirement. It is certainly not a commonly accepted practice, are particularly in high population states.

Donald Graham
#22554
[redacted]

From:	Lori Guevara
To:	Mandatory Malpractice Insurance Task Force
Subject:	WSBA Member Input Regarding Mandatory Malpractice Insurance
Date:	Monday, April 22, 2019 12:29:33 PM
Attachments:	image001.png Corr.19.04.22.MandatoryMalInsuranceWSBA.pdf

Dear Board Members:

Please see the attached from WSBA Member 28732, Lori Guevara.

Thank you,

Lori Guevara

Lori J. Guevara, J.D., L.L.M.
Victim Advocate Attorney | Tulalip Office of Civil Legal Aid
6332 31st Avenue NE
Tulalip, WA 98271
(360) 716-4516 (Desk)
[redacted]
(360) 716-0311 (Fax)
Email lguevara@tulaliptribes-nsn.gov

Law Office of Lori J. Guevara, PLLC

[redacted]

April 22, 2019

WSBA Board of Governors

insurancetaskforce@wsba.org

Re: Mandatory Malpractice Insurance Task Force Report

Dear WSBA Board of Governors:

I am a member of the WSBA (Number 28732) and I oppose implementing mandatory malpractice insurance requirements for attorneys licensed in the WSBA.

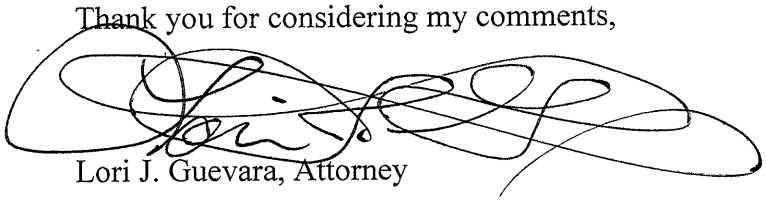
I work full-time as an in-house victim advocate attorney at Tulalip Tribes. Part time, I occasionally represent worthy pro bono or low bono clients.

I am not able to afford private malpractice insurance for my limited private cases. I will be forced to stop accepting my private caseload if I am required to purchase private malpractice insurance.

In case you want more evidence of the good work I do in taking pro bono and low bono cases, I am typically given the WSBA Pro Bono Service Award each year based on my significant hours spent helping those in need of legal services.

Please consider my work with underserved populations and please decline to institute a requirement of mandatory legal malpractice insurance for WSBA members.

Thank you for considering my comments,



Lori J. Guevara, Attorney

WSBA 28732

From: Thomas Hayden
To: Mandatory Malpractice Insurance Task Force
Subject: FW: Active Malpractice Insurance Requirement
Date: Monday, April 22, 2019 2:03:27 PM

For 4/22/19 special meeting re the above subject. This was submitted by me last November and went unresponded to. I'm now re-submitting for this meeting.

MANDATORY MALPRATICE INSURANCE MUST ONLY APPLY, IF AT ALL, TO THOSE WHO UNDERTAKE RERRESENTATION TO WHICH NEGLIGENCE LIABILITY COULD ATTACH!

TLH #18641

From: Thomas Hayden [mailto:hayden60@att.net]
Sent: Wednesday, November 28, 2018 1:45 PM
To: 'insurancetaskforce@wsba.org' <insurancetaskforce@wsba.org>
Subject: Active Malpractice Insurance Requirement

If malpractice insurance is required of all active members, it should only apply to those who are "actively" practicing - simply, doing legal work, be it litigation, counseling, whatever, for which negligence could result in liability. Be advised, there are many active members who aren't doing anything for which insurance is required. Query, then why are they active? Two reasons: First, the Bar has a silly rule that if one is inactive more than three years, he/she can be forced to take the bar exam again. Second, for those practicing in-house, government, etc…, who aren't representing clients, or those who are just looking for a position, many positions require active status in good standing in a bar association. If this goes through, one looking for a position would be required to have malpractice insurance to obtain an offer, when he/she could literally be on the other end of the country and having nothing to do with practicing law in Washington. Nonsense. In my own situation, I have not been in a representation capacity in years. However, I maintain an active license to look for any interesting opportunities and in order to not be inactive three years and be forced to take another exam.

Simply, if this mandate goes through, you will force many WSBA members into inactivity and, ultimately, resignation. To what end? To force them to carry insurance coverage they'll never need? Silly. Liken it to driving a car. If you

have a driver's license (i.e., law license), you only need automobile liability insurance when you actually drive a vehicle (i.e., representation of clients, litigation and other). It's very analogous. In short, do not go down this road (pun unintended). Mandatory malpractice insurance only for those attorneys active and actively representing clients in whatever capacity.

Sincerely, Thomas L. Hayden #18641

From: Debbie
To: Mandatory Malpractice Insurance Task Force
Subject: Mandatory Malpractice Insurance Concerns
Date: Monday, April 22, 2019 3:07:21 PM
Attachments: WSBA_Mandatory_Malpractice_Insurance.pdf

Attached is a letter outlining my concerns with implementing mandatory malpractice insurance as a condition of licensing. Thank you.

23808 NE 51st Street
Redmond, WA 98053

April 22, 2019

WSBA Board of Governors
Seattle, WA

Re: Mandatory Malpractice Insurance Task Force Report

Mandatory malpractice insurance as a condition of licensing as the Task Force Report recommends will be a hardship for many WSBA active members.

First, many current practitioners have chosen their career paths, type of practice, specialties factoring in their costs and profit. For those who have pursued a path that is not particularly lucrative, requiring them to now obtain malpractice insurance could be just enough to affect their livelihood. Yet, I did not understand there to be a specific exemption for those practicing in an area of law that does not pay well. Typically, these are the more noble types of practice and it would be a shame to penalize them.

Second, in my situation, I chose to obtain a WSBA license and keep it active while working for an aerospace company in a position that is not acting as their counsel yet I rely on my legal knowledge and skills every day. However, the company does not pay for license fees, malpractice insurance, or CLEs when the employee is not their counsel. There are two reasons I chose this path. One was because that is what I enjoy doing. The second reason is because the aerospace industry is very cyclic so I planned that working as an attorney would be my fall back if I was laid off and/or my retirement job. A side benefit of this arrangement has allowed me to do some pro bono work and to represent my family when they need me.

However, I can barely justify the ever increasing WSBA annual license fees when I make no money doing a very minimal amount of pro bono work. I have to work diligently to get enough complimentary CLEs to meet the licensing requirements. And, if I have to add malpractice insurance for the little bit of pro bono or family matters, I will be taking a pay hit with no financial benefit for doing so. Because I do not earn my living from the practice of law, I rarely use any of the WSBA extra benefits and information. I do not have time or extra money to spend volunteering or joining in the leadership of the WSBA. I do not follow what is going on because it doesn't directly affect me today or even tomorrow. I had no idea mandatory malpractice insurance was being considered until I happened to thumb through the last issue of the magazine we get. And, that was just a fluke that I took the time to even thumb through it.

Further, I know dozens of WSBA active members who do exactly as I do. I work with many of them. This would be a big impact to many, many of us. And, some of us would have to relinquish our active license which would reduce the WSBA license fees coming in. I'm certainly one of those and I would have to give up maintaining my license so I could practice when I retire from my current work.
Third, mandatory malpractice insurance for active WSBA members is a huge disincentive for all members who do provide or are even trying to get to a position where they can provide a great amount of pro bono and other volunteer work.

I don't totally oppose mandatory malpractice insurance. However, the Mandatory Malpractice Insurance Task Force Report allowed so many exceptions that it was impossible to tell who fell under an exception and who didn't. Yet, there is no exception for the many members in the category that I describe myself to be in. Therefore, maybe there needs to be another category. I'm not sure how this category can be carved out for an exception, but I will give it more thought. Perhaps, there needs to be a requirement based on income from the practice of law. For example, if an attorney's net income is under $40,000, they are not required to obtain malpractice insurance. Another approach could be based on risk of the type of law the attorney practices; e.g., high dollar business transactions, intellectual property, personal injury, etc. would require malpractice insurance; but family law would not. I would be at zero income from the practice of law and the risk of helping an occasional poor person or a struggling family member where I provide many disclaimers about the assistance I provide under such an arrangement is very, very small.

Another way that mandatory malpractice insurance could be implemented is that it only be required for new members starting as of some effective date; and, that current members remain grandfathered under the current law which does not require it. Or, this approach could also be applied by grandfathering by a different measurement such as so many years in practice is exempt or everyone who is still a "Young Lawyer" must obtain malpractice insurance because there is a higher risk of error with less experience.

I'm quite sure this initiative is driven by insurance companies eyeing another avenue of revenue and I hope that the WSBA Board of Governors will not be swayed by that influence, but rather by the needs of all its members and the good to the communities and state.

Respectfully,

Deborah C. Pederslie

Deborah C. Pederslie
WSBA Bar # 32,304

From: Kimberly LaDuca
To: Mandatory Malpractice Insurance Task Force
Subject: Mandatory Insurance Proposal
Date: Monday, April 22, 2019 4:33:15 PM

Dear WSBA Insurance Task Force,

I urge you not to adopt the current mandatory insurance policy. As a young lawyer seeking to volunteer and do only pro bono legal work, the mandatory insurance policy will prohibit me from providing legal representation to disproportionately disadvantaged individuals, those whom are most in need and to local activist community groups fighting to protect their communities and the environment. In addition, if one is barred in Washington but doesn't live or practice in the state, the fact that that attorney would still be required to have mandatory insurance is unacceptable and a totally unnecessary policy.

Kimberly LaDuca
47168
--
Kimberly LaDuca

From: Rebecca Kenison
To: Mandatory Malpractice Insurance Task Force
Subject: Comments on malpractice insurance
Date: Monday, April 22, 2019 4:36:09 PM

Thank you for the opportunity, through the web meeting this afternoon as well as through e-mail, to be able to provide comments on the issue of mandatory malpractice insurance.

There needs to be more information readily available to the bar (i.e., published in the NW Lawyer magazine) on the impact of some attorneys not having malpractice insurance. Has there been a statistically relevant problem of clients obtaining judgments against their attorneys only to find out that their attorneys were judgment proof? It would be helpful to see statistics on how often this happens and what the unpaid judgments have been.

Also, I am of retirement age and have limited my practice. Next year I was considering cutting back even more and just doing things such as updating my brothers' Wills when needed, preparing the guardianship report for a friend who is a guardian of an elderly relative and the like. Since I have done estate planning throughout my career, it most likely would still cost me several thousand dollars for insurance. I wouldn't be able to justify/recoup the cost of insurance.

Thank you for your consideration of my e-mail.

Rebecca Kenison
WSBA #11471

From: Ryan Sweet
To: Mandatory Malpractice Insurance Task Force
Subject: Oppose mandatory malpractice insurance
Date: Monday, April 22, 2019 5:48:59 PM

My name is Ryan and I'm a solo practitioner, and been a practicing lawyer since 2003 in mult-jurisdictions in public and private practice, and now a solo practitioner.

I oppose mandatory insurance and waited on hold starting at 1pm to say so, even when some people got multiple opportunities to speak and long dissertations about irrelevant information, and basically blocking those of us who waited over 4 hours on the phone. Several proponents droned on and on about superfluous information. I do not know how I was passed over for comment for 4.5 hours.

Let me speak bluntly. I am sympathetic and can appreciate the emotions and victims viewpoints, and viewpoints of plaintiff's lawyers, but let me speak from my heart; my business margins are razor thin and I'm frankly offended at the selfish audacity of these people taking money out of my hard work and savings to ease their burdens and pay their lawsuit mistakes or fees. I find this distasteful, coercive, emotionally manipulative, theft of my profession and money and business. This proposal merely shifts victimization from a small number of injured clients (who could have chosen a lawyer with insurance) to instead all innocent lawyers thru punishment of growing costs and burdens of legal practice, while foreclosing low cost or pro bono legal services to many in need. A decision be based on a fair and free market for legal services with informed clients and lawyers. Clients can choose their lawyer based on insurance, and let the free market work. I wasn't born yesterday so am more pessimistic than others about costs passed on to lawyers, so pardon me if I don't believe the empty promises of models and predictive costs, as they are rarely the final result.

I oppose this, and apparently about 47 other states offer good reasons as they don't either. But if it's necessary, put it should be put to a vote of all members. And if implemented, the pooling idea is a good one to consider. I've been licensed and practicing since 2003 in two states and never been sued, but have faced and won some frivolous bar complaints which are free and easy for disgruntled people to file. And turned down cases, might have been because they were frivolous.

We don't get our licenses from cracker jack boxes. I borrowed over $100,000 to go to law school, and am still repaying it nearly 2 decades later, and the total costs were probably closer to a quarter million dollars in years of opportunity costs just to get licensed. We all spend significant time and money on our career; as a solo practitioner, the non-paying burdens are already quite high; the licensing, tax filings, business administration portion, CLEs, and so forth to run a small practice.

I provide a valuable service, for my clients who are generally veterans, active duty, low income, disabled, or otherwise cannot afford a lawyer. Adding more costs in this already very expensive profession is not fair because someone was a victim to some other lawyer is not fair. Seems every day I have more costs, more fees, more taxes, more burdens. When do I stop hemorrhaging money to practice law and focus on representing people who need a good lawyer? Just today, this real burden has manifest in this conference call which has cost me nearly 5 hours or ½ of a productive working day, for which I won't be paid. The harm of this is already tangible in many hundreds of dollars in lost billables today alone. Time and money from my business.

1. This is blunt tool to address a small minority of lawyers. The public is going to be harmed by reduced legal fees or pro bono services.

2. I'm with the majority of speakers today, and obviously not alone in that such a mandated scheme will cripple my business and ability to serve my clients. I'm a solo practitioner representing active duty and veterans, and often pro bono clients. I volunteer significant time to pro bono clients. My clients are generally lower income and often disabled. This insurance cost would be a large portion of my income, and will likely push me out of the industry or cause me to increase my rates. My contingency cases are generally 20%. I will have to increase it to the maximum, generally about 1/3rd. I may also lose my dream and career because I don't want to work in a big firm or corporation. And clients will lose representation. One of my clients who was essentially homeless was turned away by over 50 lawyers and I took him on knowing I would not be paid.
3. Insurance increases the deep pockets incentive for frivolous lawsuits. Look at the medical industry. Medical malpractice insurance has buried that industry in malpractice suits and caused medical prices to skyrocket and price people out of medical services.
4. Loss of control. We lawyers will become hostages to a mandatory scheme. A lawyer may not want to settle a frivolous case but an insurance company might settle against the lawyer's wishes. Further, as others stated, insurers can deny coverage at their whim, raise rates due to claims they settled against our wishes, etc.
5. This is about money. Plain and simple. More litigation. We heard from some lawyers who base their livelihood on malpractice suits. Hardly unbiased. Hungry litigators seeking bigger money pots. The only winners here are the insurance companies receiving windfall premiums, or those representing or suing in malpractice suits, which I suspect will become more common. We've heard quite emphatically from lawyers who profit from insurance and malpractice suits. Some lawyers who have spoken on behalf of representing clients for "justice" have quite tellingly turned down clients when the alleged lawyer doesn't have insurance. Read between the lines! They seek big dollars, not small dollars. This is purely money driven. And premiums are going to increase as they always do when mandated, just like the "Affordable Care Act" skyrocketed healthcare premiums and insurance costs and as I understand it crippled insurers and most states dropped the coverage. So those in favor of this want lawyers to pay into the mandatory premium system, so they have more lawyers to sue.
6. Those advocating for mandatory insurance are acting against the interest of their clients since it will necessarily increase fees. That seems like a conflict of interest in my opinion.
7. Currently disclosure is mandatory. If insurance is important, a client can select someone that is insured.
8. The cost and significant application burdens of insurance would force me to increase my prices and price most of my clients out of representation. This issue alone has cost me many hours of unpaid time. I won't do any indigent or probono work again. Too much risk. How much is the harm to those who can't get representation? I've been quoted more than $3000 annually, and even $3000 is a lot of money and nearly 3 times my home owners insurance. That's $30,000 for a decade of insurance, so I would have wasted $45,000 over the last 15 years of practice, enriching the insurance companies. And that doesn't factor the time involved in shopping insurance, which is many unpaid hours. And those are the "estimated" open market figures. They can easily increase, especially in a forced market.
9. I agree with the point about not getting paid by clients. Where our remedy for non-payment? I've eaten huge amounts of losses from non paying clients. I have no insurance against that.
10. And lawyers are already held to significant professional standards with the state bar. Believing a bar complaint won't occur is a fantasy. And bar complaints are easy and free,

so frivolous ones presumably increase rates. Clients have remedies. They can shop for a lawyer with insurance if that's important. They can sue, since most lawyers have assets. Or they can file grievances. It's not as though clients don't have remedies, and the profession is one with a high degree of skill anyway.

11. There was the point about a victim's fund. I presume there's millions of dollars already available in that fund. Let's use those resources before forcing lawyers to spend many thousands of dollars to enrich the insurance companies, malpractice lawyers, and a tiny number of impacted clients of bad lawyers.

12. I hadn't realized it until now but it is alarming that the task force seems to have been underrepresented by insurance-free members. Further, I'd like to understand who pays the insurance premiums for those with insurance on the task force? Is it out-of-pocket, or employer/state paid? Or indemnity? That bias must be exposed and considered. It's also concerning to learn so many clearly opposing comments were not marked as opposing but instead "unclear."

I waited from 1pm, 4.5 hours, to make my voice heard. I'm disappointed that apparently the same few vocal people in favor of this were again heard and heard repeatedly thereby denying my voice, and that of others. And the proponents were allowed to bloviate and waste a lot of time on minutia, gratuities, pleasantries and so forth. In the future folks need to be given a strict time limit and cut off. Thankfully the bulk of people and my peers are vehemently against this proposal. It's no small piece of evidence that only apparently 2 states require this. We should take serious caution before jumping into this idea and releasing this Pandora's box.

For these and reasons my peers have stated, forcing these costs and burdens and releasing this Pandora's box on innocent lawyers is simply unfair.

Thank you.
Respectfully,
Ryan Sweet, Esquire

From:	Paul Majkut
To:	Mandatory Malpractice Insurance Task Force
Cc:	Steve Cook; Kelley Beamer; Mike Running; Nancy Duhnkrack
Subject:	Re: mandatory malpractice insurance
Date:	Monday, April 22, 2019 5:53:27 PM

WSBA, As you can see by the emails above, since 2017 I and my clients have been advocating an exemption for attorneys who provide legal advice directly to nonprofits. I spent 4 and a half hours today listening to the testimony on mandatory malpractice insurance. I was encouraged to hear several attorneys ask for an exemption for attorneys who provide legal advice directly to nonprofits. Your proposed exemption is limited to "qualified legal services providers," like legal aid. Why won't you expand the exemption to allow nonprofits to obtain pro bono legal advice? What public good is served by your refusal? Is the Bar trying to discourage the rendering of pro bono legal advice to nonprofits? Thank you. Paul Majkut WSBA #6523, OSBar # 872900

On Wed, Apr 3, 2019 at 12:43 AM Paul Majkut <[redacted]> wrote:

> WSBA,
> I am concerned that your draft rule omits a class of pro bono attorneys who provide advice to environmental non profits, such as the Coalition of Oregon Land Trusts and its Washington member the Columbia Land Trust, that provide malpractice insurance for those attorneys. Exception (5) is limited to qualified legal services providers:
> "(5)Volunteer pro bono service for a qualified legal services provider as defined in APR 1(e)(8) that provides insurance to its volunteers. APR1(e)(8) defines "Qualified legal services provider" means a not for profit legal services organization in Washington State whose primary purpose is to provide legal services to low income clients."
> Please amend your exception to apply to provision of volunteer pro bono legal services to environmental non profits that provide insurance to its volunteers. On the other hand, if providing advice to environmental nonprofits is not considered "the private practice of law," that would be an acceptable outcome. I have attached your draft rule and my prior correspondence on this issue. Thank you Paul Majkut WSBA #6523 OSBar #872900.
>
> malpractice insurance 4-3-19.docx
> (21K)

From:	Margaret Shane
To:	Thea Jennings
Subject:	FW: BOG Special Meeting on Mandatory Malpractice - April 22, 2019
Date:	Tuesday, April 23, 2019 9:48:59 AM
Attachments:	Board of Governors Special Meeting.pdf Board of Governors Special Meeting.docx image001.png

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Comment from Thomas Mengert

_____

Margaret Shane | Executive Assistant
Washington State Bar Association | 206.727.8244 | fax 206-727.8316 | margarets@wsba.org
1325 Fourth Avenue, Suite 600 | Seattle, WA 98101-2539 | www.wsba.org

From: Info [redacted]]
Sent: Tuesday, April 16, 2019 4:52 PM
To: Margaret Shane; Thomas Mengert
Subject: BOG Special Meeting on Mandatory Malpractice - April 22, 2019

Please find my comments enclosed. Please confirm receipt. Thank you, Margaret.

Sincerely,
Thomas Mengert

Board of Governors Special Meeting

Mandatory Malpractice Insurance April 22, 2019
Member Comments

Thomas Mengert, J.D.

As a member of the WSBA since 1989 I would like to submit the following comments to aid in the board's decision-making process. These comments will address substance and procedural concerns as well as general policy issues regarding mandatory performance standards and their effect on the lawyer/client relationship and the public perception of lawyers in our society.

There is often an automatic assumption that a direct cause and effect relationship exists between the amount of regulation applied and the ability to control unfavorable outcomes that accounts for much of the metastasis in the volume of laws and regulations in our society. This unwarranted general presumption when combined with the pervasive tendency of lawyers to see themselves as the guardians of public order has resulted in the unwieldy complexity of today's legal system at precisely the time when Americans are flirting with autocratic government as a remedy for the expense and delay that are inherent to our legal institutions.

It is a commonplace observation that many members of the public distrust lawyers. What is even more unfortunate however is that many lawyers are coming to mistrust the bar associations that manifest our collective conscience as attorneys. Bar associations, particularly in the case of Unified Bar Associations often appear as distant and even adversarial bureaucracies that demand financial support while essentially going their own way to first imagine and then effectuate various idealized appeals for approval from an amorphous public. Citizens must bear their own fair share of sustaining our form of government. We often expect too much from our private advocates.

To draw an analogy between the practice of law and that of medicine or various construction standards in engineering is to ignore the multitudinous variables involved in any legal process. Law is closer to the humanities than it is to the sciences. Lawyers cannot be asked to assume the role of buffers or to act as social cartilage in the joints and sinews of society. It is sheer hubris to assume that it is our job to know all of the answers and to present an illusion of control and predictability amidst chaotic and indeterminate situations in these changing times. To assume that perfect competence and to embrace insurance as the answer is to court unreality. A certain degree of paternalism begins to infiltrate its way

into the attorney/client relationship so that its private aspects become dominated by a presumed omnipotence and universal competence individually and even more so in the collective associations and their staff to discover and enact remedies to govern the legal ecosystem of human relations that sustain social order and harmony.

I suggest that this way of thinking is inherently unrealistic and that the proposed mandatory malpractice requirements are symptomatic of this unfortunate trend. A recent review that I undertook of the West Casebook, *Legal Malpractice Law: Problems and Prevention* led me to the extract from Jennifer Knauth, *Legal Malpractice: When the Legal System Turns on the Lawyer* (35 St. Mary's L. J. 963). This extract explained how unfilled client expectations and the natural disappointment in unfavorable outcomes are being translated into an ever growing trend towards legal malpractice litigation. Juries tend to sympathize with the client rather than the attorney who (they imagine) should have worked his magic more effectively.

What was only beginning to be evident in 2004 grows more observable each day. As the supply of attorneys has increased the search for new causes of action grows apace. Legal malpractice may become the new mother-lode for hungry litigators. The standards of care grow increasingly refined and arcane. This trend towards the practical result of presumed lawyer liability is only furthered by chumming the water with mandatory insurance as an incentive to mistrust and a stimulus to seek a remedy carefully prepared and universally commanded under the assumption that no litigant should be disappointed by an inability to provide a ready resource for public indignation or private dissatisfaction.

Most of the states that have visited the issue of mandatory malpractice realize the inherent problems that it would present. Even the two states that have provided the primary stimulus to our own revisit of this long-since settled question are inapposite to Washington. Oregon made the decision in reaction to high malpractice rates so that through collective bargaining coverage would be more affordable. Idaho adopted a free-market approach but only after a voluntary assumption of the new duty by a closely contested vote of the membership. If our Board of Governors should adopt mandatory malpractice coverage for Washington attorneys, particularly at the present juncture when the very existence of Washington's Unified Bar is in question, it will be perceived as the best evidence available that the membership is powerless and held in benevolent contempt by their representatives.

The final report of the task force was honest and complete in its appraisal. Their function however does not deserve the same deference that we are accustomed to bestow on administrative agencies. Their task was limited and their composition not sufficient to plumb the depths of our large and diverse bar membership. The weak points in the final report were admitted candidly. A careful reading by the board members will reveal that many less intrusive options exist for the Board of

Governors to recommend. A critical and unbiased reading will make salient the vast perimeter of unplumbed considerations that demand a renewed and extended period of information gathering and reflection over time before any recommendation is made to the Washington State Supreme Court on this issue.

I urge you to consider the following points.

- **The burden of proof should first show that malpractice in Washington has reached a critical threshold before any insurance crisis may be inferred.**
- **The adequacy of a one-size fits all mandate should receive strict scrutiny as a supposed viable remedy before being adopted.**
- **The Board should consider the probable externalities that are inherent in any such proposed mandate – early retirements, refusal to take risks in marginal or pro bono cases, increased litigation, etc.**
- **The Board should pay strict attention to less intrusive initial solutions such as mandating fuller client disclosure requirements, classes for attorneys who possess indicia of dysfunctions that may lead to malpractice liability, or increased CLE's that are specifically oriented towards malpractice prevention just as we have mandatory ethics requirements now.**
- **A wait and see period should be adopted while the Idaho experiment has a chance to demonstrate its effectiveness in concrete empirical data.**
- **To supplement the findings of the task force by similar studies on a national level and by state by state comparisons will allow various options to show their worth. We need not be the first diver into deep waters simply to boast that we are pro-change.**
- **As a last resort (should it be deemed advisable) the Board of Governors should submit the issue to the members themselves for at least an advisory vote on the various options before making any definitive recommendation.**

The question of a new mandatory malpractice rule will be crucial at the present time as the bar membership assesses how they are perceived by the organization that owes at least half of its institutional loyalty to the members themselves. I wish sadly in closing to reinforce the urgency of my comments today to the survival of the WSBA as we know it by recalling the Board to the impression that has been made on many members by the atmosphere of the last two meetings of the BOG on those who do not inhabit the select atmosphere of governance but who have witnessed a lamentable degree of internecine upheaval and discontent on various internal issues that their own hard earned bar dues must subsidize. It is not the time to court further alienation by experimentation or precipitate action on a critical issue without member advice and consent. I call the Board to a sober assessment of its duties at this time and remind them of the opportunity afforded to manifest a sober and moderate approach to the question at hand.

Thomas Mengert

From: [redacted]
To: Mandatory Malpractice Insurance Task Force
Subject: Mandatory Insurance
Date: Tuesday, April 23, 2019 3:56:02 PM

Mandatory Insurance is a ridiculous idea that will ultimately hurt the poorer members of society as less attorneys choose to practice. Economics should be a requirement in law school. That way silly ideas like this wouldn't make it this far and waste everyone's time.

Bruce Busch
23811

From:	ELIZABETH R MITCHELL
To:	Mandatory Malpractice Insurance Task Force
Subject:	Opposition to Mandatory Insurance
Date:	Tuesday, April 23, 2019 8:31:25 PM

To the WSBA Insurance Task Force:

On April 22, I watched the webcast of the Governors' meeting on mandatory malpractice insurance. At the end, President Pickett asked that any additional comments be directed to you.

Please add my name to the list of WSBA members who oppose mandatory malpractice insurance. I have no objection to additional disclosure requirements. I was also intrigued by the suggestion of a law professor who asked that a committee be established to adjudicate individual applications for exemption in the event mandatory insurance is adopted.

I fall in the category of retired attorneys who maintain Bar membership and CLE requirements in order to be available to provide occasional pro bono legal services under appropriate circumstances.

As an example, I was fortunate to be able to provide pro bono services to local fishing and environmental organizations opposing environmentally damaging energy development projects before the Federal Energy Regulatory Commission. We achieved the result we wanted, but it took five years and appeals through the Ninth Circuit. It is also a highly specialized, highly compensated area of the law in which there are relatively few practitioners, and few if any pro bono attorneys.

There was no way my clients could have hoped to afford any kind of conventional legal representation, but they had a serious issue and I was willing to help. I was a government lawyer for 25 years, so I have a pension sufficient to support a modest lifestyle. Since I don't need the money, I promised myself that any future legal practice would be pro bono. However, I can't afford malpractice insurance on my current income, and would be constructively disbarred.

Until *Gideon* is expanded to cover civil cases, lawyers in my position should be encouraged to contribute their services to clients who understand the risks of receiving legal services from an uninsured attorney. From what I heard at the Governors' meeting yesterday, your proposed solution would have the opposite effect.

Sincerely,

Elizabeth R. Mitchell
Seattle WA 98102
WSBA # 7705

From:	Government Lawyers Bar Association
To:	Mandatory Malpractice Insurance Task Force
Cc:	meservebog@yahoo.com
Subject:	MMI Task Force Input
Date:	Wednesday, April 24, 2019 7:05:43 AM
Attachments:	WSBA MMI signed letter.pdf

Good morning,

Please see attached letter.

Thank you,
GLBA Board

November 15, 2018

Washington State Bar Association
Mandatory Malpractice Insurance Task Force
1325 Fourth Ave., Suite 600
Seattle, WA 98101-2539
Email: insurancetaskforce@wsba.org

Dear Members of the Mandatory Malpractice Insurance Task Force:

The Government Lawyers Bar Association of Washington (GLBA) submits the following comments to the Washington State Bar Association's Mandatory Malpractice Insurance Task Force (Task Force). The GLBA is comprised of its membership and a fifteen member executive board. Among other things, the GLBA strives to promote, protect, and further the interests and ethics of lawyers in governmental service, as well as promoting a better understanding of the role of a government lawyer.

The GLBA would support the tentative conclusion of the Task Force that government lawyers should be exempt from any mandatory malpractice insurance requirements.[1] The GLBA also supports the recent recommendations of a Task Force Committee that government lawyers should be "automatically exempted because they would not be 'engaged in the private practice of law.'" The GLBA would also propose that the Task Force consider a broad interpretation of the term government lawyer to include those attorneys licensed to practice in Washington and employed by a state department or agency, a county, a city, or other public or municipal corporation.

The states that have mandated malpractice insurance for lawyers have included an exemption for government lawyers. In Oregon, mandatory malpractice insurance is required for those attorneys who are engaged in the private practice of law.[2] Exempt from this requirement are attorneys employed by "the state, an agency or department thereof, a county, city, special district or any other public or municipal corporation or any instrumentality thereof."[3] Moreover, in

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[1] Mandatory Malpractice Insurance Task Force, *Mandatory Malpractice Insurance Task Force Interim Report to Board of Governors,* July 10, 2018 at 2. Found at: https://www.wsba.org/docs/default-source/legal-community/committees/mandatory-malpractice-insurance-task-force/mandatory-malpractice-insurance-task-force-interim-report-july-10-2018(00430844).pdf?sfvrsn=398306f1_3 (last accessed November 5, 2018).
[2] ORS 9.080(2).
[3] ORS 9.080(2)(b).

Idaho an attorney is not required to submit proof of mandatory malpractice insurance if they do not represent private clients.[4] Finally, Illinois exempts those attorneys who are not engaged in the private practice of law from completing a self-assessment of the operation of his or her legal practice in lieu of obtaining mandatory malpractice insurance.

The concerns underpinning the Task Force's tentative conclusion that malpractice insurance should be mandated for Washington-licensed lawyers engaged in the private practice of the law does not apply to government lawyers. The Task Force has identified that a key goal of its project is to "ensure that clients are compensated when attorneys make mistakes."[5] In addition, the Task Force is focused on "the risk of injury to the *public* that arises from uninsured lawyers."[6] Put simply, the work of government lawyers does not engage these concerns.

The GLBA appreciates this opportunity to provide the Mandatory Malpractice Insurance Task Force with comments on this important issue. If you have any questions or wish to discuss our comments further, please feel free to contact the GLBA via email at GovtLBA@gmail.com.

Sincerely,

Meredithe Quinn-Loerts, WSBA # 27320
Board President
Government Lawyers Bar Association of Washington

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[4] Idaho Bar Commission Rule 302(2)(5).
[5] *Interim Report* at 1.
[6] *Id.*

From: Susan Fortney
To: Mandatory Malpractice Insurance Task Force
Cc: Susan Fortney
Subject: Comments to be directed to the attention of the Board of Governors.
Date: Thursday, April 25, 2019 9:11:48 AM
Attachments: Fortney.Mandatory Insurance.essay.pdf

Dear Board Members,

I am professor at Texas A&M University of Law who specializes in the area of legal ethics and malpractice. In my work related to lawyer regulation, I have observed that regulators and decision makers often do not hear the consumer voice. My comments are intended to provide the consumer perspective, focusing on public protection, as the first regulatory objective adopted by Washington Supreme Court.

The most compelling reason to require insurance is to provide malpractice victims access to meaningful remedies. As professionals who exclusively are given licenses to practice law, lawyers should be financially accountable when their conduct harms others.

Decisions related to public protection should not be determined by a lawyer opinion poll in which uninsured lawyers emphasize how insurance impacts their individual practices. To avoid elevating lawyer interests over consumer interests, decision makers should consider available data reflecting consumer interests. In the 2018 public opinion study conducted by a research center at University of Chicago for the California Working Group on Insurance, 78% of the respondents (California residents) indicated that lawyers should be required to carry insurance. Of that number, 86% believed that they should be required to carry insurance even if it means that the lawyer may charge higher fees. Given these results pointing to consumer interest in insurance, those who oppose insurance should have the burden to demonstrate that mandating insurance will impact the availability of legal services.

Those lawyers who refuse to purchase insurance suffer from what behavioral ethicists call an ethical blind spot in they do not see the ethical imperative to be financially accountable to those they harm. Ethical blindness and complacency also contributes to insured lawyers not getting involved in the debate over insurance and not leaving it to the minority of uninsured lawyers to dominate the discourse. I urge decision makers and insured lawyers to address these blind spots by mandating insurance. If we fail to do so, it hurts the integrity of the legal profession and our standing as an accountable profession that can be trusted with self-regulation.

During the April 22, 2019 session of the Board of Governors, one lawyer commented on a “net worth” alternative to insurance. In the attached article on page 33, I discuss Proof of Financial Responsibility as an option for lawyers who do not want to purchase insurance.

For those lawyers who claim that they are in solo practice and uninsurable, I point to the Idaho experience where no lawyer reported the inability to obtain insurance. Moreover, if lawyers are practicing in a high risk and complex areas, such as securities or patent law, clients may be better served if those lawyers practice with other lawyers, rather than practicing alone because firm practice would likely provide risk management safeguards.

Thank you for your leadership and commitment to an open process.

Respectfully submitted,

Susan Saab Fortney
Professor
Texas A&M University School of Law
1515 Commerce
Fort Worth, Texas 76102
Telephone 817-212-3902
To read my articles, visit
http://ssrn.com/author=415779

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Mandatory Legal Malpractice Insurance: Exposing Lawyers' Blind Spots

Susan Saab Fortney

Mandatory Legal Malpractice Insurance: Exposing Lawyers' Blind Spots

Susan Saab Fortney*

This is the draft of an article forthcoming in Volume 9, Issue II of *St. Mary's Journal on Legal Malpractice & Ethics*.

CONTENTS

INTRODUCTION

The legal landscape for lawyers' professional liability in the United States (U.S.) is changing.[1] In 2016, the members of the Idaho Bar Association voted on a rule change mandating legal malpractice coverage for Idaho attorneys in private practice.[2] Following the membership's approval of the resolution by a vote of 51 percent in favor and 49 percent opposed to the resolution,

[1] *See* Petition, at 1, *In re* Amendments to Supreme Court Rule 79, No. ADKT-354 (Nev. June 29, 2018) (referring to the shift in the tide) [hereinafter *Nevada Petition*].
[2] Annette Strauser, *2018 Malpractice Coverage Requirement—General Information*, IDAHO ST. B. (Aug. 29, 2017), https://isb.idaho.gov/blog/category/licensing/ [http://perma.cc/B2VM-6KPL].

the Idaho Supreme Court adopted the proposed rule with an effective date of January 1, 2018.[3] The new Idaho rule requires that lawyers who are engaged in private practice to submit proof that they carry professional liability insurance coverage with minimum limits of liability of $100,000 per occurrence and $300,000 for an annual aggregate of claims.[4]

The adoption of the Idaho rule was the first move in forty years by a state to require legal malpractice insurance since Oregon mandated lawyer participation in a malpractice insurance regime.[5] In 1977 Oregon established the Oregon State Bar Professional Liability Fund for the purpose of providing insurance to bar members. The Oregon requirement that lawyers in private practice maintain a minimum level of insurance coverage was unprecedented in the U.S.

Over the last two years, a few states have considered whether their jurisdictions should join Oregon, and now Idaho, in requiring malpractice insurance for practicing attorneys. Bar groups in California, Washington, Nevada, and Georgia have studied the issue of mandatory insurance coverage for attorneys.[6]

In recognition of the "importance of protecting the public from attorney errors through errors and omissions insurance," the California legislature enacted a 2017 statute directing the State Bar to review and study errors and omissions insurance for attorneys licensed in California.[7]

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[3] *See Mandatory Malpractice Insurance Task Force, Minutes, Presentation by Diane Minnich, Executive Director of the Idaho State Bar*, WASH. ST. B. ASS'N 2–3 (February 28, 2018), https://www.wsba.org/docs/default-source/legal-community/committees/mandatory-malpractice-insurance-task-force/february-21-2018-minutes.pdf?sfvrsn=9b0407f1_2 [http://perma.cc/B2VM-6KPL] [hereinafter *Idaho Presentation*] (offering a presentation before the Washington Bar on the newly adopted Idaho rule and the background information on why it was adopted).

[4] For licensing purposes, the Idaho rule requires that attorneys certify whether they represent private clients. Those attorneys who represent private clients must "submit proof of current professional liability insurance coverage at the minimum limit of $100,000 per occurrence [and] $300,000 annual aggregate." ID. B. COMM. R. 302(a) (5) (Westlaw 2019).

[5] Carol J. Bernick, *PLF Celebrate 40 Years*, 134 PLF IN BRIEF 1, 1 (May 2018), https://www.osbplf.org/assets/in_briefs_issues/PLF%20Celebrates%2040%20Years.pdf [http://perma.cc/A9AY-XX7A].

[6] Greg Land, *State Bar Mulls Rule on Purchase, Disclosure of Legal Malpractice Insurance*, DAILY REPORT, Jan. 4, 2019, available at https://www.law.com/dailyreportonline/2019/01/04/will-state-require-purchase-disclosure-of-legal-malpractice-insurance/ (quoting the State Bar of Georgia president who explained that reports from malpractice lawyers that the problem of uninsured lawyers was "pervasive" spurred him to call for the creation of a study committee).

[7] S. B. 36, 2017 Leg., Reg. Sess. (Cal. 2017); CAL. BUS. & PROF. CODE § 6069.5 (a) (2017). In addition to directing the State Bar to study mandatory insurance for lawyers, the statute directs the State Bar to review, study and make determinations on all of the following issues: the adequacy, availability and affordability of errors and omissions insurance for licensed attorneys in California, proposed measures for encouraging attorneys to obtain and maintain such insurance, the ranges of insurance limits recommended to protect the public, the adequacy and efficacy of the current rule relating to disclosure of the attorneys insurance status, and other proposed measures relating to insurance that will further the goal of public protection. *Id.*

The statute identifies a number of areas for study and expressly notes that the study must cover the advisability of mandating errors and omissions insurance for attorneys and the adequacy of California's rule requiring lawyers to disclose whether they carry insurance.[8] Following the directive from the legislature, the State Bar of California established a Malpractice Insurance Working Group (California Working Group).[9] On January 14, 2019, the California Working Group voted to make the following recommendation: "More data is required prior to making a recommendation regarding whether mandatory malpractice insurance is necessary."[10]

In 2017 the Board of Governors for the Washington State Bar Association established the Mandatory Malpractice Insurance Force (Washington Task Force).[11] The Washington Task Force's Charter specifically charges the task force with determining whether to recommend mandatory malpractice insurance for Washington attorneys, developing a model that might work best in Washington, and then drafting rules to implement that model.[12] In its final report, the Washington Task Force described its information-gathering process, key findings and its recommendation that [a]ctive Washington-licensed attorneys engaged in the private practice of law, with specified exemptions, should be required to be covered by continuous, uninterrupted

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[8] *Id.*

[9] The Board of Trustees of the State Bar of California authorized the formation of the California Working Group. *The State Bar of California Malpractice Insurance Working Group Charter*, ST. B. CAL., 1, http://www.calbar.ca.gov/Portals/0/documents/cc/Malpractice-Insurance-Working-Group-Charter.pdf [http://perma.cc/2J5B-8FLB]. The Charter of the working group notes that the study and review process will include consideration of past studies and convening meetings with attorneys and other interested parties with knowledge of relevant issues. *The State Bar of California Malpractice Insurance Working Group Charter*, ST. B. CAL., 1 http://www.calbar.ca.gov/Portals/0/documents/cc/Malpractice-Insurance-Working-Group-Charter.pdf [http://perma.cc/2J5B-8FLB]. *Id*. The Charter also outlines the appointment source for the 14–17 members of the working group. As noted, one member was to be a "consumer advocate (not licensed attorney)." *Id.*

[10] *State Bar of California Malpractice Insurance Working Group,* (Draft) Report to the Board of Trustees, Mar. 15, 2019 1, 12 (draft report available on March 6, 2019). [hereinafter *California Draft Report*].

[11] *Washington Mandatory Malpractice Insurance Task Force Charter*, WASH. S. B. ASS'N (Sep. 28, 2017), https://www.wsba.org/docs/default-source/legal-community/committees/mandatory-malpractice-insurance-task-force/task-force-charter.pdf?sfvrsn=381a3bf1_6 [http://perma.cc/T2C9-SCVN].

[12] *Id.* The Washington Task Force's Charter also directs the study to focus on the nature and consequences of uninsured attorneys, to examine current mandatory malpractice insurance systems, and to gather information and comments from bar association members and other interested parties. *Id.*

malpractice insurance."[13] The Washington Task Force Report concludes by recommending that the insurance coverage requirement be managed through the existing annual licensing process.[14]

A State Bar of Nevada Task Force reached a similar conclusion in 2018, recommending adoption of a rule to require all attorneys in private practice to carry minimum levels of malpractice insurance.[15] Based on the recommendation of the task force, the Board of Governors of the Nevada State Bar petitioned the Supreme Court of Nevada, asking that the Court amend licensure rules to require professional liability insurance for attorneys engaged in private practice.[16] The sixteen-page petition describes the justification for requiring insurance and addresses specific concerns articulated in opposition to such a requirement. The petition's conclusion states that "requiring a minimum level of professional liability insurance for all attorneys directly responds to the State Bar's mission to protect the public."[17] In a two-page Order, the Supreme Court denied the petition, stating that the Board of Governors "provided inadequate detail and support demonstrating that the proposed amendment is appropriate."[18]

In 2018, the New Jersey State Bar Association took a similar position in concurring with a recommendation of a Supreme Court Ad Hoc Committee on Attorney Malpractice to reject mandatory insurance.[19] "The Committee determined that a rule requiring mandatory professional liability insurance would be unworkable in the New Jersey marketplace and would not satisfy a current and plain unmet need."[20]

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[13] Mandatory Malpractice Insurance Task Force, *Report to WSBA Board of Governors*, WASH. S. B. ASS'N 1, 45 (Feb. 2019)), https://www.wsba.org/docs/default-source/legal-community/committees/mandatory-malpractice-insurance-task-force/mandatory-malpractice-insurance-task-force-report815766f2f6d9654cb471ff1f00003f4f.pdf?sfvrsn=728e03f1_0 [hereinafter *Washington Task Force Report*]. The Washington Task Force voted unanimously to approve the Report and its recommendation for submission to the Washington State Bar Association Board of Directors. *Id.* at 2. The Washington Task Force recommended that the minimum coverage should be $250,000 per occurrence and $500,000 total per year. *Id.* at 45.

[14] *Id.* at 52.

[15] Vernon "Gene" Leverty, *Message from the President, Tipping the Scales in Honor of our Profession*, NEV. LAW. 4 (Apr. 2018), https://www.nvbar.org/wp-content/uploads/NevadaLawyer_April2018_PresidentsMessage_taskforces.pdf. [http://perma.cc/6N2H-BVMJ].

[16] *Nevada Petition*, *supra* note 1, at 1

[17] *Id.*

[18] Order, at 1 *In re* Amendments to Supreme Court Rule 79, No. ADKT-354 (Nev. Oct. 11, 2018) [hereinafter *Nevada Supreme Court Order*.

[19] Letter from Robert B. Hille, President of the New Jersey State Bar Association to Hon. Glenn A. Grant, Acting Administrative Director of the New Jersey Court, N.J. ST. B. ASS'N (Jan. 15, 2018), https://tcms.njsba.com/personifyebusiness/Portals/0/NJSBA-PDF/Reports%20&%20Comments/malpractice%20insurance%20--%202018.pdf [http://perma.cc/YDQ9-HWY8] [hereinafter *NJSB Comments*].

[20] *Report of the Supreme Court Ad Hoc Committee on Attorney Malpractice Insurance*, N.J. CTS. 7 (June 2017), https://www.njcourts.gov/courts/assets/supreme/reports/2017/attmalpracticeinsurance.pdf [http://perma.cc/YDQ9-HWY8] [hereinafter *New Jersey Report*].

As states consider the advisability of mandatory insurance, it is worth examining different positions in the debate on mandatory insurance and recent empirical research related to uninsured lawyers and legal malpractice litigation. To introduce the topic, Part I provides a historical note with information on the current status of requiring malpractice insurance for lawyers in practice. Part II examines arguments in favor of mandating insurance. Part III tackles common arguments opposing such a requirement. The discussion of the insurance debate focuses on arguments in favor of insurance and approaches that may be used to address concerns expressed by those who oppose requiring lawyers to carry professional liability insurance. Following the discussion of the pros and cons of mandating insurance, Part IV considers select alternatives to mandatory insurance. After concluding that mandatory insurance better promotes public and lawyer protection than the alternatives, the conclusion examines reasons why decision makers fail to require that lawyers carry a minimum level of insurance. Drawing on ethics scholarship and behavioral psychology research, I argue that individual uninsured lawyers may fail to see the consequences of their conduct because they have a blind spot. Furthermore, I argue that the bar and judiciary may suffer from a collective blind spot that contributes to responsible lawyers and judges not seeing financial accountability as an ethics issue. This ethical blindness and complacency allow the minority to dominate the discourse on lawyer's professional responsibility and accountability for their acts and omissions. The conclusion urges lawyers who are insured to address the blind spots and promote their states joining Oregon, Idaho and countries around the world that recognize that financial accountability is a hallmark of an ethical profession.

I. HISTORICAL AND PRACTICE CONTEXT OF THE DEBATE ON MANDATORY LEGAL MALPRACTICE INSURANCE

Around the world both common law and civil law regulators require that lawyers maintain a minimum level of professional liability insurance coverage.[21] Depending on the regulatory scheme, carrying insurance could be a statutory mandate in civil law counties or a requirement imposed by professional associations in common law countries.[22] The majority of common law countries outside the U.S. require some form of malpractice insurance.[23] The minimum coverage required in these countries is at least one million dollars in those countries' currencies.[24]

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[21] Susan Saab Fortney, *Law as a Profession: Examining the Role of Accountability*, 40 FORDHAM URB. L.J. 177, 189 (2013) [hereinafter *Law as a Profession*].

[22] Dimitra Kourmatzis, *Professional Liability Insurance Coverage in Common and Civil Law Jurisdictions; Event Made and Claims Made Approaches*, 2009 INS. L. REV. 41, 41.

[23] *See* Leslie C. Levin, *Uninsured Lawyers and Professional Liability Insurance Requirements: What Does the Research Tell Us?*, NW LAW, Aug. 2018, at 36, 36 [hereinafter *Uninsured Lawyers*] (noting that the vast majority of common law counties outside the U.S.—as well as civil law countries—require some form of malpractice insurance for lawyers in private practice).

[24] The Washington Task Force Report identified the following minimum limits of liability required in the other common law jurisdictions as follows: AU $1.5 million or AU 2 million (US $1.11 million or US $ 1.48 million) in most Australian states; CDN $1 million (US $760,000) in the

The Law Society for England and Wales described the justification for mandating professional indemnity insurance (PII) as follows:

> PII also increases your financial security and serves an important public interest function by covering civil liability claims, including: certain related defence costs, and regulatory awards made against you. It ensures that the public does not suffer loss as a result of your civil liability, which might otherwise be uncompensated. This is important in maintaining public confidence in the integrity and standing of solicitors.[25]

In the U.S. concerns about affordability and accessibility of malpractice insurance prompted bar associations to seriously examine mandatory insurance. In the late 1970s, the restrictive insurance market caused lawyers to explore alternatives to private insurance.[26] In an effort to provide affordable insurance, some bar associations established bar-related mutual companies.[27] Lawyers in other states, including California, Washington and Oregon explored the possibility of lowering insurance costs by requiring all lawyers in the state to purchase legal malpractice insurance.[28]

Following study and proposed legislation mandating legal malpractice in California, the governor refused to sign the bill.[29] Oregon then "borrowed the proposed California legislation and passed it as its own."[30] On July 1, 1978 Oregon became the first state in the U.S. to require that all lawyers purchase minimum levels of insurance coverage provided through the state's professional liability fund. Although some lawyers challenged the constitutionality of the compelling lawyers to purchase insurance from a state-related entity, the U.S. Court of Appeals for the Ninth Circuit upheld the requirement that lawyer purchase primary insurance from the Oregon program.[31]

British Columbia; S$1 million (US $730,000) in Singapore; and £1 million (US $2,628,000) in England and Wales. *Washington Task Force Report, supra* note 11, at 26-27.

[25] *Law as a Profession supra,* note 21, at 189 (citing *Professional Liability Insurance,* L. SOC'Y § 3.2 (July 4, 2012))

[26] 5 RONALD E. MALLEN, LEGAL MALPRACTICE § 38:3 (2019 ed.) [hereinafter LEGAL MALPRACTICE TREATISE].

[27] *Law as a Profession, supra,* note 21, at 191. There are currently thirteen U.S.-based companies that are members of the National Organization of Bar-Related Insurance Companies (NABRICO). NABRICO *Member Companies*, NABRICO, https://nabrico.com/members/ [http://perma.cc/HYK3-JLRM].

[28] *Law as a Profession, supra* note 21, at 191.

[29] *Id.*

[30] Manual R. Ramos, *Legal Malpractice: Reforming Lawyers and Law Professor,* 70 TUL. L. REV. 2583, 2610 (1996).

[31] Hass v. Oregon State Bar, 883 F.2d 1453, 1463 (9th Cir. 1989). The defendant-appellee challenged the insurance requirements on Constitutional and antitrust grounds. The Ninth Circuit rejected the antitrust attack because the activity was undertaken pursuant to a clearly articulated and affirmatively expressed state policy. *Id.* The court also rejected the Constitutional challenge because the mandatory participation provision of the Bar's resolution "regulates a local matter in

When the Oregon fund was first established the primary coverage required was $100,000 with a separate $50,000 available for defense costs.[32] In 2019, the basic primary coverage is $300,000 per claim and $300,000 in the aggregate for claims made against each covered attorney each year, and $50,000 for claims expenses with an annual payment reduced to $3,300 per attorney in private practice.[33] Idaho, the second U.S. jurisdiction to require mandatory insurance, requires minimum limits of liability of $100,000 per occurrence and $300,000 for an annual aggregate of claims.[34] The Idaho requirement does not specify any one insurance carrier, but allows lawyers to purchase insurance in the open market.[35]

In addition to the Idaho and Oregon requirements that apply to all lawyers in private practice, malpractice insurance may also be mandated for particular types of practice or work. For example, it is common for lawyer referral agencies to require insurance.[36] Similarly, around the U.S., a number of states require certain levels of insurance as a condition for lawyers who practice in limited liability law firms.[37] In private transactions, sophisticated clients, such as corporations, routinely require that counsel they retain provide proof of insurance.[38]

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which the state has a strong interest, and the provision does not impose an excessive burden, if any, on interstate commerce." *Id.*

[32] Bernick, *supra* note 5, at 4.

[33] OSB Professional Liability Fund, Coverage, . https://www.osbplf.org/coverage/overview.html

[34] For licensing purposes, the Idaho rule requires that attorneys certify whether they represent private clients. Those attorneys who represent private clients must submit proof of current professional liability insurance coverage at a minimum limit of $100,000 per occurrence and $300,000 annual aggregate. ID. B. COMM. R. 302(a)(5) (Westlaw 2019).

[35] Robert Horne & Jennifer Smith, *Join the Discussion: Whether Malpractice Insurance Should be Mandatory for Nevada Attorneys*, NEV. LAW., Dec. 2017, at 28, 28.

[36] The ABA Model Rules Governing Lawyer Referral & Information include a provision requiring that lawyer-participants maintain errors and omissions insurance or provide proof of financial responsibility. MODEL SUPREME COURT RULES GOVERNING LAWYER REFERRAL & INFORMATION SERVICE R. IV (AM. BAR. ASS'N 2019), https://www.americanbar.org/groups/lawyer_referral/policy/ [http://perma.cc/JQP6-ZXCG].

[37] For a discussion of insurance requirements for limited liability partnerships, see CHRISTINE HURT, ET AL., BROMBERG & RIBSTEIN ON LIMITED LIABILITY PARTNERSHIPS, THE REVISED UNIFORM PARTNERSHIP ACT, AND THE UNIFORM LIMITED PARTNERSHIP ACT § 2.06 (2018 ed). Some jurisdictions base the amount of insurance on the number of lawyers in the firm. Such an approach provides more protection to malpractice plaintiffs with claims against large law firms. *See, e.g.* 100A ILL. COMP. STAT. ANN. 722(b)(1) (West 2019) (requiring that limited liability firms maintain a minimum "amount of insurance of $100,00 per claim and $250,000 annual aggregate, times the number of lawyers in the firm . . . provided that the firm's insurance need not exceed $10,000,000 annual aggregate"). For a discussion of the insurance issues related to practice in limited liability firms, see Jett Hanna, *Legal Malpractice Insurance and Limited Liability Entities: An Analysis of Malpractice Risk and Underwriting Response*s, 39 S. TEX. L. REV. 641 (1998).

[38] Manual R. Ramos, *Legal Malpractice: The Profession's Dirty Little Secret*, 47 VAND. L. REV. 1657, 1730 (1994) [hereinafter *The Profession's Dirty Secret*].

As noted above, there is a new wave of state bar associations appointing groups to study mandatory insurance and related issues. When the issue was raised in the past, lawyers and bar leaders discussed in bar journals and Internet pieces the pros and cons of mandating insurance for lawyers.[39] A few law students also published law review pieces examining the issue.[40] A number of these articles were written before there were studies dealing with uninsured lawyers and malpractice claims. Some findings come from surveys conducted by bar groups. Other assessments come from studies and analyses conducted by scholars. Notably, Professor Leslie C. Levin published the results of her study on uninsured lawyers.[41] Professors Herbert M. Kritzer and Neil Vidmar have recently published a book that includes qualitative and quantitative data related to legal malpractice claims and the impact of lawyers' insurance status on victims of lawyer malpractice.[42] To help inform the debate on imposing an insurance requirement, the following discussion of the pros and cons of mandatory insurance draws on findings and commentary from these scholarly works, as well as bar studies.

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[39] *See* John Schlegelmilch, *Insufficient Evidence to Support Mandatory Malpractice Requirements,* NEV. LAW., June 2000, at 9, 9 (submitting the argument "that there is insufficient evidence to support any State Bar" requirements for malpractice insurance"); Jeffrey A. Tidus, *Mandatory Malpractice Insurance; Any Feasible Plan Must Enable Lawyers to Obtain Affordable Coverage*, L. A. LAW., Mar. 1987, at 16 (examining whether lawyers who do not carry malpractice insurance can pose a threat to the general public); Jeffrey M. Wilson, *Mandatory Malpractice Insurance — The Debate Continues*, ADVOCATE, Nov. 1994, at 6 , 16 (claiming small town lawyers will not be impacted through a requirement that they maintain malpractice insurance).

[40] *See* Nicole Cunitz, Note, *Mandatory Malpractice Insurance for Lawyers: Is There a Possibility of Public Protection Without Compulsion*?, 8 GEO J. LEGAL ETHICS 637, 652 (1995) (examining and presenting arguments "in favor of requiring malpractice insurance for attorneys"); Nicholas A. Marsh, Note, *"Bonded & Insured:" The Future of Mandatory Insurance Coverage and Disclosure Rules for Kentucky Attorneys*, 9 KY. L.J. 793, 793 (2003) (exploring mandatory insurance coverage for attorneys); Devin S. Mills & Galina Petrova, Note, *Modeling Optimal Mandates: A Case Study on the Controversy over Mandatory Professional Liability Coverage and Its Disclosure,* 22 GEO. J. LEGAL ETHICS 1029, 1029 (2009) (considering mandatory professional liability and accompanying disclosures).

[41] Leslie C. Levin, *Lawyers Going Bare and Clients Going Blind,* 68 FLA. L. REV. 1281, 1287–88 (2016) (using information from a 2011 survey of uninsured New Mexico lawyers and recent surveys of insured and uninsured lawyers in Arizona and Connecticut) [hereinafter *Lawyers Going Bare*].

[42] HERBERT M. KRITZER & NEIL VIDMAR, WHEN LAWYERS SCREW UP: IMPROVING ACCESS TO JUSTICE FOR LEGAL MALPRACTICE VICTIMS (2018). Professors Kritzer and Vidmar note that calls for mandatory insurance are not new. *Id*. at 170. According to a review conducted by research assistants, 47 articles have been written on mandatory insurance with the many articles advocating in favor of mandatory insurance for lawyers. *Id.* at 207 n. 4. One of the earliest articles advocating for mandatory insurance was written by Manual R. Ramos, a law professor who previously defended legal malpractice cases. Manual R. Ramos, *Legal Malpractice: The Profession's Dirty Little Secret*, 47 VAND. L. REV. 1657, 1725–30 (1994) (addressing arguments on both sides of the mandatory insurance debate for both requiring a duty to report and a duty to carry coverage).

II. ARGUMENTS IN SUPPORT OF MANDATORY MALPRACTICE INSURANCE

In his seminal article on the role that legal malpractice plays in our regulatory system, Professor John Leubsdorf, an Associate Reporter on the American Law Institute's Restatement (Third) of Law Governing Lawyers, noted that legal malpractice relates to three regulatory functions of the law of lawyering by "delineating the duties of lawyers, creating appropriate incentives and disincentives for lawyers in their dealings with clients and others, and providing access to remedies for those injured by improper lawyer behavior."[43] Arguments supporting mandatory insurance directly or indirectly relate to each of these functions, starting with the concern that victims of legal malpractice are denied access to meaningful remedies when lawyers fail to carry professional liability insurance. This is commonly characterized as the public protection justification for requiring that licensed lawyers carry malpractice insurance.

A. Public Protection & Access to Remedies

Legal malpractice as a type of third-party insurance covers claims seeking damages arising out of the insured's acts, errors, or omissions in rendering legal services to others.[44] Policy coverage is triggered when a person alleges that a lawyer has engaged in conduct that damaged the claimant. This points to the most compelling reason for requiring insurance: to provide access to remedies for malpractice victims, whether the injured person is a client or a nonclient.

States restrict the practice of law to licensed attorneys. This special privilege comes with the responsibility to be accountable when lawyers' misdeeds harm others.[45] This financial accountability distinguishes lawyers as professionals.

As a matter of professionalism, lawyers should be required to bear the costs of practicing law and not shift losses to others. Applying tort law and risk distribution principles, lawyers, not clients (or injured third parties) are the persons in the best position to guard against and obtain insurance for losses caused by lawyers' professional misconduct.[46] Lawyers can then factor in insurance costs when setting fees.

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[43] John Leubsdorf, *Legal Malpractice and Professional Responsibility*, 48 RUTGERS L. REV. 101, 105 (1995).

[44] RONALD E. MALLEN, LEGAL MALPRACTICE: THE LAW OFFICE GUIDE TO PURCHASING LEGAL MALPRACTICE INSURANCE § 2:21 (2019 ed.) [hereinafter *Insurance Purchasing Guide*]. For an explanation on the different types of policies and insurers' preference for claims-made policy forms, see Susan Saab Fortney, *Legal Malpractice Insurance: Surviving the Perfect Storm*, 28 J. LEGAL PROF. 41, 43 (2003-2004) (identifying different types of claims-made policy forms) [hereinafter *Legal Malpractice Insurance*].

[45] "A license to practice law is a privilege, and no lawyer is immune from his or her responsibility to clients injured because of those mistakes." *Washington Task Force Report* , *supra* note 11, at 38.

[46] *See* Guido Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE L.J. 499, 500 (1961) (introducing a critique of "enterprise liability," with the following notions: "Activities should bear the costs they engender' [and] 'it is only fair that an industry should pay for the injuries it causes" (citing 2 HARPER &JAMES, ON TORTS 731 (1957)).

Despite these basic principles of tort law and the professional imperative to be financially accountable, a significant portion of lawyers practice without insurance.[47] This poses a serious risk to clients who rely on lawyers, as well as third parties who are injured by lawyers' misdeeds.[48] Uninsured lawyers impede the ability of victims to obtain redress, largely because of the economics and challenges associated with successfully pursuing a legal malpractice case.[49]

Most fundamentally, the lack of insurance will make it highly unlikely (some would say "virtually impossible") for most legal malpractice victims to retain counsel to pursue a claim, unless the victim is able to pay legal fees associated with prosecuting the case. Interviews with experienced plaintiffs' lawyers confirmed a commonly held belief that experienced lawyers will decline to represent malpractice victims, unless the prospective defendant-lawyer carries insurance.[50] Experienced lawyers also avoid cases involving uninsured defendants because uninsured defendants may proceed pro se and any judgment obtained would be uncollectable.[51] These conclusions are logical, especially when the target is a lawyer with limited means to pay defense costs or a judgment. Even if the prospective defendant could afford defense costs, plaintiffs' lawyers may be concerned that uninsured lawyers may hide or shield assets, creating questions on the ability to recover amounts awarded in malpractice judgments.[52]

Consumers who infrequently seek legal counsel are the persons who are more likely to retain solo or small firm lawyers. [53] Because of the higher concentration of uninsured lawyers among the ranks of solo and small firm lawyers, these clients may unwittingly hire uninsured

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[47] For a Table based on available data, see KRITZER & VIDMAR, *supra* note 42, at 41 (displaying a table composed of available data on private attorneys practicing without insurance).

[48] *See Washington Task Force Report*, *supra* note 11, at 45 (noting uninsured lawyers pose serious risks to clients and themselves).

[49] *See* Susan Saab Fortney, *A Tort in Search of a Remedy: Prying Open the Courthouse Doors for Legal Malpractice Victims*, 85 FORDHAM L. REV., 2033, 2038–41 (2017) [hereinafter *Tort in Search of a Remedy*] (discussing how the complex and expensive nature of legal malpractice cases makes it very difficult for many malpractice victims to retain counsel to handle cases on a contingency fee basis). Depending on the facts of a case, it is common for an experienced plaintiffs' attorney to require a minimum amount of damages, such as $300,000, before the attorney agrees to a contingency fee. *Id.* at 239.

[50] KRITZER & VIDMAR, *supra* note 42, at 148.

[51] *Id.*

[52] *See Lawyers Going Bare*, *supra* note 41, at 1330 (suggesting one reason that the percentage of uninsured lawyers may be higher in some states is because of state laws that make it easy to shield assets from malpractice judgments).

[53] *See* KRITZER & VIDMAR, *supra* note 42, at 2 (concluding that clients using small-firm lawyers or solo practitioners have a "substantial chance of dealing with a lawyer who lacks insurance").

lawyers.[54] As a result, the clients may feel doubly victimized when malpractice occurs and the lawyer is uninsured.[55]

Although experienced users of legal services may hire firms who carry maintain insurance, infrequent consumers may not even ask lawyers about insurance in those states where lawyers are not required to disclose the lawyers' insurance status directly to prospective clients. According to a public opinion poll conducted for the State Bar of Texas, 87.1 percent of the respondents indicated that they did not ask if their attorneys carried professional liability insurance.[56] Many lay people may mistakenly believe that lawyers are required to carry insurance. Subject to limitations in the policy, mandatory insurance protects all users of legal services, especially the most vulnerable due to the disparate positions between lawyers and clients. In short, mandatory insurance is necessary to protect the public by providing a source of compensation for persons injured by attorneys' malpractice.

B. The Mission of the Organized Bar & Integrity of the Legal Profession

Bar groups that have recommended mandating insurance focus on the risk that uninsured lawyers pose to the public. The Petition filed by the State Bar of Nevada went so far as to say that requiring insurance responds to the bar's mission as it "puts in place safeguards for both the attorney and client if a negligent act occurs."[57]

Similarly, the February 2019 Report of the Washington Task Force on Mandatory Malpractice Insurance focuses on the risk to the public, noting that that mission of the bar association includes serving the public, ensuring the integrity of the legal profession, and championing justice.[58] In commenting on the autonomy of lawyers to not purchase insurance and the role of the Washington State Bar Association (WSBA), the Washington Task Force Report to the Board of Governors made the following observations:

> While it may be appropriate for attorneys to evaluate and assume personal risks created by lack of professional liability insurance, the Task Force concluded that it

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[54] *See Uninsured Lawyers*, *supra* note 23, at 36 ("Ordinary people are overwhelmingly the ones who are harmed by uninsured lawyers. This is because most individuals hire solo and small firm lawyers for their legal matters."); *see also* KRITZER & VIDMAR, *supra* note 42, at 5 (using a two-hemisphere dichotomy of corporate clients who hire larger firms as compared to personal service sector clients who more frequently hire solo and small firm lawyers).

[55] *See Uninsured Lawyers*, *supra* note 23, at 36 (reviewing the prolonged battle that a former client in litigating with an uninsured defendant on a claim that an insurer would likely have settled many years earlier).

[56] *Law as a Profession*, *supra* note 21, at 197 n. 105 (citing *PLI Disclosure Survey of the Public*, ST. B. TEX. (Nov. 2009), http://www.texasbar.com/pliflashdrive/material/PublicSurvey.pdf [http://perma.cc/Q69R-6Y3N]).

[57] *Nevada Petition*, *supra note* 1, at 1. "The State Bar's mission is to govern the legal profession, to serve our members and to protect the public interest. This mission is fulfilled through rigorous admission standards, disciplinary proceedings and client protection programs." *Id* at 1.

[58] *Washington Task Force Report, supra* note 11, at 5 (also referring to the mission "to serve the members of the Bar"). "Protection of the public is the overriding *public* duty of lawyers, the WSBA, and the Washington Supreme Court*." Id.*

> is simply not fair for the clients. Clients of uninsured lawyers often have a difficult time obtaining compensation from those lawyers after a malpractice event. Clients of uninsured lawyers have an especially difficult time finding legal representation for quite legitimate claims against uninsured lawyers because plaintiffs' lawyers routinely decline to handle those claims. . . .
>
> In the Task Force's view, there is a distinct problem that directly affects the public interest and a solution is needed. The Washington Supreme Court as the supervisory authority over the practice of law in this state, regulates the profession to protect the public and maintain the integrity of the legal profession.[59]

As noted by Professor Levin, "uninsured lawyers . . . threaten to undermine the public's trust in lawyers" when clients discover that they have no meaningful recourse against their uninsured lawyers and when media report stories about clients who cannot recover for the harm caused by uninsured lawyers.[60]

Meaningful public protection through mandatory insurance helps fosters confidence in the legal profession.[61] More malpractice judgments may improve the public perception of lawyers if members of the public see that lawyers cannot escape liability for their mistakes that cause harm to others.[62] By providing access to remedies to malpractice victims, mandatory insurance advances the status of law as an honorable, self-regulatory profession that holds lawyers accountable for their misdeeds. "If we fail to protect those who rely on us, we fail to fulfill our obligations as a protected profession."[63]

C. Preserves Attorney Self-Regulation

Proponents of insurance also warn that failure to act will invite legislative control of the legal profession.[64] Arguably, the legal profession does not deserve to be self-regulated if we fail to discharge our responsibilities to protect the public and provide remedies to those we injure.[65] Although this argument may appear to be an empty threat, developments over the last twenty years

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[59] *Washington Task Force Report*, *supra* note 11, at 38.
[60] *Lawyers Going Bare*, *supra* note 41, at 1319.
[61] *See* Professional Indemnity Insurance—10 Key Questions Answered, THE L. SOC'Y (July 24, 2017), https://www.lawsociety.org.uk/support-services/advice/articles/professional-indemnity-insurance-10-key-questions-answered [http://perma.cc/46HW-FCVN] (explaining professional liability insurance is important for public confidence in the legal profession).
[62] *See* Cunitz, *supra* note 40, at 652 (suggesting that more cases reaching the court system will generate publicity and may alter the public perception of the legal profession).
[63] *Law as a Profession*, *supra* note 21, at 215.
[64] *See, e.g.*, *Lawyers Going Bare*, note 41, at 1319 (pointing to the concerns that if the bar does not self-regulate and require lawyers to carry insurance, legislatures may impose the requirement).
[65] "Once confidence is lost in the bar's ability to regulate itself in ways that are consistent with the public interest, state legislatures may increasingly become involved in lawyer regulation." *Id.*

point to a shift towards more administrative and legislative regulation of lawyers.[66] In discussing how lawyers increasingly are subject to legislation that governs their conduct, Professor James M. Fischer suggests that there will be increased "flashpoints between legislators and the bar over lawyers' professional and public duties."[67] The mandatory insurance issue may ignite such a flashpoint, requiring the bar to take decisive action to protect the public and discharge professional duties.

This may first occur in California given the 2017 statute requiring the State Bar to review and study the legal malpractice insurance issue and to report back to the legislature no later than March 31, 2019.[68] Following the report, decision makers may fashion a legislative solution if they determine that the bar is unwilling to take steps that protect the public and advance access to justice.[69]

D. Improves Risk Management & the Delivery of Legal Services

Lawyers who carry insurance benefit from the role that insurers play in risk management and practice assistance. Although it may be a challenge to quantify the impact of risk management, studies have revealed that the implementation of risk management techniques saved firms millions

[66] *See* Ted Schneyer, *An Interpretation of Recent Developments in Regulation of Law Practic*e, 30 OK. CITY U. L. REV. 559, 608 (2005) (reviewing recent developments and implications for lawyer self-regulation). Increasingly, there are challenges to lawyer self-regulation. *E.g.* Renee Knake, *The Legal Monopoly*, 93 WASH. L. REV. 1293, 1307–08 (2018) (referring to lawyer self-regulation as "problematic on multiple levels").

[67] James M. Fischer, *External Control over the American Bar*, 19 GEO. J. LEGAL ETHICS 59, 108 (2006).

[68] CAL. BUS. & PROF. CODE § 6060.5 (Westlaw 2019). The statutory directive opens with the following phrase: "In recognition of the importance of protecting the public from attorney errors through errors and omissions insurance." *Id.* § 6060.5(a). One California expert on lawyer regulation suggests that this phrase provides a glimpse of the Legislature's attitude on the insurance issue and that the legislature has already made up its mind and that the public needs protection through insurance. James Ham, *Will California Have Mandatory Malpractice Insurance for Attorney and What Will It Look Like?* (2018) (unpublished paper on file with author).

[69] *See Fisher*, *supra* note 67, at 98 ("In California, aggrieved individuals and groups have developed a practice of seeking legislative solutions to issues that were once seen as entirely within the purview of the bar.").

in claims[70] and were associated with a substantial reduction in the number of complaints against lawyers who implemented appropriate management systems.[71]

Insurers' risk management assistance to lawyers takes various forms.[72] Most obviously, insurers assist lawyers by educating them through continuing legal education programs, seminars, practice materials, and newsletters.[73] In addition, insurers provide individual guidance to firms. This individual guidance includes consultations on specific issues and practice reviews or audits of firm risk management systems that relate to preventing malpractice.[74] In the event that the review reveals areas in need of improvement, the insurer's representative may recommend remedial steps for resolution or the insurer may require implementation of appropriate changes as a condition to obtaining insurance.[75]

The Attorneys' Liability Assurance Society (ALAS), a legal malpractice mutual formed by large law firms, pioneered loss prevention audits for member firms and the designation of loss prevention partners at member firms.[76] This initiative was part of the movement of law firms to

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[70] *See* News Brief, *Risk Management Techniques Can Save Firms Millions in Claims*, 1997 ANDREWS INS. INDUS. LITIG. REP. 22529, Oct. 1, 1997 (reporting on the results of survey of 395 of the approximately 1,100 law firms in the U.S. employing 35 or more attorneys). The survey conducted by Louis Harris & Associates identified to key practices that correlate to large saving in liability dollars. *Id.* "Firms which have a designated risk management partner or committee, on average, paid out over $1 million less for the largest claim they resolved over the past five years. . . . [And f]irms which have a separate partner or committee to oversee the acceptance of new clients and engagements, on average, paid out approximately $800,000 less for the largest claim." *Id.*

[71] *See* Susan Saab Fortney, *Preventing Legal Malpractice and Disciplinary Complaints: Ethics Audits as a Risk-Management Tool,* BUS. L. TODAY, March 2015, at 1, 2 (reporting on the results of an Australian study that revealed that the complaints rate against law firms that completed a self-assessment process went down by two-thirds and the complaints rates for those firms was one-third of the number of complaints registered against firms that had not completed the process). For additional discussion of the self-assessment process as part of a proactive, management-based regulation program, see *infra* Part IV–B.

[72] For an overview of insurer's risk management efforts and positive impact on the quality of legal services, see Anthony E. Davis, *Professional Liability Insurers as Regulators of Law Practice*, 65 FORDHAM L. REV. 209, 220–22 (1996) [hereinafter *Insurers as Regulators*].

[73] *Id.* at 220 (noting the programs deal with fundamental firm management issues, as well as particular issues, such as conflicts, dockets, and file controls). For a discussion of risk management services that insurers offer solo and small firm lawyers, see Leslie C. Levin, *Regulators at the Margins: The Impact of Malpractice Insurers on Solo and Small Firm Lawyers,* 49 CONN. L. REV. 553, 582-84 (2016) [hereinafter *Regulators at the Margins*].

[74] *Id.* (Also within this education category are the variety of newsletters and even more substantial publications issued to insured by Insurers to guide and assist insureds in avoiding claims by adopting improved practice management.").

[75] *Id.* at 220–21.

[76] *See* Tom Baker & Rick Swedloff, *Mutually Assured Protection Among Large U.S. Law Firms*, 24 CONN. INS L.J. 1, 13 (2017) [hereinafter *Mutually Assured Protection*] (describing the origin of

designate ethics counsel and general counsel who contribute to the improvement of the quality of legal services.[77] Other carriers offer audits provided by employees of the insurer or outside counsel.[78] These audits are designed to review firm policies and procedures, as well as informal controls that focus on ethics and malpractice concerns.[79]

Some insurers provide self-audit materials that enable lawyers to systematically review firm policies and procedures relating to the firm's ethical infrastructure and delivery of legal services, such as the firm's procedures related to commencing and documenting the attorney-client relationship. By illustration, insurers have provided lawyers a great deal of guidance in adapting to the new world of electronic communications and data security. This assistance benefits lawyers as well as clients they serve.

In addition to the valuable assistance that insurers provide lawyers in avoiding and dealing with malpractice concerns, insurers' positive impact on lawyers' practices actually starts with the terms of insurance policies. Policy provisions can be written in such a way to dissuade lawyers from risky and unwise practices. As explained by insurance law experts, Professors Tom Baker and Rick Swedloff:

> Insurers also use contract provisions that eliminate or reduce coverage for claims thought to pose a high degree of moral hazard. . . . These contract designs regulate indirectly. By leaving a greater share of certain liability risks on the insured, they encourage greater vigilance over those risks.[80]

In analyzing such contract provisions in legal malpractice insurance policies, Anthony E. Davis, a risk management expert, explains that the policy provisions may supplement or clarify the definition of prohibited conduct beyond the terms and standards of ethical constraints or may limit

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ALAS). After analyzing qualitative data based on interviews and participants' observations related to the role of ALAS and other mutual organizations, Professors Baker and Swedloff conclude that mutual insurance arrangements in the lawyers' professional liability sector serves the members firms as well as the legal profession. *Id*. at 62.

[77] *See* Elizabeth Chambliss & David B. Wilkins, *The Emerging Role of Ethics Advisors, General Counsel, and Other Compliance Specialists in Large Law Firms*, 44 ARIZ. L. REV.559, 590 (2002) (examining the contributions that compliance specialists play in law firms). "Several [study] participants credit ALAS for shaping the development of in-house compliance efforts in their firms; and we heard similar comments about the role of other insurers." *Id.* at 590.

[78] For a discussion of practice audits by a person who conducts them for insurers and firms, see Anthony E. Davis, *Legal Ethics and Risk Management: Complementary Visions of Lawye*r Regulation, 21 GEO. J. LEGAL ETHICS 95, 111–12 (2008) [hereinafter *Risk Management*].

[79] See *Insurers as Regulators*, *supra* note 72, at 221 (noting some firms are beginning to recognize the value of streamlined practice management in the increasingly competitive marketplace in which they operate, and are, therefore, voluntarily commissioning and undergoing risk management audits").

[80] Tom Baker & Rick Swedloff, *Regulation by Liability Insurance: From Auto to Lawyers Professional Liability*, 60 UCLA L. REV. 1412, 1420 (2013) [hereinafter *Regulation of Liability Insurance*].

or exclude coverage for conduct not forbidden by the ethics rules.[81] For example, malpractice policies include some form of business pursuits exclusion that eliminate coverage for claims related to business transactions with clients.[82] These exclusions recognize the serious risks associated with such claims and the difficulty in lawyers engaging in such activities in accordance with applicable ethics rules and fiduciary principles.[83] Over the years lawyers have heeded the warnings and prohibited such transactions in their law firms.[84] Firm managers and ethics counsel can justify the prohibitions by pointing to the policy exclusions.

Insurers' positive impact on the implementation of risk management measures also dates back to the time when lawyers apply for insurance. Insurance applications require lawyers to describe how the firm handles matters such as conflicts checking and tracking deadlines. To respond to the application questions, lawyers must consider their policies and procedures. Lawyers who do not have policies and procedures in place should develop them in order to complete the application. Renewal applications should also contribute to lawyers evaluating the adequacy of policies and procedures related to practice and risk management.[85]

Once insured, lawyers can obtain their insurers' guidance when dealing with ethics and malpractice concerns. This is illustrated in Oregon where all lawyers in private practice get practice management assistance as participants in a mandatory insurance plan provided by the Oregon Professional Liability Fund (PLF). The PLF has developed an outstanding reputation for

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[81] *See Insurers as Regulators*, *supra* note 72, at 211–20 (providing examples of policy provisions which augment existing ethical rules and those that create new classes of restricted conduct).

[82] Some policy exclusions are narrow, eliminating claims related to the business enterprise while others ae broader in extending to claims related to the rendition of legal services to the enterprise. *See id* at 212–14 (reviewing policy approaches).

[83] *See id.* at 214 (noting cases involving business pursuits "invariably cast the lawyers in a negative, self-interest light. . . .[and are] difficult to defend and lead to awards or settlements that reduce Insurers' profits"). "By excluding coverage, Insurers attempt to make the profession confront the fact that lawyers who engage in representations involving conflicts, even if such representations are technically permissible, will assume the entire risk of the consequences." *Id.*

[84] "While it is generally imprudent to do business with a client, it is very dangerous and irresponsible to do so if the policy's business pursuit exclusion eliminates coverage for all claims relating to the business enterprise." SUSAN SAAB FORTNEY & VINCENT R. JOHNSON, LEGAL MALPRACTICE LAW: PROBLEMS AND PREVENTION 547 (2d ed. 2015) [hereinafter LEGAL MALPRACTICE LAW].

[85] In interviews with Connecticut lawyers, a "small number reported that the process of applying for [insurance] positively affects their thinking or conduct," *Regulators at the Margins, supra* note 73, at 594. For example, one lawyer stated that the renewal process "makes us go and review the [office] policies . . . and question whether or not there's a more efficient way to do it, a safer way to do it." *Id.*

its loss prevention and mitigation efforts that have evolved into a comprehensive Personal and Practice Management Assistance Program[86] which helps thousands of lawyers a year.[87]

Requiring insurance in other jurisdictions will extend the reach of such practice management assistance and possibly incentivize insurers to improve the practice assistance they provide in order compete in the marketplace. This type of risk and practice management guidance helps lawyers avoid and address professional liability problems at the same time that it assists lawyers in discharging their duties to clients.[88]

Mandating insurance also incentivizes lawyers to take precautions to minimize their malpractice exposure. Lawyers should invest in risk management when they recognize that such efforts can help avoid claims that would require them to pay deductibles and would negatively impact future premiums.[89]

E. Improves Accessibility & Affordability

As noted above, the need for a source of affordable insurance first prompted Oregon to implement a mandatory insurance program in the 1970s.[90] Interestingly, market forces and lawyer self-interest sparked the change.[91]

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[86] "The PLF stands at the vanguard as an innovative program for providing covered parties with services and support in the most cost-effective, efficient, responsive, and responsible way possible." Bernick, *supra* note 5, at 4. Such assistance includes counseling on claims prevention, as well as assistance in claims repair to address the problem and get the matter back on track. *Id.*

[87] "The PLF's practice management advisors make over 250 office visits and answer over 750 informational calls annually, teach dozens of CLEs throughout the state, and publish nearly 400 practice aids." *Id.* at 4. The PLF services include legal education, on-site practice management assistance through the PLF Practice Management Advisor Program, and personal assistance through the Oregon Attorney Assistance Program. *See* 2017 Annual Report, OR. ST. B. PROF. LIABILITY FUND 3–4, https://www.osbplf.org/assets/documents/annual_reports/2017%20PLF%20Annual%20Report.pdf [http://perma.cc/8GDR-UM9K] [hereinafter *Oregon 2017 Annual Report*] (noting that 100 percent of the people who returned surveys were "very satisfied" or "satisfied" with eight aspects of the Professional Management Assistance program).

[88] For example, one thorny ethical conundrum relates to lawyers' duty to disclose professional malpractice to their clients, see ABA COMM'N ON ETHICS & PROF 'L RESPONSIBILITY, Formal Op. 481 (2018). Although this ABA Ethics Opinion provides some general guidance, lawyers would benefit from expert guidance and a disinterested opinion in determining whether they have a duty to disclose malpractice to clients given the particular facts and circumstances of representation.

[89] Insurers can also incentivize risk management by providing premium discounts for certain activities. *See Regulators at the Margins*, *supra* note 73, at 582 (noting that a few underwriters offer a premium discount to lawyers who participate in risk management or ethics programming).

[90] *Law as a Profession*, *supra* note 21, at 190–192 (providing historical background on the establishment of the Oregon program).

[91] *Id.* at 190.

Since creation of the PLF in Oregon, all Oregon attorneys in private practice have been charged an annual assessment. In 2019 the assessment was $3,300.[92] From 2012–2018, the assessment was $3,500 per Oregon lawyer in private practice.[93]

Regardless of practice area, claims experience, or years of practice, lawyers in private practice in Oregon pay the same assessment and obtain basic coverage that includes $50,000 for defense costs and $300,000 for indemnity and, if necessary additional defense costs.[94] By insuring all lawyers, the Oregon fund has been able to spread the risk while keeping costs down for all insured lawyers.[95] All Oregon lawyers in private practice obtain the primary coverage provided by the Oregon fund even if a lawyer has a record of professional discipline or liability claims that make the lawyer a high-risk insured.

Although the Oregon experience of relying on a State Bar program to provide quality coverage to all lawyers at an affordable premium may not translate to other jurisdictions where the practicing private bar is considerably larger, requiring insurance of all lawyers may positively impact the affordability and accessibility of insurance through the private marketplace.[96] With more prospective insureds in the marketplace there should be more competition among insurers, contributing to greater stability in the insurance market, less restrictive coverage, and greater availability of coverage.[97]

Mandating that lawyers carry insurance may also contribute to the creation of special programs and risk retention groups. More state bar associations may establish bar-affiliated companies to provide affordable and accessible insurance. Specialty bar groups, such as National Association of Criminal Defense Lawyers, have developed programs where association members can obtain a full-range of professional liability insurance products.[98] Such programs can be designed to meet the special needs of members while improving the affordability and accessibility of insurance.[99]

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[92] *See About the PLF*, OR. ST. B. (2019), https://www.osbplf.org/about-plf/overview.html [http://perma.cc/P4B4-F59A] (stating the basic assessment for Oregon lawyers).

[93] From 2012–2018 Oregon lawyers in private practice were required to pay $3,500. *Oregon 2017 Annual Report*, *supra* note 87, at INTRODUCTION.

[94] Bernick, *supra* note 5, at 4.

[95] A mandatory state program saves expenses by eliminating broker commissions, marketing costs, taxes, regulator fees, and required contributions to state guaranty funds. Cunitz, *supra* note 40, at 648 (citing a 1993 Report from the ABA National Legal Malpractice Conference).

[96] *See* Bennett J. Wasserman & Krishna J. Shah, *Mandatory Legal Malpractice Insurance: The Time Has Come*, 199 N.J.L.J. 58, 58 (2010) (suggesting that carriers would lower premiums because there would be more revenue for carriers and competition for premium dollars).

[97] *Id.*

[98] *See National Association of Criminal Defense Lawyers*, COMPLETE EQUITY MKT http://cemins.com/attorneys/nacdl.php [http://perma.cc/HS2E-VFFU] (describing various insurance products tailored to types of practice, including part-time and assigned counsel practices).

[99] For example, the exoneration or "actual innocence" rule applicable in the majority of U.S. jurisdictions significantly lowers malpractice exposure of criminal defense lawyers. The

F. Avoids Shifting of Losses to Insured Lawyers

Uninsured lawyers also increase the malpractice exposure of insured lawyers. Quite simply, if there are insured lawyers and uninsured lawyers involved in representation, the insured lawyers will likely be the targets of possible malpractice claims related to the representation, even if the insured lawyers did not engage in misconduct.[100] For example, an uninsured lawyer may refer a matter to an insured lawyer. If the fee arrangement between the uninsured and insured lawyers is not in proportion to the services provided by each lawyer, state versions of ABA Model Rule 1.5(e) require that the lawyers assume joint responsibility for the representation.[101] The comments to the rule clarify that "[j]oint responsibility for the representation entails financial and ethical responsibility for the representation as if the lawyers were associated in a partnership."[102] In the event of malpractice by the uninsured lawyer, such as failure to convey a settlement offer to a jointly-represented client, the insured lawyer can face a malpractice claim even though the insured did not commit malpractice.[103] Requiring insurance for all private practitioners should help prevent situations where uninsured lawyers commit malpractice and shift responsibility to those lawyers who purchase insurance.

G. Helps Lawyers and Malpractice Victims Avoid Insurance Gaps

In the professional liability market, insurers initially offered the "occurrence" policy form.[104] Under an "occurrence" policy, an occurrence during the policy period triggers coverage. Because of unpredictability associated with predicting claims and losses that would be paid under occurrence policies, insurers abandoned the occurrence policy form and moved to the "claims-made" policy form.[105] A claims-made policy typically covers claims that are first made against an insured during the policy period, regardless of when the incident giving rise to the claim actually occurred.[106]

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premiums for an insurance product designed for criminal defense attorneys can reflect the lower risk of civil liability claims against criminal defense lawyers.

[100] *See* Robert I. Johnston & Kathryn Lease Simpson, *O Brothers, O Sisters, Art Thou Insured?: The Case for Mandatory Disclosure of Malpractice Insurance Coverage*, PA. LAW., May–June 2002, at 28, 32 (noting that members of the Pennsylvania Bar Association Professional Liability Committee have seen "responsible attorneys who are drawn into malpractice suits because another attorney involved in the matter proved to be uninsured").

[101] MODEL RULES OF PROF'L CONDUCT R. 1.5(e) (AM. BAR. ASS'N 2019).

[102] *Id.* cmt. 7. For a discussion of joint responsibility under ABA Model Rule 1.5, the Restatement of Law Governing Lawyers and related case law, see Susan S. Fortney & Vincent R. Johnson, Legal MALPRACTICE §5-7.3(a)(1) IN LEGAL ETHICS, PROFESSIONAL RESPONSIBILITY AND THE LEGAL PROFESSION (West Academic Publishing 2018) [hereinafter LEGAL ETHICS].

[103] Although the insured lawyer may pursue a contribution claim, such a claim may not result in any recovery if the other lawyer is uninsured and does not own sufficient non-exempt assets.

[104] INSURANCE PURCHASING GUIDE, *supra* note 4444, § 2:28.

[105] *See id. at* § 2:28 (explaining that the claims-made form provides insurers more underwriting certainty and the ability to better control their losses).

[106] *Id.* §§ 2:31, 2:32.

The shift from occurrence policies to claims-made policy forms can create gaps when lawyers do not understand that they must have a policy in effect at a time a claim is made and reported. In particular, a coverage gap may occur when a lawyer switches law firms. Insurers may rely on a number of policy provisions to clarify that the policy will only cover claims related to work performed while working at the named insured firm.[107] This can create a coverage gap for the lateral lawyer who joins a firm if the lawyer's former firm does not have a policy in effect at the time the claim is made.[108] When I was in private practice handling legal malpractice coverage matters I was surprised to learn how many lawyers did not focus on the limitations under their insurance policies. If insurance is required, lawyers would have to certify that they have a policy in effect. This would effectively force lawyers to understand the terms of their policy and to obtain coverage to protect them and persons they injure.

In short, mandating insurance serves the regulatory functions of the law of lawyering by providing access to remedies and providing incentives for lawyers to obtain insurance to protect themselves and their clients or third parties, while improving their practices. Although the most compelling justification relates to public protection, the discussion above also reveals that a mandatory scheme can positively impact the individual lawyers, the legal profession, and the quality of legal services.

III. ARGUMENTS IN OPPOSITION TO MANDATORY INSURANCE

A pattern of arguments emerges in reviewing commentary and reports that oppose requiring that private practitioners maintain professional liability insurance. Although many of these arguments focus on the impact on lawyers who are required to purchase insurance, some arguments are framed in terms of the public good. The discussion below reviews some of the most common arguments asserted by those who oppose mandating insurance.[109]

A. No Proof of Harm

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[107] Susan Saab Fortney, *Insurance Issues Related to Lateral Lawyer Musical Chairs*, 2000 PROF. LAW. 65, 70-71 (2000) (discussing the different approaches that insurers use to limit coverage to claims related to legal services performed at the law firm that is named as the insured under the policy).

[108] *Id.* at 70. Typically, a former lawyer will be covered under the former firm's policy for claims related to legal services performed at the former firm. The complication and possible gap occurs when the former firm does not carry insurance at the time the claim is made. A gap can also occur when a law firm dissolves without adequate tail coverage. For a discussion of post-dissolution risks, see ROBERT W. HILLMAN & ALLISON MARTIN RHODES, HILLMAN ON LAWYER MOBILITY § 4.11.3 (3d ed. Supp. 2018). The authors note that it is unlikely that lawyers are taking steps to insure against the post-dissolution malpractice risks because most lawyers are "unaware of the possibility of post-dissolution liabilities." *Id*. at 70.

[109] Those who oppose insurance also identify various logistics issues that will not be addressed by this article.

As a starting point, opponents maintain that there is no demonstrated need for requiring that lawyers maintain professional liability insurance. Simply stated, they assert that the proponents have failed to establish that the public is harmed by the status quo in the vast majority of jurisdictions where insurance is not required for lawyers in private law practice. Rather than conceding that there is a public protection problem, some bar groups and leaders have asserted that there is insufficient evidence to support mandating insurance.[110] This is the position recently taken by the New Jersey State Bar Association in recommending that the New Jersey Supreme Court reject a mandatory insurance requirement because there is "no evidence . . . [that such a] requirement is necessary or will resolve any demonstrated problem in connection with the ability of consumers to obtain quality legal services and to have recourse available in the event of negligent representation."[111]

The argument that there is no proof of harm refers to the lack of "statistics" demonstrating that the existence of uninsured attorneys results in uncompensated claims.[112] This argument does not recognize data available on unsatisfied judgments against lawyers and the significant percentage of lawyers practicing law without insurance. In an article reporting on her empirical study on uninsured lawyers, Professor Levin devotes nine pages to addressing the "no harm" argument.[113] She concludes, "there is evidence that clients of uninsured lawyers are being harmed by their lawyer[s'] malpractice, clients are not always compensated for the harm, and sometimes clients suffer substantial harm."[114]

Although it is difficult to discern the extent to which there are unsatisfied judgments against uninsured lawyers, there are numerous media stories reporting on unsatisfied judgments. In her article based on an empirical study of uninsured lawyers, Professor Levin cited numerous news stories referring to cases around the U.S. where plaintiffs obtained uncollectible judgments against uninsured attorneys.[115] These judgments ranged from amounts as small $25,000 in one case to $10 million in another case.[116] In Virginia, where lawyers must report unsatisfied judgments against them, ten lawyers indicated that they had unsatisfied judgments in 2015 and six of those were uninsured.[117]

These cases only represent a sliver of the number of victims injured by uninsured lawyers because malpractice claims against uninsured lawyers are very rarely pursued. Data collected by

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[110] *See, e.g.*, John Schlegelmilch, *Insufficient Evidence to Support Mandatory Malpractice Insurance Requirements*, NEV. LAW., June 2000, at 9, 9 (referring to the "complete lack of empirical data supporting the need for mandatory malpractice insurance").
[111] *NJSB Comments*, *supra* note 19, at 1.
[112] "Given the lack of statistics, it is not possible to determine the extent of public harm occurring, if any, due to the absence of mandatory insurance, and no way to measure the benefit of requiring insurance." *New Jersey Report*, *supra* note 20, at 50.
[113] *Lawyers Going Bare*, *supra* note 41, at 1309-17.
[114] *Id.* at 1316.
[115] *Id.* at 1314–15 n.196.
[116] *Id.*
[117] "Some uninsured lawyers have more than one unsatisfied malpractice judgment against them." *See id.* at 1314 n.185 (citing *In Re* Jobi, 896 N.Y.S.2d 328, 329 (App. Div. 2010)).

empirical scholars in two different studies reveal that it is very difficult for a victim to retain counsel to handle a legal malpractice matter on a contingency fee.[118]

When cases are not brought because the target is uninsured, we cannot establish with certainty the extent of the harm caused by uninsured lawyers. We do have one empirical scholar's estimate of harm caused by uninsured lawyers. Based on available claims data in Missouri, Professor Levin extrapolated from the Missouri data to estimate that the total indemnity payment for solo and small firm lawyers was-very roughly- $260 million annually.[119] Assuming that 25 percent of all solo and small firm lawyers are uninsured nationwide, she concludes that tens of millions more dollars would be paid annually to compensate the clients of uninsured lawyers for malpractice if their lawyers were insured.[120]

When evaluating the risk of harm, the number of uninsured lawyers and their practice settings should be considered. Although there are not national numbers available, data from individual states does reveal the percentage of uninsured lawyers in those particular states. Available survey data reveal that there is a significant percentage of lawyers practicing without insurance, ranging from 6 percent in South Dakota to 36 percent in Texas.[121] Uninsured lawyers are predominately in solo practice or firms of five or fewer lawyers.[122] These uninsured lawyers may represent individuals and small businesses.[123] This suggests that the clients of the uninsured

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[118] *See* KRITZER & VIDMAR, *supra* note 42, at 148 (reporting their study results that revealed that members of the plaintiff's bar were reluctant to pursue claims against uninsured lawyers). The following describes what Professor Levin learned in her interviews with six attorneys who devote substantial time to plaintiffs' malpractice work:

> Some plaintiffs' lawyers will "absolutely never" take such cases, at least on a contingent fee basis. If plaintiffs' malpractice lawyers discover that a lawyer is uninsured during the representation, some drop the case if there are no substantial assets. One such lawyer, who encounters two to three cases a year in which he learns after the lawsuit commences that the lawyer is uninsured, noted, "It has gotten to the place where I tell clients up front that if it turns out their lawyer is uninsured, I will have to send the case elsewhere or drop the claim. It does not make sense to chase lawyers for their condos and BMWs. They will file for bankruptcy.

Lawyers Going Bare, *supra* note 41, at 1313 (citing a Telephone Interview with Plaintiff's Attorney No. 5 (May 6, 2015)).

[119] *Id.* at 1311.

[120] *Id.*

[121] For a table outlining available data, see KRITZER & VIDMAR, *supra* note 42, at 41.

[122] *See id.* a 41-42 (discussing the practice setting of uninsured lawyers). According to the Washington Task Force Report 14% of all Washington lawyers in private practice consistently report being uninsured, but 28% of those in solo or small firms reported being uninsured. *Washington Task Force Report, supra* note 11, at 11.

[123] "[S]ome unknown but probably substantial proportion of lawyers working in personal services sector forgoes insurance." KRITZER & VIDMAR, *supra* note 42, at 92.

will likely be infrequent users of legal services and may be the most vulnerable when lawyers commit malpractice. At that point the malpractice victim will likely need to hire a plaintiff's attorney who will handle the matter on a contingent fee basis. As noted above, qualitative data support the conclusion that the malpractice victims will not be able to retain such counsel when the wrongdoer is uninsured. This harm to individual consumers may not be quantifiable, but deserves special note because personal service clients are the least prepared to protect themselves and most directly impacted by uncompensated losses.[124]

Finally, there is the personal face of harm experienced by clients injured by uninsured lawyers. In an open letter to the Nevada Supreme Court and Board of Governors, a Nevada litigator shared his experiences in counseling two personal injury clients, one of whom had lost a leg and another who suffered from life-long disabilities and pain.[125] Both had their cases dismissed because the attorney failed to timely serve the complaints in the personal injury actions. Because of the malpractice, the clients lost their underlying personal injury cases, leaving millions in uncompensated damages. Because the lawyer was uninsured and had no collectible assets, the clients were left without recovery. In cases such as these, the lawyer's negligence not only "deprives the client of property or rights to which they would otherwise be entitled under applicable law, [but also] damage is done . . . to the societal objectives embodied in the substantive rule and to the capacity of the legal system as a dispute-solving mechanism."[126]

B. Invites Litigation

Those who support and oppose mandatory insurance may agree on one point: the insurance status of a lawyer will affect the odds that a malpractice lawyer will pursue a claim. It is undeniable that existence of insurance improves the likelihood that the lawyer will be sued. This is where the proponents and opponents part ways.

Proponents focus on the impact on the injured person, arguing that without insurance, most victims are denied access. Stated differently, public protection is advanced if mandatory insurance increases the possibility that injured persons will be able to retain counsel to pursue actions with the prospect of recovery.[127]

Those who oppose mandatory insurance focus on the impact on lawyers, maintaining that insurance effectively puts a target on the lawyers back. They may believe that "going bare" and "making their pockets shallow" is an effective and ethical loss prevention strategy.[128] Without malpractice insurance to cover losses, some may also shelter non-exempt assets that would be

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[124] *Id.* at 168–69 (summarizing findings related to the differences between the corporate and personal services hemispheres and the ability of personal service clients to obtain redress).

[125] Robert T. Eglet, An Open Letter to the Nevada Supreme Court & the Board of Governors of the State Bar of Nevada, VEGAS LEGAL MAG. (last visited Feb. 19, 2019), https://www.vegaslegalmagazine.com/nevada-supreme-court-board-of-governors/ [http://perma.cc/BP8A-EPTX].

[126] *Improving Information on Legal Malpractice*, 82 YALE. L.J. 590, 592 (1973).

[127] *See infra* Part II, Section A.

[128] *But see Lawyers Going Bare*, *supra* note 41, at 1324 (suggesting that it would be a "perverse outcome, however, to allow these lawyers to reduce their chances of being sued by declining to purchase insurance that would compensate clients if the lawyers commit malpractice").

subject to execution in the unlikely event of a malpractice action.[129] Lawyers who use such tactics do not appear to differentiate between meritorious and frivolous claims, apparently believing that it appropriate to take action to avoid responsibility for malpractice losses.

A related argument against mandatory insurance is that it will lead to more frivolous claims.[130] Persons who take this position may not recognize or acknowledge that the economics and common law rules related to legal malpractice claims present significant challenges for persons injured by lawyers' conduct.[131]

To commence a legal malpractice action an injured person typically will seek representation. Because of the costs and complexity associated with legal malpractice actions, experienced plaintiffs' counsel screen carefully engagements, declining claims that are unmeritorious, unprovable, or where the amount of damages do not justify moving forward.[132]

Because of defendant-friendly rules related to malpractice cases it is very difficult for plaintiffs to carry the burden of proof on each element of a negligence claim.[133] Most notably, proving causation with the trial-within-a-trial presents a serious obstacle that many injured persons will not be able to overcome.[134] Other rules related to the case-in-chief and affirmative defenses also protect lawyers.[135]

Lawyers who understand what is necessary to prove malpractice claims should be less concerned about insurance inviting frivolous limitation. To help lawyers better understand their malpractice exposure, bar associations could educate lawyers on challenges that plaintiffs face in commencing, trying, and recovering on legal malpractice claims. More information on the showing necessary to prevail on a legal malpractice claim should help lawyers take measures to limit their exposure while, at the same time, deal with concerns related to insurance inviting frivolous claims.

To further address the concern that mandatory insurance would invite frivolous litigation, a jurisdiction could raise the threshold for filing a legal malpractice claim. One approach to doing so is to require that plaintiff file an expert's affidavit of merit within a certain period of time after

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[129] "The failure to purchase insurance is especially concerning when some uninsured lawyers use their legal knowledge to shelter assets." *Id.*

[130] *E.g.*, Harry H. Schneider Jr., *Mandatory Malpractice Insurance: No: An Invitation to Frivolous Suites*, A.B.A. J., Nov. 1993, at 45, 45.

[131] For an article that focuses on the various challenges that victims must overcome in commencing a legal malpractice case, trying the case, and recovering judgement, see *Tort in Search of a Remedy*, *supra* note 49.

[132] *See id.* at 2039–41 (reviewing factors that plaintiffs' counsel consider in evaluating malpractice cases); *see also* KRITZER & VIDMAR, *supra* note 42 at143–50 (discussing interview responses related to the screening factors that plaintiffs' lawyers use in evaluating legal malpractice claims).

[133] *Tort in Search of a Remedy*, *supra* note 49, at 2042.

[134] *See id.* at 2043–48 (discussing the trial-within-a-trial hurdle and causation in civil litigation, transactional matters and criminal cases). See generally Vincent R. Johnson, *Causation and "Legal Certainty,"* 8 ST. MARY'S J. LEGAL MALPRACTICE & ETHICS 374 (2018).

[135] *See id* at 2048–51 (identifying common rules on recovering types of damages and attorneys' fees, as well as affirmative defenses that enable lawyers to escape or limit their liability).

the commencement of litigation.[136] In connection with tort reform related to medical malpractice litigation, a number of states adopted statutory requirements requiring that complaints against professionals be supported by expert affidavits.[137] Some states expressly require such affidavits for legal malpractice cases.[138] Although the procedural and substantive requirements for these requirements vary,[139] such affidavits can be used to both deter and dismiss frivolous professional liability claims. Imposing such an affidavit requirement may be a reasonable approach to deal with lawyer concerns related to mandatory insurance and frivolous litigation, while providing protection to injured persons who can prove their legitimate claims.

C. Cost and Impact on Legal Fees

The largest percentage of uninsured respondents refer to "cost" when identifying reasons why they do not carry lawyers' professional liability insurance (LPL). The following summarizes the findings from surveys of uninsured lawyers in New Mexico, Arizona and Connecticut:

> In all three of these jurisdictions, annual LPL premiums for solo and small firm practitioners cost around $3,000 per lawyer for minimum levels of coverage ($100,000/$300,000). LPL insurance is a deductible business expense. Nevertheless, uninsured New Mexico lawyers most frequently cited cost as the reason for not carrying malpractice insurance. In the other two states, uninsured lawyers most frequently cited unaffordability as the reason: Among the uninsured Arizona and Connecticut lawyers, 65% and 58% responded, respectively, that one of the reasons they did not carry LPL insurance was because they could not afford it.[140]

As suggested in this excerpt, lawyers often refer to "cost" or "affordability" as a reason for not buying insurance but may not actually know the relatively reasonable cost of purchasing insurance in their jurisdictions. For example, New Mexico lawyers most frequently cited cost as the reason for not carrying malpractice insurance, but 40.8 percent of the uninsured lawyers in private practice reported that they had never applied for insurance.[141] Another telling result was that 53 percent of the New Mexico uninsured lawyers "strongly agreed" or "agreed" that they would purchase insurance if the New Mexico Supreme Court required them to do so.[142] This suggests that some respondents may conflate "cost" and "affordability." Evidently, lawyers who can afford to

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[136] LEGAL MALPRACTICE LAW, *supra* note 84, at 78.
[137] LEGAL MALPRACTICE TREATISE, *supra* note 26, § 37:62.
[138] LEGAL ETHICS, *supra* note 102, at §5-2.2(f)(3).
[139] *See id.* (reviewing jurisdictional variations and attempts of plaintiffs to avoid application of the requirement).
[140] *Lawyers Going Bare*, *supra* note 41, at 1290. "Among the fifteen Arizona lawyers who had never been insured, seven had never communicated with an insurance agent, broker, or underwriter about the possibility of obtaining LPL insurance." *Id.*
[141] *Id.* at 1290.
[142] *Id.* at 1291.

purchase insurance do not see it as a cost of practicing law, unless insurance is required by the regulator.

The recent experience in implementing an insurance requirement in Idaho suggests that objections based on cost are overstated. The Executive Director of the Idaho State Bar reported that no premium quote had exceeded $3,500, although some expressed concern about the cost.[143] In her study of uninsured lawyers, Professor Levin learned that some lawyers with marginal or not very profitable practices genuinely could not pay for insurance.[144] If required to purchase insurance these lawyers would need assistance on law practice management to determine if they could improve the profitability of their practices or could be forced to find other positions.

Some attorneys concerned about cost may be practicing on a part-time basis. These attorneys may be able to purchase part-time policies with very reasonable premiums.[145] Undeniably, if insurance is required, some lawyers who currently practice on a part-time basis may retire if the cost of insurance is more than the revenue from occasional legal work.[146]

. Another critique is that mandatory insurance could contribute to increases in legal fees lawyers charge.[147] This argument assumes that the lawyer will pass the cost of insurance on to clients. This is not the only option available to lawyers. Without increasing fees, a lawyer could elect to work more hours (assuming that the lawyer has enough business to generate additional income) or a lawyer may absorb the cost of insurance (effectively adjusting annual income).

Because uninsured lawyers are predominately in solo and small firm practice, data on lawyers' income shed light on the ability of lawyers to purchase insurance and not raise legal fees. Although the findings of these surveys and analyses of data on the income of solo lawyers have been debated, data reveal that lawyers at the higher percentiles of income should be able to more comfortably pay insurance premiums than those in the lower quartiles[148] For those in the lower quartiles, the cost of insurance may be more of a hardship without an increase in legal fees.

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[143] *Idaho Presentation*, *supra* note 3, at 3.

[144] *Lawyers Going Bare*, *supra* note 41 at 1292.

[145]"In some states, part-time lawyers (working fewer than 25 hours per week) can obtain LPL insurance for $600 per year or less." *Id.* at 1320.

[146] *See Uninsured Lawyers*, *supra* note 23, at 36–7 (noting that some uninsured lawyers that were semi-retired cited "cost" as a reason for not maintaining insurance but reported that they could afford to purchase insurance if required to do so).

[147] See *NJSB Comments*, *supra* note 19, at 2 (asserting "any increase due to the mandatory nature of the coverage might be passed onto clients. . . . [And] could make legal services even more out of reach for those who need them the most.").

[148] Data and analyses of income reported by solo and small firm lawyers vary a great deal. For example, according to an online survey by the Martindale Legal Marketing Network, solo and small firm lawyers made an average of $198,000 in 2017, while the median earning amount was $140,000. Debra Cassens Weiss, *Average earnings for solo and small-firm lawyers was nearly $200K last year, report says,* ABA J., May 22, 2018, http://www.abajournal.com/news/article/average_earnings_for_solo_and_small_firm_lawyers_was_nearly_200k_last_year. By contrast, Professor Benjamin H. Barton identified Internal Revenue data indicating that the average income for solos was slightly more than $49,000 in

For those lawyers who determine that they cannot afford to purchase insurance without increasing fees, the amount of the actual increase will depend on a number of factors, including the type of fee and the number of hours that lawyers work. Even if we assume that the average lawyer bills only 2.4 hours a day, as one study has suggested, the amount of increased legal fees would be $6.07 per hour to cover a $3,500 insurance premium if the lawyer works 48 weeks per year.[149]

Depending on their circumstances and means, consumers may be willing to pay higher fees for a lawyer who is insured. In a 2018 survey conducted by the National Opinion Research Center at the University of Chicago, 78% of California residents indicated that legal malpractice insurance should be required for lawyers to practice in California.[150] Of those respondents, 86% believed that lawyers should be required to carry insurance even if lawyers would charge higher fees to cover insurance premiums.[151]

If a lawyer is practicing in a high risk and high premium area such as securities law, that lawyer's fees may reflect the cost of services. If the fees do not and the uninsured securities lawyer is charging less than insured lawyers, any increase in fees to cover insurance costs could eliminate the competitive advantage of uninsured lawyers who appear to be charging less for comparable services.

2012. *See* Debra Cassesns Weiss, *How much do solo lawyers make? More than IRS data suggests, law profes assert*, ABA J., Aug. 1, 2016, http://www.abajournal.com/news/article/how_much_do_solo_lawyers_make_more_than_irs_data_suggests_law_profs_assert/ (discussing the debate related to calculating average earnings for solo lawyers).

Amounts earned may also vary depending on the state of residence. For example, the following sets forth the results for income reported by the 1530 full-time solo lawyers who responded to the Texas survey conducted in 2016: the 25th percentile was $65,000, the 50th percentile was $105,000, and the 75th percentile was $175,000. Milan Markovic & Gabriele Plickert, *Results of the 2016 Texas Lawyer Study*, http://tamulawyerstudy.org/results/#gf_1

[149] The 2.4 per day figure is based on a 2018 CLIO study that found that an average lawyer dedicates 2.4 hours to billable work per day. CLIO, 2018 Legal Trends Report, https://www.clio.com/resources/legal-trends/. For the purposes of estimating possible fee increases to cover insurance cost, the calculation assumed that work is billed on an hourly basis.

[150] NORC at University of Chicago, Legal Malpractice 2018, *California State Bar, Amerispeak Field Report*, December 13, 2018. The NORC results reflected opinions of 1038 adults who were selected using sampling strata. *Id.* at 1.

[151] For those respondents who indicated that all lawyers should be required to carry legal malpractice insurance, 86% responded that insurance should be required, even if lawyers would charge higher fees to cover the cost of insurance. When asked if they would vote in favor of a proposed law requiring lawyers to have legal malpractice insurance, 72% indicated that they would be in favor of mandatory insurance if it would result in lawyers raising their hourly fees by $10 and 60% would be in favor of mandatory insurance if it would result in lawyers raising their hourly fees by $30. "Overall, 57 percent of respondents would support such a law, despite an increase in costs." *California Draft Report, supra* note 10, at 10.

D. Impact on Pro Bono, Low Bono Representation

Some lawyers maintain that requiring insurance will adversely impact pro bono representation. Lawyers interested in providing such services may be able to identify legal services programs that provide insurance coverage to volunteers who handle pro bono cases under the umbrella of the legal services organization.[152] If a state mandates insurance coverage for private practitioners, the insurance provided by the legal services organization should satisfy the state requirement for lawyers who only represent pro bono clients under the organizations' umbrella. If the lawyer's other representation of clients is limited, the lawyer may seek a part-time policy available from some insurers.

The Washington Task Force Report discusses various insurance options for lawyers providing primarily pro bono services.[153] The report notes that 56% of Washington lawyers are connected to their pro bono clients through referral from legal aid providers, non-profit organizations, or bar association or other independent pro bono programs, many of which are required to provide malpractice insurance for their volunteers or have a policy in place to require that all volunteers carry their own malpractice insurance.[154] Recognizing that there are some gaps in the availability of insurance for lawyers providing pro bono representation in Washington, the Washington Task Force Report recommends that the Washington State Bar Association "develop and put into effect an improved statewide program to increase access to malpractice insurance for lawyers whose private practices are limited solely to pro bono representation."[155] Other bodies recommending mandatory insurance should follow Washington's lead in evaluating and addressing issues related to the availability of insurance for lawyers providing pro bono representation.

Lawyers handling matters on a reduced fee basis should study their business model to determine how they can cover insurance costs. Guidance is available from experts, such as directors of legal incubators, who can assist lawyers in determining how to develop personal and professional budgets to cover their costs, including insurance, while continuing to provide representation to persons of modest means.[156]

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[152] According to the ABA Standards for Programs Providing Civil Pro Bono Legal Services to Persons of Limited Means, a pro bono program should obtain professional liability insurance for itself, its staff and its volunteers. AMERICAN BAR ASSOCIATION, STANDARDS FOR PROGRAMS PROVIDING CIVIL PRO BONO LEGAL SERVICES TO PERSONS OF LIMITED MEANS, Standard 4.6, at 148.

[153] *Washington Task Force Report, supra* note 11, at 17-19.

[154] *Id.* at 17-18.

[155] *Id.*at 53.

[156] For a very helpful article on the importance and sustainability of low bono law practices, see Luz E. Herrera, *Encouraging the Development of "Low Bono Law" Practices*, 14 U. MD. L. J. RACE, RELIGION, GENDER & CLASS 1, 3 (2014). Dean Herrera's article includes budget illustrations that factor in the cost of malpractice insurance. *Id.* at 15. Some incubator programs designed for law school graduates starting their own practices require that incubator attorneys

E. Philosophical Objections

Some commentators question the manner in which a mandatory insurance regime would encroach on bars' autonomy and cede too much power to insurance companies.[157] The argument is that insurers through their underwriting and pricing can effectively determine who practices law.[158]

Given the degree to which insurers compete for business in a soft market, this concern appears to be unfounded. Even in harder insurance markets, lawyers who encounter difficulty in securing insurance should be provided the opportunity to obtain coverage from an assigned risk pool. Interestingly, after Idaho adopted the rule requiring insurance, no lawyer reported an inability to purchase insurance, although some indicated that the requirement will affect their decision to retire from practice.[159]

Some fiercely independent lawyers resent being required to purchase malpractice insurance. They may believe that they practice safely and that they should be able to self-insure. One approach to addressing this concern is to give lawyers an option of maintaining the minimum amount of insurance required or proof of financial responsibility. This possibility is discussed in the next section dealing with alternatives to mandatory malpractice insurance.[160]

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obtain malpractice insurance. For example, the Los Angeles Incubator Consortium requires incubator participants to carry insurance, but the organization does not provide it to them. *See* American Bar Association, Lawyer Incubator Profiles, https://www.americanbar.org/groups/delivery_legal_services/initiatives_awards/program_main/program_profiles/#laconsortium

[157] For a review brief discussion of lawyers' objections based on autonomy, see Jacob. J. (Jake) Key, *Analyzing the Oregon Model: The Pros and Cons of Requiring Attorneys in Private Practice to Maintain Malpractice Insurance*, 19 W. MICH. U. COOLEY. J. PRAC. & CLINICAL L. 163, 177–78 (2017).

[158] *See, e.g.*, Harry H. Schneider, Jr., *Mandatory Malpractice Insurance, Has the time come to require coverage?; No: An Invitation to Frivolous Suits*, A.B.A. J., Nov. 1993, at 44, 45 (warning that mandatory malpractice insurance "effectively defers to the insurer . . . the ultimate decision as to who will, and who will not, be permitted to practice law").

[159] In a presentation to the WSBA Task Force on February 21, 2018, Diane Minnich, Executive Director of the Idaho State Bar stated that "so far no lawyer had been categorically unable to obtain insurance." *Idaho Presentation*, *supra* note 3, at 3.

[160] In other situations, in which insurance is required, lawyers may maintain proof of financial responsibility rather than purchasing insurance. For example, an Illinois rule allows lawyers to practice in limited liability firms provided that they maintain insurance or proof of financial responsibility in the amount set forth in the rule. ILL. CT. R. 722 (Westlaw 2019).

IV. ALTERNATIVE APPROACHES DEALING WITH RISKS POSED BY UNINSURED LAWYERS

Rather than requiring that all practitioners maintain malpractice insurance, three different approaches have been used in the U.S. to address specific risks posed by uninsured lawyers: mandatory disclosure of insurance status, compulsory risk management training, and proof of financial responsibility. Each of the alternatives has its advantages and limitations.

A. Insurance Disclosure Rules

The most common alternative to mandatory insurance has been for states to adopt disclosure rules that require uninsured lawyers to disclose their insurance status. These disclosure rules are intended to address the asymmetry between lawyers and consumers related to information on the lawyer carrying insurance.[161] The lack of insurance is clearly material information because surveys reveal that nonlawyers mistakenly believe that all lawyers are insured.[162] Many of the same public protection arguments that are made in favor of mandatory malpractice insurance apply to mandatory insurance rules.[163]

Twenty-four states have adopted some form of disclosure of a lawyer's insurance status.[164] By adopting these rules, states took the middle ground between continuing the status quo and implementing mandatory insurance.[165] Rather than requiring all lawyers to maintain minimum levels of insurance, disclosure balances lawyer autonomy and client protection. Lawyers have the choice to decide to purchase insurance, understanding that they must disclose their lack of insurance to clients. When lawyers elect not to purchase and make the required disclosure,

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[161] For a discussion of how disclosure of the lack of insurance helps bridge the information gap, see *Law as a Profession*, *supra* note 21, at 197–98.

[162] See *Uninsured Lawyers*, *supra* note 23, at 38 (citing a Virginia State Bar Association Report on Study Undertaken By Client Protection Subcommittee of the Special Committee on Lawyers Malpractice Insurance 2005-2006).

[163] A number of practitioner and student articles have examined whether lawyers should be required to disclose to clients whether they carry insurance. *See* Farbod Solaimmani, Note, *Watching the Client's Back*: *A Defense of Mandatory Insurance Disclosure Laws*, 19 GEO. J. LEGAL ETHICS 963 (2006) (arguing for modifications to the disclosure rule to balance the professional interests of attorneys and consumer protection); *see also* James C. Gallagher, *Should Lawyers be Required to Disclose Whether They Have Malpractice Insurance?*, VT. B. J., Summer 2006, at 5, 5 (analyzing considerations as to Vermont's possible adoption of disclosure requirement); James E. Towery, *The Case in Favor of Mandatory Disclosure of Lack of Malpractice Insurance*, VT. B. J., Fall 2007, at 35, 35 (advocating the adoption of a disclosure requirement as a obligation owed by attorneys pursuant to their license); Jeffrey D. Watters, *What They Don't Know Can Hurt Them: Why Clients Should Know if Their Attorney Does Not Carry Malpractice Insurance*, 62 BAYLOR L. REV. 245, 250 (2010) (suggesting that Texas adopt a dual-disclosure rule, requiring disclosure to both clients and the state bar).

[164] For background information on state rules and a Model ABA Court Rule on Insurance Disclosure, see *Law as a Profession*, *supra* note 21, at 193–96.

[165] *Id.* at 193.

consumers are (theoretically) provided information before hiring counsel.[166] Assuming that consumers obtain the information at the time that they are selecting counsel, they can decide between lawyers who purchase insurance as a safety net and lawyers who go bare.[167]

Although disclosure rules do not directly reduce the risk of asset insufficiency, such rules may reduce the number of uninsured lawyers. To avoid having to disclose their lack of insurance, lawyers may purchase insurance. In this sense, disclosure rules incentivize lawyers to buy insurance.

To determine whether disclosure rules has actually impacted the number of uninsured lawyers, Professor Levin systematically examined the number of uninsured lawyers in states with disclosure rules.[168] Based on the limited available data, she concluded that it is difficult to assess whether disclosure requirements have had a significant effect on the purchase of lawyers professional liability (LPL) insurance.[169] The following describes her findings on two states with rules requiring direct disclosure to clients:

> The biggest success story may be South Dakota, where 94% of lawyers who engage in private practice in the state carry LPL insurance. This state also has the most demanding direct disclosure requirements. After South Dakota required uninsured lawyers to directly disclose their lack of insurance to clients in all written communications and advertising, the percentage of insured lawyers practicing in the state reportedly reached a high of 96%. . . . The state did not, however, gather data concerning the percentage of uninsured lawyers before 1990, when it adopted the direct disclosure requirement, so it is not possible to determine whether the percentage of uninsured lawyers significantly decreased thereafter.
>
> . . . .
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> It may not be a coincidence, however, that Pennsylvania—which requires direct disclosure to clients and posts lawyers' LPL insurance information on a website—reports the next highest rate of insured lawyers in private practice (93.1%).[170]

Unlike South Dakota and Pennsylvania, New Mexico did not appear to have a significant reduction in the number of uninsured lawyers after adopting a direct disclosure rule.[171]

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[166] The actual receipt of information depends on whether the rule requires that prospective clients be directly provided information, as opposed to the information being available on regulators' websites.

[167] Some suggest that lawyers who "go bare" may have a greater incentive to avoid liability because they have personal liability rather than insurance protection. *E.g. Leusbsdorf, supra* note 43, at 156. The problem with this proposition is that lawyers who go bare likely know that the lack of insurance significantly lowers the likelihood of them being sued.

[168] For the study results and related analysis, see *Lawyers Going Bare, supra* note 41, at 1296–1309.

[169] *Id*. at 1303.

[170] *Id*. at 1305.

[171] *Id*. at 1306.

Professor Levin concludes that there is also "little evidence that uninsured lawyers are motivated to purchase LPL insurance simply because state regulators post their lack of insurance coverage on an official website.[172]

After examining the impact on the percentage of uninsured lawyers, Professor Levin turns to the limits of the disclosure, starting with the effectiveness of informing consumers of the lack of insurance.[173] Even with direct disclosure to consumers, she notes that it is unclear whether clients actually read the information or fully understand the implications of their lawyers being uninsured.[174] She also notes that the timing of the disclosure may be problematic because the disclosure typically comes after the consumer has decided to engage the lawyer.[175] "Cognitive biases may also make it difficult for a client to change course once a decision to retain a lawyer has been made."[176]

To address the concerns and better empower consumers to make informed choices, Professor Levin makes a number of recommendations for disclosure requirements to provide "meaningful information to the public before the client makes the decision to hire the lawyer.[177] This would include direct disclosure to clients, as well is disclosure on the lawyers' website and in written communications with potential clients.[178] In order for consumers to find information on a lawyer's insurance status before contacting a prospective lawyer, she also recommends that state regulators make such information accessible through a simple internet search.[179] Regulators and bar groups interested in implementing meaningful disclosure rules that help bridge the information gap between consumers and clients, should make changes recommended by Professor Levin.

Even with improved disclosure rules, decision makers interested in public protection should recognize the disclosure rules are largely limited to providing information to prospective clients. From the standpoint of information asymmetry, this is a good thing. However, if the primary goal is to reduce the number of uninsured lawyers, it is unclear the extent to which a disclosure requirement incentivizes uninsured lawyers to purchase insurance.[180]

Moreover, disclosure rules provide no information or protection to nonclients who are victims of malpractice. Most often the discourse on legal malpractice and insurance focuses on clients, without recognizing that some of the most serious malpractice claims involve nonclient victims.[181] Therefore, from the standpoint of public protection, both clients and nonclients who are injured by uninsured lawyers would be better protected through a mandatory insurance rule.

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[172] *Id*.
[173] *Id.* at 1325.
[174] *Id.*
[175] *Id.* at 1326.
[176] *Id.*
[177] *Id.* at 1328.
[178] *Id.*
[179] *Id.*
[180] *See infra* at notes 156-160
[181] For an overview of liability claims brought by nonclients, see LEGAL MALPRACTICE LAW, *supra* note 84, at 179–258.

B. Proof of Financial Responsibility

The second alternative to requiring insurance is to give lawyers the option to provide proof of financial responsibility as an alternative to malpractice insurance. In this context, proof of financial responsibility refers to specifically segregated and designated funds to satisfy a malpractice judgement.[182] Although there is no assurance that the insurance proceeds or segregated funds will completely cover the plaintiff's losses, the funds provide a protected source of recovery and minimum level of protection for persons injured by the acts or omissions of a lawyer.

A few states allow for use proof of responsibility in connection with practice in limited liability firms. When enacting statutes or rules that allow lawyers to limit their liability for vicarious liability claims, jurisdictions included insurance requirements. These requirements were intended to address pubic protection concerns related to the ability of a plaintiff to recover in the event of a malpractice judgment.[183] For those lawyers who wanted to convert to a limited liability firm, but did not want to purchase insurance, the provisions allow lawyers to provide proof of financial responsibility as an alternative to insurance.

Statutes will indicate the type of proof required as well as the amount of funds. For example, the Illinois rule requires that the amount of funds be in a sum no less than the required annual aggregate for minimum insurance. Because the Illinois minimum annual aggregate for firms in Illinois is $250,000 times the number of lawyers in the firm, the amount of designated or segregated funds is a large sum for firms of any size.[184]

Unlike insurance policies with an expense-within-limits feature, the amount of the segregated or designated funds would not be reduced for defense costs.[185] As compared to insurance where coverage may be disputed or denied by the insurer, with proof of responsibility the malpractice plaintiff should have a source of recovery, provided that the funds are safely segregated and designated for payment in the event of a malpractice judgment.

Although it is doubtful that many lawyers would elect to rely on the proof of financial responsibility in lieu of purchasing insurance, it is an option for those persons who want to self-insure. From the standpoint of public protection, it should address the same issue of asset insufficiency, providing an amount that can be tapped in the event of a malpractice judgment. Therefore, any mandatory insurance regime requiring lawyers to purchase insurance in the open market should include the proof of responsibility option.

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[182] INSURANCE PURCHASING GUIDE, *supra* note 44, §§16–17.

[183] *See* Susan Saab Fortney, *Seeking Shelter in the Minefield of Unintended Consequences—The Traps of Limited Liability Law Firms*, 54 WASH. & LEE L. REV. 717, 729–30 (1997) (noting: "[L]egislatively mandated insurance addresses the concern that the elimination of vicarious liability leaves malpractice plaintiffs without recovery in the event of a judgment").

[184] ILL. CT. R. 722 (Westlaw 2019).

[185] Policies that include an expense-within-limit provision require that defense costs be deducted from the limits of liability. *Legal Malpractice Insurance*, *supra* note 44, at 48.

C. Proactive Management-Based Regulation

A third approach to dealing with concerns related to uninsured lawyers is to use proactive regulation. Proactive regulation refers to approaches and programs that try to prevent lawyer regulatory and service problems from occurring, rather than dealing with alleged misconduct after complaints are filed.[186] Proactive regulatory measures that promote ethical law practice by assisting lawyers with practice management are referred to as proactive, management-based regulation (PMBR).[187]

The development of PMBR can be traced to initiatives to liberalize the business structures available to Australian lawyers.[188] New South Wales (NSW) was the first Australian state to enact legislation allowing incorporated firms to include nonlawyer owners without restriction.[189] The statute imposed management-related provisions intended to allay concerns related to new structures, called "incorporated legal practices" (ILPs).[190] First, the statute required that the incorporated firms appoint a legal practitioner director to be generally responsible for the management of the firm. Second, the statute required that the director ensure that "appropriate management systems" are implemented and maintained to enable the provision of legal services in accordance with obligation imposed by law.[191]

Because the statute did not define "appropriate management systems," the Legal Services Commissioner for NSW worked with various stakeholders, including bar groups and legal malpractice insurers, to determine what approach to use.[192] Rather than imposing prescriptive rules, they determined that the preferred approach would be to develop guidelines that addressed

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[186] *Proactive Regulation: Frequently Asked Questions*, NAT'L ORG. OF B. COUNS. (June 22, 2017), https://nobc.org/resources/Documents/Entity%20Regulation/2017-6-22%20FAQs%20NOBC%20Proactive%20regulation%20Committee.pdf [http://perma.cc/AMC6-5XE3]. For a thorough discussion of proactive regulation's role in promoting public protection by preventing problematic behavior, see Laurel S. Terry, *The Power of Lawyer Regulators to Increase Client & Public Protection Through Adoption of a Proactive Regulation System*, 20 LEWIS & CLARK L. REV. 717 (2016).

[187] Ted Schneyer, *On Further Reflection: How "Professional Self-Regulation" Should Promote Compliance with Broad Ethical Duties of Law Firm Management*, 53 ARZ. L. REV. 577, 584 (2011).

[188] *See* Susan Saab Fortney, *Promoting Public Protection through an "Attorney Integrity" System: Lessons from the Australian Experience with Proactive Regulation of Lawyers*, 23 PROF. LAW. 16, 17 (2015) [hereinafter *Attorney Integrity System*].

[189] For an in-depth description for the development of PMBR in Australia, see Susan Saab Fortney & Tahlia Gordon, *Adopting Law Firm Management System to Survive and Thrive: A Study of the Australia Approach to Management-Based Regulation*, 10 U. ST. THOMAS L.J. 152 (2012) [hereinafter *Management-Based Regulation*].

[190] Susan Saab Fortney, *The Role of Ethics Audits in Improving Ethical Conduct in Law Firms: An Empirical Examination*, 4 ST. MARY'S J. LEGAL MAL. & ETHICS 112, 118 (2014) [hereinafter *Ethics Audits*].

[191] *Id.*

[192] *See Management-based Regulation*, *supra* note 192, at 160–65 (describing the development of the objectives and the self-assessment process).

lawyers' professional guidelines.[193] Using that approach, they articulated ten objectives of sound practice based on type of concerns that lead to complaints against practitioners, such as conflicts of interest and supervision lapses.[194]

In an effort to give practitioners guidance in meeting the objectives, the Legal Services Commissioner also worked with stakeholders to devise a self-assessment process. The self-assessment process required that the director for the firm complete a self-assessment form (SAF).[195] The SAF listed the ten objectives with indicative criteria to guide the director in evaluating the firm's implementation of appropriate management systems with respect to each objective.[196] The SAF required that the director rate the firm's compliance with the each of the ten objectives on a scale ranging from "Fully Compliant" to "Non-Compliant."[197] When the SAF indicated that the firm was "Non-compliant" or "Partially Compliant" a representative from the Commissioner's Office worked with the firm to achieve compliance.[198] The entire process became known as "education towards compliance" because it gave the director the opportunity to first engage in self-examination of management practices and then obtain guidance from regulators.[199] Because the approach focuses on prevention and mitigation, Professor Ted Schneyer referred to the NSW program as the prototype for "proactive, management based regulation."[200]

Empirical studies examined the impact of the NSW approach to proactive regulation. Dr. Christine Parker conducted the first study that focused on the complaints rates against firms that completed the self-assessment process.[201] Her study found that complaints rates for incorporated firms went down by two thirds after the firms completed their initial self-assessment.[202] Another noteworthy finding was that the complaints rate for firms that completed the self-assessment process was one-third of the number of complaints registered against non-incorporated legal practices.[203]

Following publication of the study results, I was interested in knowing more about the impact of the "appropriate management systems" requirement and the self-assessment process. In 2012, I conducted a mixed-method study to learn more about how the self-assessment process affected lawyer conduct in firms and how the self-assessment process could be improved.[204]

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[193] *Id.* at 160.
[194] *Id.* at 162.
[195] *Id.* at 163.
[196] "Specifically, the self-assessment document provides a list of objectives and the key concepts for the ILPs to consider when assessing each objective." *Id.*
[197] *Attorney Integrity System*, *supra* note 191, at 17.
[198] *Id.*
[199] *Id.*
[200] Schneyer, *supra* note 187, at 584.
[201] See *Management-based Regulation*, *supra* note 192, at 166–67 (reviewing the research questions and results).
[202] *Id.* at 167.
[203] *Id.*
[204] For a description of the methodology, see *id*. at 168–69.

First, to obtain data on the relationship between self-assessment and conduct, my questionnaire asked respondents to note the steps taken after the firm's first completion of the self-assessment process. The majority (84 percent) reviewed firm policies and procedures and 71 percent indicated that they revised firm systems, policy and procedures.[205] Close to half (47 percent) reported that they actually adopted new systems, policies and procedures.[206]

In interviews directors also described how they learned from the process by systematically reviewing their firm's practices and management controls. The majority (62 percent) indicated that they agreed or strongly agreed with the following statement: "The SAP was a learning exercise that enabled our firm to improve client service."[207] Only 15 percent disagreed or strongly disagreed with the statement.[208] The respondents also recognized the positive effects of the self-assessment process in dealing with problems. Sixty-five percent of the respondents agreed that the self-assessment process assisted the firm in addressing problems.[209] Only 13 percent disagreed with the statement.[210] "Quite simply, these findings point to the positive impact that the self-assessment process has in encouraging firms to examine and improve the firms' management systems, training, and ethical infrastructure."[211]

Following the Australian experience and studies, regulators in other countries examined and implemented PMBR programs. The Canadian Bar Association developed a voluntary, self-assessment form to assist Canadian law firms and lawyers in systematically examining the ethical infrastructure that supports their legal practices."[212] Rather than using such a voluntary approach, the Canadian province of Nova Scotia moved forward with an ambitious agenda for regulatory reform to regulate in a manner they describe as proactive, principled and proportional.[213] A centerpiece of this reform is a comprehensive self-assessment tool that must be completed by all law firms.[214]

To the south in the U.S., Colorado conducted a multi-year study that culminated in a comprehensive on-line self-assessment tool.[215] The Colorado approach is entirely voluntary, using

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[205] For most steps taken by firms, there was no significant difference related to firm size and the steps taken. *Id*. at 173.
[206] *Id.*
[207] *Management-based Regulation*, *supra* note 192, at 175.
[208] *Id.*
[209] *Id.* at 178 n.158. Seven percent checked "strongly agreed" and 58 percent checked "agreed."
[210] The 15 percent breaks down to 10 percent who disagreed with the statement and 3 percent who strongly disagreed. *Id.* at 178 n.159.
[211] *Attorney Integrity System*, *supra* note 191, at 19.
[212] *CBA Ethical Practices Self-Evaluation Tool*, CAN. B. ASS'N, http://www.lians.ca/sites/default/files/documents/00077358.pdf [http://perma.cc/X4D3-MBPJ].
[213] *Legal Services Regulation*, NOVA SCOTIA BARRISTERS' SOC'Y, http://nsbs.org/legal-services-regulation [http://perma.cc/LN4U-4LHX].
[214] *Management System for Ethical Legal Practice (MSELP)*, NOVA SCOTIA BARRISTERS' SOC'Y, http://nsbs.org/management-systems-ethical-legal-practice-mselp [http://perma.cc/U95L-GBJZ].
[215] Lawyer Self-Assessment Program, COLO. SUP. CT OFF. OF ATT'Y REG., http://www.coloradosupremecourt.com/AboutUs/LawyerSelfAssessmentProgram.asp [http://perma.cc/5EHP-NLF6].

outreach and incentives to encourage lawyers to complete the self-assessment process that emphasizes "high-quality client service, efficient law office management and compliance with professional obligations."[216]

In the U.S. Illinois took the pioneering step in becoming the first jurisdiction in the U.S. to implement a form of PMBR to address concerns related to uninsured lawyers.[217] In 2017, the Illinois Supreme Court adopted a rule requiring that all uninsured lawyers complete an on-line self-assessment regarding the operation of their law firm.[218] Following the lawyers' self-assessment, the Illinois regulator will provide the lawyer with a list of resources to improve those practices that are identified during the self-assessment process.[219]

As explained by Lloyd A. Karmeier, the Chief Justice of the Supreme Court of Illinois, "PMBR promises a new level of protection for the public."[220] Rather than relying on the reactive disciplinary systems that deal with misconduct after it occurs, Chief Justice Karmeier explains that "PMBR is aimed at helping lawyers avoid disciplinary problems before they occur."[221]

The Illinois program was intended to provide assistance to uninsured lawyers with the expectation that such training will improve their practice management and lower the risk of disciplinary and malpractice complaints.[222] According to James Grogan, the deputy director of the Illinois Supreme Court's Attorney Registration & Disciplinary Commission (the Illinois Commission) the Commission chose to focus first on (uninsured) lawyers who are "most at risk."[223] Grogan also noted that the process of purchasing insurance forces lawyers to think about their protocols, suggesting that uninsured lawyers do not have that opportunity.[224]

The Illinois self-assessment process is an interactive online educational program covering professional responsibility requirements for operating a law firm.[225] Illinois-licensed attorneys who represent private clients, but who do not have malpractice insurance, must complete the four-hour

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[216] *Id.*
[217] Supreme Court of Illinois Press Release, *Illinois Becomes First State to Adopt Proactive Management Based Regulation*, ILL. SUP. CT. 9 (Jan. 25, 2017), http://www.illinoiscourts.gov/Media/PressRel/2017/012417.pdf. [http://perma.cc/YLA2-YT6T] [hereinafter *Illinois Supreme Court Press Release*].
[218] ILL. CT. R. 756(e) (West 2019).
[219] *Illinois Supreme Court Press Release*, *supra* note 2209.
[220] *Id.*
[221] *Id*.
[222] Joan C. Rogers, *Illinois Kicks Off Era of Proactive Lawyer Regulation*, BLOOMBERG NEWS, (Feb. 8, 2017), https://www.bna.com/illinois-kicks-off-n57982083522/ [http://perma.cc/5G7W-FD2S].
[223] *Id.*
[224] *Id.*
[225] *Id.*

interactive, online self-assessment course regarding the operation of their firms.[226] Lawyers who complete the entire program receive four hours of free, continuing legal education credit.[227]

The Illinois Supreme Court and Illinois Attorney Registration and Disciplinary Commission should be recognized for their creative approach to helping uninsured lawyers improve their management practices. The hope is that uninsured lawyers will not just check the boxes but engage in serious self-examination of their management practices. The study results on PMBR in Australia suggest this self-examination will benefit both the lawyers and the clients they serve.

Since conducting an empirical study on PMBR, I have actively promoted PMBR through numerous articles, presentations, and workshops. Although I am a staunch proponent of PMBR and commend any PMBR initiative to assist uninsured lawyers, I do not think that PMBR substitutes for mandatory insurance.[228] PMBR should help lawyers improve their practices and may lower their risk of disciplinary complaints and malpractice complaints. This clearly advances pubic protection by avoiding problems. PMBR, however, does not address the risk of asset insufficiency in the event of a malpractice claim.[229] In order to provide a source of recovery (and the other benefits discussed in Part Two) states should require mandatory insurance for lawyers in private practice. Even with the best management systems, malpractice occurs. When it does, insurance provides a source of recovery for those harmed by attorney malpractice.

V. CONCLUSION—EXPOSING LAWYERS ETHICAL BLIND SPOTS

Given the compelling arguments in favor of insurance and the fact that the majority of lawyers in private practice carry insurance, the question is why more states have not mandated insurance for lawyers in private practice have.[230] One explanation may be that lawyers and decision makers may be suffering from ethical blind spots on both the individual and organizational levels. Findings from the burgeoning field of behavioral ethics provide insights on

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[226] *PMBR Self-Assessment Course FAQ*, ILL. ATT'Y REGISTRATION & DISCIPLINARY COMMISSION, https://registration.iardc.org/attyreg/Registration/Registration_Department/PMBR_FAQs/Registration/regdept/Rule_756e2_Self-Assessment_FAQ_s.aspx [http://perma.cc/8EP6-FAK4].

[227] *Id.*

[228] A jurisdiction that is considering PMBR as an approach to dealing with uninsured lawyers can take steps to incentivize lawyers to purchase insurance. One way of doing so is to require that the uninsured lawyers complete a process similar to that used in Australia, where the results of the self-assessment are reported to the regulator, with the requirement that the lawyer address problem areas. Failure to do so can subject the firm to a practice audit by the regulator.

[229] Because the Illinois PMBR requirement for uninsured lawyers is a free, on-line CLE that takes four hours, it is doubtful that it will incentivize many lawyers to purchase insurance.

[230] Most recently, the Supreme Court of Nevada denied the Petition of the State Bar of Nevada asking the Court to adopt a new rule requiring insurance for lawyers in private practice. *Nevada Supreme Court Order*, *supra* note 18.

how the lawyers and judges may not clearly see the ethical dimensions of conduct and decisions related to malpractice insurance.[231]

Behavioral "research has shown that unethical behavior often stems from actions that actors do not recognize as unethical."[232] On an individual level, decision makers experience ethical blind spots when they do not see the ethical issues involved in a decision or when they believe that any potential ethical challenges can easily be overcome.[233] This psychological phenomenon may explain why many reputable attorneys do not purchase insurance and oppose mandatory malpractice insurance. Their ethical blind spot may impede their ability to recognize that the purchase of insurance involves ethical dimensions related to professional accountability and access to justice for malpractice victims. Lawyers who refuse to purchase insurance may not see the ethical imperative for lawyers to be financially accountable for those they harm. In this sense they may look at themselves in the mirror and do not question the ethicality of their decisions because the insurance issue is in their blind spot.

Increasingly, lawyers are equating ethical conduct with the minimum standards for avoiding discipline under the professional rules of professional conduct. This approach is very narrow, reducing "ethics" to an exercise of determining whether the disciplinary rules address particular issues. When the rules do not address a situation, lawyers may stop deliberations and not thoughtfully reflect on the ethical implications of their individual decisions.[234]

Ethical blindness also comes into play at the organizational level, when peers and organizational leaders fail to accurately assess the unethical behavior of individuals. In the context of lawyering this can occur within firms and bar groups when other lawyers ignore unethical conduct of individuals. A number of factors contribute to the tendency to not respond to the unethical behavior of others.[235] To begin with we may not believe it is our place to judge others and we are busy paying attention to other things.[236] We also may be influenced by what theorists have called motivated blindness, defined as the "the tendency for people to overlook the unethical behavior of others when it is not in their best interest to notice the infraction."[237]

As it relates the debate of mandatory insurance, ethical blindness and complacency may contribute to insured lawyers not getting involved. Attorneys who recognize their individual responsibility to carry insurance should consider the collective responsibility as members of a legal

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[231] *See* MAX. H. BAZERMAN & ANN E. TENBRUNSEL, BLIND SPOTS: WHY WE FAIL TO DO WHAT'S RIGHT AND WHAT TO DO ABOUT IT 4 (2011) (introducing behavioral ethics as a field that seeks to understand how people actually behave when confronted with ethical dilemmas).

[232] Ovul Sezer et al., *Ethical Blind Spots: Explaining Unintentional Unethical Behavior*, 6 CURRENT OPINION IN PSYCHOLOGY 77, 76 (2015).

[233] Jennifer K. Robbennolt & Jean R. Sternlight, *Behavioral Legal Ethics*, 45 ARIZ. ST. L.J. 1007, 1116 (2013).

[234] *See id*. at 1127 (suggesting that lawyers may take a "minimalist approach to legal ethics, substituting rules that may only articulate minimum standards for thoughtful reflection on the ethical implications of a decision").

[235] For an analysis of various factors, see BAZERMAN & TENBRUNSEL, *supra* note 234, at 77–99.

[236] *Id.* at 78.

[237] *Id.* at 79.

profession charged with self-regulation and keeping our houses clean. Rather than allowing the minority to dominate the discourse, insured lawyers should actively support mandating insurance coverage. Those who fail to support meaningful remedies for malpractice victims are abdicating moral authority and denying access to justice. As Professor Roger Cramton cautioned, "Justice is destroyed or created by our actions, how we treat each other and how we adapt to or shape or blindly conform to familiar routines of our workplace."

With additional states studying the issue of mandatory malpractice insurance, insured lawyers should get involved and help frame the discourse in ethical terms. By exposing and dealing with ethical blind spots lawyers help demonstrate that we are an accountable profession that can be trusted with self-regulation.

We all make mistakes. We are distinguished as professionals by the manner in which we handle mistakes and treat those we injure. If members of the bar refuse see or recognize their responsibility to injured persons and the profession, it is the role of the insured lawyers to advocate for malpractice insurance to help uphold the high standards of the legal profession. If lawyers refuse to deal with their blind spots and see the ethical dimensions of financial accountability, we do not deserve to be members of a protected profession.

From:	Ron Santi
To:	Mandatory Malpractice Insurance Task Force
Subject:	fleeced by the insurance companies
Date:	Thursday, April 25, 2019 9:28:41 AM

If 40,000 Washington attorneys end up paying the insurers $2000 more or less, that's $80 million dollars a year in premiums. What are the claims in an average year--$5-10 million?. Certainly the Bar could cover all attorneys for much less than what is contemplated. Mandatory insurance will be a huge hardship for semi- retired, essentially non practicing attorneys like myself. The Bar could charge all attorneys $150 which would raise $6 million a year that the Bar could use to buy a pool of converge for all. Attorneys desiring more coverage could buy more in the private rip-off marketplace. I'm a 40 year active license who would very much appreciate making it to 50.
--Ron
#8817

From: [redacted]
To: Mandatory Malpractice Insurance Task Force
Subject: Comment
Date: Thursday, April 25, 2019 3:41:56 PM

I have been retired from active practice for 7 years. I maintain my license so that I can do no-fee will drafting, probate or advising on minor matters for relatives and friends. During the past 7 years, I have drawn one will, one community property agreement and a few afffidavits for civil matters. I am planning to draw another will, with no fee, in the near future. Please do not impose an insurance requirement on me for doing these free services.

John Staffan, #9095
Yakima

Sent from Windows Mail

From:	R.I.Payne
To:	Mandatory Malpractice Insurance Task Force
Subject:	Exemptions to mandatory malpractice insurance
Date:	Thursday, April 25, 2019 3:56:33 PM

Hello,

Would the board please consider an exemption for those of us who maintain an active license but do not engage in the practice of law. For example, I work with a political organization which expects me to have an active license but we do not engage in the practice of law whatsoever.

Thank you for your time and consideration,

RIPayne
36257

From: Richard Llewelyn Jones
To: Mandatory Malpractice Insurance Task Force
Subject: Malpractice Insurance Proposals
Date: Sunday, April 28, 2019 1:13:09 PM

I am writing to express my opposition to the proposal of mandatory malpractice insurance. The proposal appears to be a solution in search of a solution. There has been no data provided that suggests the current system is failing the public.

Moreover, the cost of such coverage for solo-practitioners would drive many from the practice (which may be the BAR's hidden agenda). Solo-practitioners offer their clients more affordable representation that the large downtown Seattle firms because they are able to practice with lower overhead without coverage.

I am personally in the process of retiring from the practice and cannot afford the coverage currently offered by the carriers.

Finally, once coverage becomes mandatory, the carriers will begin to dictate "best practices" which will adversely impact the independence of the judiciary and the practice of law. Will there be a time when the carriers say to an attorney he or she cannot take on a controversial case because they will not insure the attorney's independent determination that the issue must be addressed? Look what the carriers have done in the medical profession.

Please let me know if you have any questions or concerns. R. Jones (WSBA No.12904)

Richard Llewelyn Jones
Kovac & Jones, PLLC
PO Box 1548
Snohomish, WA 98291
Office: 425-462-7322
[redacted]
Email: rlj@kovacandjones.com

From:	Carrie Coppinger Carter
To:	Mandatory Malpractice Insurance Task Force
Subject:	Malpractice insurance should be mandatory
Date:	Monday, April 29, 2019 11:38:08 AM
Attachments:	PLD Complaint for Damages from Legal Malpractice-As Filed 6-18-12 2427199.PDF PLD Whatcom County Auditor - Recorded Judgment Summary & Judgment Against Def Butler 5844638.PDF

If the state can mandate car and common carrier insurance, we should be able to mandate malpractice insurance for any attorney actively practicing and serving clients. Not only should it be mandated, but it should be reportable to the WSBA database as part of our licensure.

I am attaching just one of the most recent issues – Complaint and Judgment to which there appears to be no insurance, or the attorneys' refusal to provide the policy information. In this case it involves an attorney who has been disciplined by the Bar on more than one occasion, left an injured party with no relief, refuses to respond to requests for his insurance information even resulting in a civil bench warrant and garnishments.

Please take action.

Very Truly Yours,

Carrie M. Coppinger Carter
ccc@coppingercarter.com

COPPINGER CARTER P.S.
Attorneys at Law
100 Central Avenue
Bellingham, WA 98225

Phone: 360-676-7545
Fax: 360-306-8369

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR WHATCOM COUNTY

SUSAN LEACH, individually, Plaintiff, vs. MATTHEW W. BUTLER AND JANE DOE BUTLER, individually and the marital community thereof, Defendants.	NO. 12 2 01586 1 **COMPLAINT FOR DAMAGES FROM LEGAL MALPRACTICE** STEVEN J. MURA

COMES NOW Plaintiff, by and through her attorney, and alleges as follows:

I. PARTIES, JURISDICTION AND VENUE

1.1 Plaintiff Susan Leach was a resident of Whatcom County at all times relevant herein.

1.2 The Defendant, Matthew Butler, is admitted to the bar in the State of Washington, and is properly licensed to practice law therein. Defendant

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Matthew Butler is believed to be a resident of the State of Washington, and maintains offices for the practice of law at 208 W. 13th Street, City of Vancouver, County of Clark, State of Washington.

1.3 The automobile collision of May 5, 2007, which is a subject of the underlying action, occurred on Smith Road, which is a public roadway in Whatcom County, Washington.

1.4 This court has jurisdiction over the parties to and subject matter of this action.

1.5 Venue is properly set in Whatcom County.

II. FACTS

2.1 On or about the afternoon of May 5, 2007, Plaintiff Susan Leach (hereinafter "Plaintiff") was driving her 1994 Toyota Camry east on Smith Road in Whatcom County, Washington. Her son, Jered Leach, was a passenger. Plaintiff turned on her left-hand turn signal and brought the Camry to a full and complete stop, waiting to take a left hand turn onto Starry Road.

2.2 On this same date, Dawn M. Garza was driving a 1987 Isuzu Trooper, travelling east on Smith Road behind the Plaintiff. Ms. Garza quickly approached Plaintiff's vehicle and slammed into the rear of the vehicle, causing damage to the vehicle, and injuring Plaintiff. The collision was investigated by the Washington State Patrol (Report No. 2693994). Ms. Garza admitted liability at the scene and was cited for speeding.

2.3 As a consequence of the collision, Plaintiff sustained extensive injuries requiring medical and hospital treatment and causing the Plaintiff

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extensive pain and suffering. In addition to extensive pain and suffering, Plaintiff suffered medical expenses, lost earnings/wages and property damage.

2.4 Within weeks of the collision, the Plaintiff consulted Defendant Matthew Butler (hereinafter "Defendant") over the phone concerning the Plaintiff's right to recover from Ms. Garza as a result of the injuries which she suffered in the collision. The Defendant informed the Plaintiff that she should commence a personal injury suit and agreed to represent the Plaintiff in bringing such a suit.

2.5 In a letter dated June 13, 2007, from Defendant to State Farm Insurance Co., Defendant stated "I will be representing Susan Leach and the Leach family in the motor vehicle accident..."

2.6 Defendant Matthew Butler was provided all necessary information that would have allowed him to the properly identify the driver that had harmed Plaintiff and included the driver in the lawsuit.

2.7 On or about May 5, 2010, the last possible day before the statute of limitations ran, Defendant filed the Summons and Complaint in Whatcom County Superior Court naming Marilyn L. Pearson, et al, as defendants (case number 10-2-01085-4 hereinafter referred to as "Lawsuit"). As of this date, the Defendant had filed no civil action against Dawn Garza, who was clearly named as the driver in the collision report, to recover damages for the Plaintiff's injury.

2.8 May 5, 2010 was the third anniversary of the Plaintiff's accident and the date by which the commencement of a personal injury action prescribed by law expired.

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2.9 On October 15, 2010, Marilyn Pearson filed a Motion to Dismiss, claiming that plaintiffs had sued the wrong person. On November 19, 2010 the court dismissed Plaintiff's Lawsuit against Marilyn Pearson.

2.10 At the present time, the statute of limitations acts to bar an action to recover damages from Dawn Garza. As of the present date, the Plaintiff has received no compensation from Ms. Garza for the injuries which she suffered in the collision.

III. CAUSES OF ACTION

3.1 An attorney-client relationship was formed when the Defendant agreed to represent the Plaintiff in her personal injury suit and acted on the Plaintiffs' behalf by filing pleadings with the court.

3.2 As a result of the attorney-client relationship created by the above conduct of the parties, Defendant had a duty to Plaintiff to exercise the degree of care, skill, diligence, and knowledge commonly possessed and exercised by a reasonable, careful, and prudent lawyer in the State of Washington.

4.1 Defendant failed to file Lawsuit on behalf of the Plaintiff against the proper party before the expiration of the applicable statute of limitations. Thus, Plaintiff's Lawsuit was dismissed, and Plaintiff was denied relief on the basis of her personal injury and property damage claims.

3.3 In naming the wrong defendant in the personal injury Lawsuit and failing to commence a timely action against Dawn Garza, the Defendant failed to exercise reasonable care, skill, and diligence in representing the Plaintiff. This failure resulted in the permanent and irrevocable loss of the Plaintiff's right of

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action, leaving the Plaintiff with no opportunity to obtain compensation for the injuries she suffered in the collision. Specifically, Plaintiff's injury includes the loss of a verdict, settlement, or award, and the interest that Plaintiff would have recovered but for Defendant's negligence. The Defendant's failure to file a timely action constituted both a negligent act and a breach of his/her contractual obligation to the Plaintiff.

3.4 Had the Lawsuit been timely and properly brought against Dawn Garza, the Plaintiff would have recovered a judgment for personal injuries, medical expenses, and pain and suffering, in an amount that will be established at trial. The loss of a judgment was the proximate result of the Defendant's failure to preserve the Plaintiff's right of action.

3.5 As a proximate result of the Defendant's failure to preserve the Plaintiff's right of action, the Plaintiff has been forced to retain another attorney and incur additional attorneys' fees, in an amount as yet indeterminate, in order to attempt to recover compensation for her injuries.

3.6 Plaintiff committed no acts of negligence which contributed to her damages.

IV. DAMAGES

4.2 As a direct and proximate result of the negligent acts of the Defendant, Plaintiff Susan Leach suffered the loss of a verdict, settlement, or award and the interest that plaintiff would have recovered, in an amount that will be established at trial.

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4.3 As a further direct and proximate result of the negligent acts of Defendants, Plaintiff Susan Leach incurred additional attorneys' fees and costs, in an amount that will be established at trial.

V. PRAYER

WHEREFORE, Plaintiff prays for judgment of liability against the Defendants as follows:

5.1 For Plaintiff an award of special damages, the exact extent of which will be established at the time of trial, to include but not be limited to:

5.1.1 Reasonable and necessary hospital, doctor, related medical treatment, and related expenses, both incurred in the past and to be incurred in the future;

5.1.2 Past and future wage lost and/or loss earning capacity as a result of her injuries and medical treatment; and

5.1.3 Property damage, if any, to include actual loss of vehicle and diminuition of value.

5.2 For an award of general damages for Plaintiff's pain, suffering and disability, and loss and impairment of the ability to enjoy life, the exact extent of which will be established at the time of trial;

5.3 For Plaintiff's reasonable and statutory attorneys' fees, costs and disbursements incurred herein;

5.4 For prejudgment interest; and,

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5.5 For such other and further relief as the Court deems just and proper.

DATED this 15th day of June, 2012.

COPPINGER CARTER P.S.

By: _____
Carrie Coppinger Carter, WSBA #28817
Jamia S. Burns, WSBA #42161
Attorneys for Plaintiff

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Whatcom County, WA
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DOCUMENT TITLE(S): JUDGMENT SUMMARY AND JUDGMENT AGAINST DEFENDANT MATTHEW W. BUTLER

AUDITOR FILE NUMBER & VOL. & PG. NUMBERS OF DOCUMENT(S) BEING ASSIGNED OR RELEASED:

Additional reference numbers can be found on page_____of document.

GRANTOR(S) MATTHEW W. BUTLER

Additional grantor(s) can be found on page_____of document.

GRANTEE(S): SUSAN LEACH

Additional grantee(s) can be found on page_____of document.

ABBREVIATED LEGAL DESCRIPTION: (Lot, block, plat name OR; qtr/qtr, section, township and range OR; unit, building and condo name.)

NA

Additional legal(s) can be found on page_____of document.

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WHATCOM COUNTY CLERK
By _____ Deputy

ORIGINAL

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR WHATCOM COUNTY

SUSAN LEACH, individually, Plaintiff, vs. MATTHEW W. BUTLER AND JANE DOE BUTLER, individually and the marital community thereof, Defendants.	NO. 12-2-01586-1 **JUDGMENT SUMMARY AND JUDGMENT AGAINST DEFENDANT MATTHEW W. BUTLER** Judge Ira Uhrig

JUDGMENT SUMMARY

1.	Judgment Creditors:	Susan Leach
2.	Judgment Debtor(s):	Matthew Butler
3.	Principal Judgment :	$165,567.30
4.	Statutory Attorneys' Fees & Costs per Cost Bill:	$867.75
5.	Prejudgment interest :	$26,076.85

15-9-01283-7

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6. Post Judgment interest shall bear interest at 5.25% per annum.

7. Attorney for Judgment Creditors: Carrie Coppinger Carter

JUDGMENT

Pursuant to the Findings of Fact and Conclusions of Law, judgment in this matter is entered in the amount of $165,567.30 against Defendant Matthew W. Butler for Plaintiff's special and general damages, plus two years prejudgment interest in the amount of $26,076.85. In addition Plaintiff is awarded statutory attorney fees and costs in the amount of $867.75. The combined total judgment against Defendant Matthew W. Butler is in the amount of $192,511.90. Post judgment interest shall bear interest at 5.25% per annum.

DONE IN OPEN COURT this 5 day of June, 2015.

Judge Raquel Montoya-Lewis

Presented By:

COPPINGER CARTER, P.S.

Carrie M. Coppinger Carter, WSBA #28817
Karen M. Phillips, WSBA #45305
Attorney for Plaintiffs

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WHATCOM COUNTY SUPERIOR COURT
Bellingham WA
DAVID L REYNOLDS
WHATCOM COUNTY CLERK

Rcpt. Date: 10/29/2015
Acct. Date: 10/29/2015
Receipt #: 2015-03-05571
Cashier ID: JOO
Time: 01:36 PM

Item	Case Number	Amount
01	12-2-01586-1	$6.00
	1500: Fee-Certified Copies	
	LEACH V BUTLER	
Total Due:		$6.00
Cash Tendered:		$20.00
Change Due:		$14.00

Paid By: COPPINGER CARTER, P.S.

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Station: 1 **Cashier:** PMCATEE

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2015-1003072 (2)	10/29/2015 01:44:17 PM	I-JDGT		73.00			$73.00
			Totals:	$149.00	$0.00	$0.00	$149.00

Thank You
Retain this receipt for your records

Receipt Total **$149.00**

CHECK 8122 $149.00

From: Paul Fjelstad
To: Mandatory Malpractice Insurance Task Force
Cc: becky boughton
Subject: Fwd: Mandatory Malpractice Insurance
Date: Tuesday, April 30, 2019 8:22:53 AM

Begin forwarded message:

From: becky boughton <[redacted]>
Subject: Mandatory Malpractice Insurance
Date: April 29, 2019 at 10:52:38 PM PDT
To: Paul Fjelstad <paul@fjelstad.com>

Good morning Paul:

I tried to send the comments below to the WSBA but my email was not successful. I have limited connections on the ship. If possible will you please forward it on to the Bar, even though it is now late?

Thank you! I hope all is well with you and KLS...
Becky Boughton (former KLS ED)

RE: Mandatory Malpractice Insurance

Good morning:

I am a Washington State Bar “inactive” attorney. I worked in the non-profit legal aid field for more than 20 years. I became an attorney so I could provide more assistance to individuals who could not afford to pay attorney fees. Unfortunately, in the legal aid world, in Washington and elsewhere, I received low wages for my attorney work. However, my legal aid organization paid for my legal malpractice insurance.

In the legal aid community we relied on volunteers to provide the majority of legal assistance needed for our clients. Many of our volunteers were retired but wanted to continue practicing. The fact that our program covered the malpractice insurance was an incentive for these individuals to volunteer their time and expertise to help those in need who could not afford to pay for legal services.

Only through volunteers were we able to assist thousands of low income residents.

I now have a position where I no longer practice law. However, upon leaving the non-profit legal aid world I purposely kept my Washington Bar license so that when I retire I can volunteer my services. My residence is in Washington but my current job is on a ship overseas or I would be volunteering now.

If mandatory malpractice insurance becomes a requirement I will no longer maintain my inactive Bar license in Washington. Additionally, once I am no longer licensed in Washington, upon retirement I will not sit for another Bar examination and therefore will not volunteer for legal aid services.

I apologize for the delayed response but due to limited internet access I am often lagging behind on my personal email communications.

As a side note I am also an inactive attorney in Illinois. Illinois does not require mandatory malpractice insurance for inactive attorneys. Nor does Idaho where I was licensed for many years.

Thank you for your consideration.

Rebecca L. Boughton

Washington State Bar #47371

From:	Deborah St Sing
To:	Mandatory Malpractice Insurance Task Force
Subject:	Comments to the BOG re: April 22, 2019 mandatory malpractice meeting
Date:	Tuesday, April 30, 2019 1:51:53 PM

1. Several references were made by the BOG regarding advice from the professional on the insurability of all attorneys. We were not told who the professionals were, their qualifications, or their profession. I assume they were insurance brokers.

2. Of course the insurers will tell the bar that insurance is available to all attorneys. It is doubtful, although possible, that the insurance professionals making presentations to the bar have set aside their own monetary self interests. Do the insurers keep records of applicants that the insurer refused to insure and will they provide the documents to the bar? We are told by insurers that increasing the pool of insured will keep rates down, however, as the plaintiff's malpractice attorneys tell us there are many, perhaps hundreds of cases, that are turned down because of the lack of insurance, if there are more insurance claims does it not stand to reason that rates will rise?

3. Thank you for the public meeting, and opportunity to for members to comment it was appreciated.

4. Consider providing public insurance through the bar as Oregon does, it works because all attorneys are insured, unlike the private market. The Bar has the ability to continue the regulation of practice instead of private market insurers.

5. During the meeting, a malpractice attorney advised that $250,000.00 is not enough coverage, where does it end? Should damages be limited similar to tort claims in some jurisdictions? Will the plaintiff's malpractice attorneys reduce their fees for clients if there is a limited amount of insurance available. Will the same attorneys turn down claims if there is not enough insurance to make it worth the attorney's time? Is it possible for those attorneys to accept a small or noncontingent fee? Will insurers fight to deny claims as is common with causality and personal injury claims? When claims are denied, will an injured party be in the same position as an injured party today where the attorney is uninsured?

6. Balancing the needs of victims of malpractice vs. practitioners vs.plaintiff's malpractice attorney's is difficult. Are the 48 states not requiring mandatory malpractice insurance wrong? Is it necessary to rush into mandating malpractice insurance?

7. Currently, I work part time as a hearing officer for a housing authority and under the proposal work be exempt from the mandatory requirement.

--
Deborah A. St. Sing, 17329
Attorney at Law
PO Box 7264
Olympia, WA 98507
[redacted]

From:	Oceania Angels
To:	Mandatory Malpractice Insurance Task Force
Subject:	No Mandatory Malpractice Insurance
Date:	Tuesday, April 30, 2019 6:20:09 PM

Hi all,

I wanted to be sure that you knew I am against the recommendation made by the taskforce for mandatory private insurance coverage.

I learned a lot watching the three hearings on the subject I have seen. I see that there is definite room for improvement in access to justice when it comes to legal malpractice in Washington State. However, I feel like it would make as much sense for the WSBA to require malpractice attorneys to take on cases where there is no malpractice insurance and the amount at issue is less than $100,000 as it does to require every attorney registered in WA to have malpractice insurance. I don't believe that we should do either thing at this time.

I do believe that we should educate our clients and potential clients about the matter so that they can make an informed decision about who to hire. One way to do that is to have the client sign an insurance disclaimer document that states that they understand the attorney has no malpractice insurance at the time of hiring. It can read something like "I understand that I have the right to seek an attorney to represent me who carries malpractice insurance. I understand that <Insert name here> carries no malpractice insurance at this time. I understand that should they later acquire malpractice insurance, any incident of malpractice occurring in the course of this representation will likely not be covered by that insurance. I understand that there is a risk I may not be able to recover damages from <insert name here> should they commit malpractice while working on my case." I strongly believe that if clients are considered competent enough to waive their right to individual representation, then they are competent enough to decide to take the risks of hiring an attorney who does not carry malpractice insurance. I will support other forms of disclosure to client. It just seems like a signed document similar to the one required for joint representation could be an elegant solution.

I really, really object to the part of the recommendation of the taskforce that says we should require the insurance be purchased through the private market. We keep saying that access to justice is what we care most about. Yet private insurance is not absolutely trustworthy either. Perhaps it will be no big deal, like automobile insurance. But we have also seen what has happened with the healthcare industry. It seems to me that lawyers are more like doctors than car drivers and so I think we should be very wary of making Washington attorneys a captive market. I do appreciate the taskforce looking for the least expensive option, I just believe that this one will cost us even more money and likely have a far greater effect in preventing access to justice in the long run. You could come up with a deal like the Affordable Care Act, but we know that even with the Affordable Care Act insurance prices went up. I would much rather figure out how to fund something like the Oregon PLF or have to pay into an additional client protection fund (this one designed to deal with malpractice issues) than have us go to mandatory private insurance.

Finally, I want to reinterate my concern for lawyer Caregivers of elderly persons. Hugh Spitzer said that people who stop being a lawyer for a year won't have to have insurance because they won't be lawyers. And maybe that will work for the ones are dealing with their own disabilities. For those of us doing Caregiving of our elders often the line is not a clear line

as to when we may need to actually take the time away from being an attorney. Also, attorneys need to know that they can stop being an attorney for a bit and still come back. Additionally, finding all the information when you are already emotionally and physically drained can be surprisingly difficult. Nothing that I have run into so far convinces me that anyone going through what I went through will have any kind of clear path to this kind of information. Please note that not all kinds of elder caregivers and elder care recipients can easily get help. Here are some examples of things I ran into as a caregiver - Meals on Wheels is only good for those who are not strict vegetarians with food allergies; there is little in home assistance available to a person with Huntington's Disease because they are much more likely to be difficult to manage and less likely to be able to keep their houses clean; those same difficulties make them extremely difficult to place in an Adult Family Home; finally, caregiver has no other family who can help. I expect we will be seeing that last more and more often as people have smaller numbers of children.

Thank you for your time. Please do not implement mandatory malpractice insurance at this time.

Best,

Oceania L. Angels
Attorney at Law

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From:	Michael Woo
To:	Mandatory Malpractice Insurance Task Force
Subject:	Mandatory Malpractice Insurance Comments
Date:	Tuesday, April 30, 2019 11:45:57 PM
Attachments:	Malpractice Insurance Comment.pdf

To the Members of the Mandatory Malpractice Insurance Taskforce and WSBA Board of Governors.

I humbly submit the attached comment for consideration as part of the Board of Governor's deliberations on the adoption of a malpractice coverage condition of practice. For the purposes of clarity and categorization, my comment is against the adoption.

Sincerely,

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April 30, 2019

WSBA Board of Governors and Mandatory Malpractice Insurance Task Force
1325 Fourth Avenue
Suite 600
Seattle, WA 98101-2539

VIA ELECTRONIC MAIL

RE: Comment Against Adoption of a Mandatory Malpractice Insurance Requirement.

Dear Members of the Board of Governors and Members of the Taskforce:

Introduction

I am a practicing attorney and member of the Washington State Bar Association (hereinafter referred to as the "WSBA" or "the Bar"), and I write to encourage the Bar to not adopt a mandatory requirement for malpractice insurance, or, failing that, to not adopt such a requirement without substantial reform of Washington's existing malpractice insurance industry.

My Background and Status as an Attorney

My current practice is a modest one, still very young compared to many of those who had the opportunity to speak at the Board of Governor's special meeting to hear comments on the proposed adoption. I had the pleasure of listening to the entire meeting, and though my comment was cut off before it could be heard, I would like to describe my current situation as I suspect it is emblematic of many younger attorneys who have opted to strike out on their own at great personal and professional risk.

Let me start by telling you how I got to where I am. I graduated early from the Gonzaga School of Law in December of 2013, passed the Bar exam the following February, and took my formal Oath of Attorney in May 2014 at the Pierce County Courthouse. However, I was the member of a glut of law students that went into law school right after the height of the recession, and, in my case, straight out of college. Following a few months of job hunting at firms with little luck, I found temporary employment, initially as a contracted temp employee that turning into a regular employee, at a national legal service corporation that will go unnamed here. We were paid only $20.00 per hour and essentially could be laid-off the next day without notice, sometimes being terminated mid-way through the day. I am not exaggerating when I say that I'm pretty sure I saw

half of my former classmates at Gonzaga working for this company at one point or another, at least one of whom had serious mental trauma after being laid off right before being rehired for a different project in the span of 48 hours. This was a modest income while living with my parents in Tacoma and job hunting throughout the region.

Eventually, after 9 months of searching for anything akin to an entry-level position, dozens of interviews, and more than a few panic attacks, I managed to answer the ad of a local property investor who needed legal help with his property management company, which I excelled at as landlord-tenant law was one of the few areas I studied independently in school due to statutory plain-language requirements that made it more accessible than more technical areas of law. I created a small at-home business in my parents' basement to help with their legal matters while searching for more stable employment.

Stable employment I did not find. Instead, I joined a firm that had a single attorney managing it who wanted to essentially have an attorney that would do the entirely of their litigation work, which I could do with some assistance. That job was supposed to be a 50/50 fee split, except I discovered that the attorney didn't track his hours at all, and didn't bring in enough business to justify two attorneys, effectively requiring me to expand my outside business and eventually declined to renew my contract when, after 9 months, I stopped receiving basic living expense payments. I then moved to a plaintiff's auto injury firm, where they clearly wanted an attorney on the cheap and I was looking for any consistent salary to pay my approximately $1,200.00 in just my student loan payments (which was originally $2,000.00+ per month before refinancing and extending it to a 25-year payment plan), which didn't even last 3 months.

I reopened my side practice as my main business while I searched for work, now resolute that I would never practice in an area I do not want to just because they were paying well, and doing Lyft driving on the side to make ends meet after a few dry months cleaned out my savings. After hard work and now approaching a year of 70+ hour work weeks, I'm finally barely able to pay for all of my expenses to run my virtual office and have some for groceries and luxuries so that my husband, who has stable employment with King County as a unionized employee, is not paying for everything. My practice primarily serves two major clients and a few semi-frequent ones, usually advising landlords and property managers on their obligations under the Residential Landlord Tenant Act and a flat-fee eviction practice. I take considerable pride in my client management and carefully screen clients to avoid ones who could be problematic due to an interest in potential unlawful activities or practices. All this time, with the exception of 12 months, I had no malpractice insurance nor felt compelled to acquire it.

I did have some good moments too. I joined a non-profit board after being recruited by a friend who served on it, eventually spending a term as president and guiding it through a difficult transition, and still serve to this day, even planning on reupping for another three-year term. I've started to make peace with my gender and sexuality and now proudly identify with other LGBTQ+ practitioners as a member of Q-Law. I met and married my spouse who is my loving husband. We even bought an inexpensive condo in Auburn condo using seed money my parents

gifted to me when I was young. During this time, my practice had busy periods and dry spells, but I never regretted my profession and remain an active member of the Solo and Small Practice Section listserv.

I'm not going to pretend that malpractice insurance would mean my practice would be unprofitable or need to end, though it would likely mean having to either increase fees or overextending myself as an attorney, both not pleasant options. My partner routinely reminds me that I can make more money and have more leisure time working as a transit operator than my current practice, but after years of looking for work where there are few openings and too many applicants, I do not believe I am ready to give up on my practice yet. I will drive Lyft or engage in other side-income as I can, but as an attorney who is not independently wealthy and with already substantial debt that is literally in excess of our mortgage, my options are limited beyond just trying to practice and not become subsumed or delay items. The $300.00 a month minimum that I would likely pay to have insurance would force me to make a serious decision about remaining in the legal profession that I love and work myself to the bone to be in, and I do not know what that decision to be would end up being. I'm just shy of making it to five years as an attorney, but I'm increasingly concerned I will not make it to ten.

Reasons for Not Supporting the Mandatory Malpractice Insurance Requirement

While it is clear I would likely have negative repercussions for the adoption of the policy, I believe my story is illustrative of more essential problems for young attorneys dealing with this new requirement, whether they are looking to join a firm or hanging their own single. As such, my criticisms are enumerated below, some of which are related to others.

1) New firms will have dramatically higher operating costs.

New firms, particularly those started by younger attorneys, will essentially have an additional $3,600.00+ commitment every year starting the day they "open," right in the essential time where expenses often put the business into deficit while it grows. Adding in malpractice insurance would effectively triple the bare minimum costs to practice (Bar dues and Continuing Legal Education being the main costs), not counting basic business expenses such as state and local business licenses, equipment, electronic services, and, in some counties, paid access to court records. This would add the single largest cost to all of that.

This essentially means that only a subset of our talented legal profession would ever be able to afford the costs to found a firm, meaning attorneys would be less likely to pursue that option without access to substantial wealth or credit. This is not a luxury that many attorneys, particularly ones fresh out of law school and often tackling $100,000.00+ in debt from student loans, can afford, which brings us to the effects on trying to join firms:

2) Effectively depresses wages for new attorneys

With the higher costs of practice, it means fewer attorneys would feel like they have the option to start their own firms and many would feel compelled to enter practice areas they do not wish to in order to pay their loans and have insurance, or give up the practice entirely. Firms, in turn, could use this as an opportunity to hire attorneys at lower wages and deny raises to a generation, with already depressed incomes due to the aftereffects of the recession and labor glut, as starting your own practice no longer a realistic alternative. Supply and demand shifts the economic power further to firms, who can offer lower wages due to fewer options, particularly for newer practitioners burdened with student debt and needing almost any work they can find.

While this is a collateral effect of this measure, it would be enormously felt throughout the legal profession for generations to come, furthering an imbalance that partners have outsized incomes to their associates.

3) Disproportionate impact on minority practitioners

As with all matters that relate to hiring and pay, we know that the legal profession is rife with biases based on gender, race, and other minority statuses, many unconscious, others less so. Our profession is inherently social, as human interaction is the cornerstone of transactions and disputes. Firms are always going to be under pressure to hire the kinds of qualified attorneys least likely to offend a client's sensibilities. What that means is that even if there are prohibitions on discrimination in regards to hiring or promotions, there would be a legitimate business reason to favor candidates who at the very least appear white cis-gendered men over people of color, women, the disabled, and "non-passible" LGBTQ+ minorities. What we have learned about cognitive biases over the past several years reinforces this as often not even a conscious decision, but rather existing ingrained practices born from decades of psychological shaping from our experiences and media that can be a serious blind spot for even the most open-minded individuals.

Applying this to the existing issues, those minority practitioners would be particularly sensitive to stagnation and suppression of legal wages resulting from fewer economic options.

4) No effective controls on malpractice insurance costs and requirements

As many of the commenters noted in the special meeting, there's no real regulation of malpractice carriers that would prevent abuses by those industries. That means that the $3,600.00 wouldn't even be a floor in terms of expenses. Software requirements, client screening requirements, and blanket denials of coverage should be effectively banned before the Bar reviews requiring insurance for all practitioners. The complexity of the forms and policies boggles the minds, taking away valuable time that would better be utilized assisting clients. Like in the case of the Affordable Care Act, the insurance product needs to be better before you have everyone be forced to buy it. Simply addressing this fact may cause practitioners to start or resume malpractice insurance coverage, further minimizing non-covered attorneys.

5) Less expensive and intrusive options are available

One of the core issues is that while malpractice insurance is held by most members of the Bar, the minority that do not may decline for legitimate business reasons, such as excessive expense for the potential coverage, self-insurance, and unnecessary restrictions on practice. As such, the Bar could better address the concerns of the general public through less intrusive and/or less individually expensive options, many of which are adapted from existing regulatory regimes and voluntary associations. Some examples are provided here:

i. WSBA published/approved pamphlets to clients on hiring attorneys

In the area of residential Landlord-Tenant law (where the bulk of my practice originates), the Seattle jurisdiction addressed concerns about tenants not being aware of their rights, particularly under Seattle's unique regulatory regime that deviated greatly from the state Residential Landlord-Tenant Act. They found the best remedy for this asymmetry of knowledge was to require landlords to provide a pamphlet published and regularly updated by the Seattle Department of Construction and Inspections. While this pamphlet is long, it is comprehensive and helps insure that tenants have the opportunity to review and understand their rights under the law.

Similarly, the WSBA could publish a pamphlet on selecting attorneys, discussing the importance of areas of practice, the risks associated with pursuing litigation, and that clients should review an Attorney's malpractice insurance disclosures via the bar directory. This would be a very low-cost option that provides potential clients with necessary information without burdening attorneys with excessive costs or administrative hurtles.

Alternatively, the various bar sections and associations, including practice-area or county associations, could publish their own pamphlets geared towards their common clients that are reviewed and approved by the bar as adequate for consumer purposes. I imagine the King County Bar Association or the Washington Association for Justice would certainly provide pamphlets to their members as part of their services that the Bar could review and approve as to their content to insure they are adequate for the targeted clients, who may vary in sophistication and ability to comprehend the contents of each pamphlet.

ii. Required disclaimers

Another very low-cost option would be the formal disclosure, either in marketing or in the fee disclosures/agreements, that the attorney does not maintain liability insurance. Marketing disclosure requirements would most directly target those plaintiff and family law attorneys that actively market to potentially vulnerable populations and are most likely to have legitimate malpractice claims. Conversely, a required disclaimer in the fee agreement/disclosures (not all legal matters have a formal fee agreement) would have attorneys disclose their malpractice insurance status to referred and new clients before they can commit to the attorney. While more of just an expansion of our existing disclosures (now currently only in our individual bar

directory profiles), having it more directly given to potential clients will likely push some attorneys, particularly those who market heavily on television and billboards, to obtain insurance so that they can avoid the label of "This attorney does not carry malpractice insurance."

iii. Bonds

The WSBA, in conjunction with the Washington legislative and executive branches, could create a bond scheme that adequately covers attorneys with a bond of $100,000.00-$1,000,000.00 (as determined by the WSBA to be a reasonable amount, which may vary by practice area or be flat for all attorneys) in case of a malpractice claim that could be recovered by a plaintiff in a successful malpractice suit. This would be similar to professional bonds used in construction and other trades. While not likely covering the full value of many malpractice claims, it would effectively prevent an attorney suspected of malpractice from being "judgment-proof," and encouraging malpractice attorneys to pursue more cases that could be successful, even if the best case scenario is only recovery of the bond value.

This scheme could also include optional mediation or arbitration services administered by the WSBA or an administrative law judge that would expedite and reduce the costs of litigation in a manner similar to the Northwest Multiple Listing Service (the primary association of real estate brokers in Washington) mandatory mediation and arbitration for commission disputes.

iv. Expanding the Client Protection Fund to include some malpractice claims

As bar members, most, if not all, members in good standing pay a fee into the Client Protection Fund as part of their annual Bar dues necessary to maintain their practice. This fee is currently $30.00 as of the 2019 renewal fees and only covers mishandling of funds or property entrusted to an attorney. The Bar could expand this fee to $300.00 or more and dramatically expand the number of qualifying actions that constitute attorney malfeasance. Attorneys without malpractice insurance could pay a higher amount than attorneys with malpractice insurance to demonstrate where the burdens would most likely come from.

There are, of course, some fairly large caveats to this. The first being that the increase in the number of qualifying actions would likely necessitate additional administrative staff to assist in processing the more complex claims that would result, depending on how expansive the list of applicable actions the Bar would expand it to. The Bar may need to restrict it to claims where the attorney has a judgment against them they are unable to pay due to insolvency or bankruptcy, which would limit the administrative costs, but create a fairly high bar both in terms of time and effort for a wronged client to access the funds. If the fee is based on malpractice insurance status, then the income generated may not be adequate to keep the fund solvent. Substantial research and review would be necessary in order to proceed with such a modification to the existing fund.

Depending on how it is administered, an expansion of the Client Protection Fund would go a long way with insuring that victims of malpractice would have a means of recovery regardless of whether an attorney who has committed malpractice has the financial resources to cover the

damages. As a self-governing body of professionals, this kind of collective responsibility would go a long way to demonstrating that our collective reputation is every attorney's responsibility.

v. WSBA "public option" insurance

Finally, while likely the most expensive to individual attorneys, having the bar administer a malpractice insurance fund alongside existing private insurers would provide two major benefits: (1) it could provide lower-income attorneys and startup firms with the ability to purchase insurance at a more affordable and possibly flexible rate, likely reducing the number of uninsured attorneys; and (2) it would force the private insurance companies to adjust their rates to remain competitive.

Like the bond scheme and CPF expansion alternatives mentioned on this list, how this is administered would greatly determine its efficacy. It would likely not entirely eliminate the problem of attorneys without insurance, but it may address more fundamental issues with the malpractice insurance industry as a whole. This alone may help alleviate the problem by minimizing the number of attorneys without malpractice insurance due to cost or coverage. Conversely, it may also give those private insurance companies carte blanche to offload what they determine to be higher-risk practice areas onto the WSBA's plan in a way that could cause solvency issues if a higher rate of insurance corresponds with a higher rate of claims and actions.

The Bar could also create a voluntary insurance co-op for the purposes of bargaining for insurance in a manner similar to some health insurance co-ops that were created for small businesses. This co-cp does not need to be limited to malpractice insurance, but could also cover health, dental and optical insurance as well, which could dramatically help smaller firms with their insurance and benefit costs.

Either approach would better address the main issues that make malpractice insurance unpalatable for many attorneys: costs and coverage.

No solution is perfect, but before pursuing a plan that would dramatically increase the baseline costs to practice law, the Bar should at least explore lower-burden options that would provide at least some of the ideal benefits of expanded malpractice insurance before taking a much more expensive step.

Options should the Mandatory Malpractice Insurance Requirement Go Into Effect.

While I hope that the Bar does not require malpractice insurance as a condition of practice, it is understandable if the Bar decides otherwise. This is not a black and white issue, but rather a balance of costs, benefits, and trade-offs where personal and professional values can create serious and honest disagreements about the best past forward. Those advocating for mandatory

malpractice insurance are doing so out of good faith and a desire to improve the practice and prestige of the legal profession.

As such, the Bar should consider options that would reduce the burdens of malpractice insurance on practitioners should they decide that malpractice insurance should be mandatory for all bar members. Some options are discussed here.

1) Common Pool provided/negotiated by Bar

A common pool is a mechanism similar to a co-op, except that contributions to it are effectively mandatory for members to contribute to it. This would give the Bar the ability to effectively set prices and have a de facto monopoly on malpractice coverage within the state, substantially increasing the bargaining power between the insured (who pay through the Bar) and the insurance providers. Simply the size of the Bar membership would give the Bar immense power to negotiate premiums and terms with insurance providers and likely reduce the individual costs to attorneys.

This was brought up by a member at the oral comment hearing and discussed by a few of the governors. Its overall legality is not known and would likely be subject to substantial court challenge, especially following the *Janis* US Supreme Court decision, but it may be a good option to pursue if the existing malpractice insurance regime is inadequate or abusive in its coverage of attorneys.

2) Substantial regulation is needed on cost and coverage

One of the biggest drivers of attorneys deciding to not obtain malpractice insurance (and, indeed, one of the biggest arguments against mandatory malpractice insurance), is the substantial cost of coverage even at the beginning. The average starting monthly premium would effectively triple or quadruple the bare-minimum practice costs of the average practitioner right at the start and often grow rapidly over time.

As such, like the Affordable Care Act's approach to health insurance, the Bar should approach a mandatory coverage requirement alongside substantial regulation of the malpractice insurance industry, which would likely require coordination with the state legislature and the Washington State Insurance Commissioner. The Bar should insist on regulation designed to:

> (a) reduce monthly premiums and deductibles to a reasonable amount that the bottom quarter of practitioners in terms of income could reasonably pay without substantial risk to the solvency of their firm and/or practice;
>
> (b) provide specific guidance on the care and quality of coverage required by insurance carriers regarding claims and the requirements of coverage.
>
> (c) completely and totally ban on non-coverage of certain practice areas or activities that are allowed under our Rules of Professional Conduct, but are

frowned upon by insurance companies (such as advertising). No non-Bar entity should be setting the terms of practice. Any items or services effectively required for coverage, such as calendaring software, should be provided without cost by the insurance company if their coverage is dependent on their adoption;

(d) and, ideally, insurance carriers shouldn't be able to discriminate based on practice area at all and should limit the determining factor in determining premiums simply to years in practice. This would make insurance predicable in a way that allows attorneys to change and add practice areas, including new and emerging practice areas, without adverse consequences to their bottom line simply because insurance adjusters believe the attorney shouldn't engage in those kinds of risks essential for our growth as practitioners.

These are just some ideas on regulating the malpractice insurance industry so that attorneys who are required to obtain insurance have real affordable coverage that doesn't set the terms of their practice.

3) Exemptions need to be tailored to allow easier start-ups and low-practice members

Exemptions are a key part of insuring fair coverage so that practitioners are both adequately covered but key groups that either don't need or otherwise cannot justify coverage are not required to obtain it. The task force, in the proposed rule, listed exemptions to include employment by government or corporations/business entities, non-profit legal aid, mediators or arbitrators, or attorneys who volunteer pro bono at qualified legal aid clinics. While these are clearly essential exemptions, they are too narrowly tailored to cover the kinds of attorneys that are essential to the dynamic practice of law. Key areas that would benefit from exemptions are startup firms and "low-practicing" members. The reasons for this are discussed below:

i. Startup Firms.

The vibrancy of a state's industries are often measured in the ability of firms to be founded and grow (colloquially referred to as startups). Many solo and small practices in our states begin as startups, often at great personal expense to the founders and early employees as they strike it out on their own and try to build a practice. The Bar actively encourages this even from law students, because it is the attorneys who are willing to take those risks who often are the ones who provide some of the unique and creative interpretations of the law that can shape how we practice and approach our interpretation of the law, as well as figuring out how to better serve clients as we evolve culturally and legally.

As such, the Bar should provide an exemption for these start-ups, allowing for a 3-5 year exemption to startup firms that would help reduce their immediate costs that would likely be put towards rent and other essential business expenses and services. Make no mistake, this would be allowing an exemption for firms at a point where there is a higher likelihood of malpractice, but it is safe to say that clients who approach a newer firm are likely to understand the risks of using

a newer firm over a more established one. We approach CLE costs and other elements of the law practice it comes to new practitioners by substantially reduced fees and assistance; it only makes sense that we extend this to the highest-cost requirement of practice.

ii. "Low-Practicing" Attorneys

Make no mistake: when I say "low-practicing" attorneys, I am not saying that these are attorneys who are not putting in 40-80 hours a week serving clients as top of their field professionals. Rather, because of the nature of their clients or the specific items they are retained to handle, they do not engage in enough litigation or legal activities to justify coverage of malpractice insurance. Senior attorneys who solely handle appellate issues, for example, may only appear and argue half-a-dozen cases a year, often by clients that are sophisticated enough to understand the high risk of appellate cases. Attorneys whose practice is almost entirely providing general counsel services to small businesses who can't otherwise afford full-time in-house counsel often have little risk and rarely appear in matters likely to create malpractice claims. Semi-retired attorneys may advise or associate with firms to consult on a handful of cases a year. (Note: as a disclosure, depending on how a "low-practicing attorney is defined, my practice would be covered under this definition.)

These attorneys would be required to maintain malpractice insurance when there is a lack of substantial need or would create unnecessarily high costs given their level of activity in their legal practice.

The Bar would be served, should it decide to require members to have malpractice insurance, by having some basic guardrails to insure that members are protected in their obtaining and maintaining their insurance and exemptions for key practitioners whose practice would be threatened by requiring coverage. Without these regulations, Bar members would be at the whims of insurance carriers and brokers, who would have no reason to adjust their practices to deal with the influx of new customers.

Conclusion

I am a fundamental believer in democracy above all else. Our Bar, unlike many state agencies, provides members who will be directly affected by the actions of the Bar a form of direct representation by the Governors. I understand and celebrate that the nature of democracy requires us to sometimes acknowledge that the majority may make choices that the minority disagrees with, sometimes passionately, but that the minority ultimately will accept as the majority will. And that we, as a country and a society, have determined that due process is an essential part of insuring the minority have a fair chance to respond and make their case to a general public. As such, we have adopted the notice and comment period for many administrative decisions so that all affected parties have a chance to be heard and make their case when a rule is proposed.

And it is through this notice and comment period that I submit this comment against adoption of a requirement for practitioners, generally, to obtain malpractice insurance as a condition of practice. It has substantial economic costs to new attorneys and firms, fails to address the shortcomings of the malpractice insurance providers, and is a much more expansive and expensive option when options are available that could address the real concerns that justified pursuing an inquiry into mandatory malpractice coverage that is more limited and less costly than adopting the rule.

And, should the Bar decide that is it reasonable for most members to obtain malpractice insurance as a requirement to practice, I encourage the WSBA to also explore options designed to address the biggest concerns relating to costs and coverage, as well as looking at expanding the proposed exemptions to insure that we continue to have startup firms and practitioners who would otherwise be unable to practice in the proposed final rule.

Regardless of the choice that the Board of Governors makes on this matter, I will stand by the decision for as long as my membership remains active. I simply hope that the WSBA chooses to not adopt this rule for the reasons outlined above as well as those expressed by the members critical of the proposal during these deliberations.

I would like to conclude by thanking both the members of the Taskforce and the Board of Governors for their service as part of this dynamic debate we have been having on this matter. Your service to the Bar and the State of Washington cannot be understated.

Sincerely,

Michael P. Woo
WSBA Member No. 47364

From:	Heidi Kay Walter
To:	Mandatory Malpractice Insurance Task Force
Subject:	Oppose Mandatory Malpractice Insurance
Date:	Wednesday, May 1, 2019 12:04:27 PM

Dear WSBA Governors,

Thank you for your careful consideration of the Mandatory Malpractice Insurance Task Force report. Despite my opposition to the final recommendations, I also extend my hearty thanks to the Task Force for its work on this issue. I attended the 4/22 meeting to learn more about the recommendations and others' opinions.

I oppose the implementation of the Task Force's recommendations. For many of the reasons given in prior comments and testimony by others, I am generally opposed to mandatory malpractice insurance for active WSBA membership (disproportionate impact on smaller firms; discouraging part-time, personal pro-bono, or mentoring attorneys; increased costs without definitive commensurate benefits; bias toward insurers; etc.)

I add my concerns about the risk of **further alienating attorneys with non-traditional practices**. While the recommendations offer a variety of waivers, the list cannot possibly be all-inclusive. Not all bar members are litigators or transactional lawyers. The rest of us tire of the expectation that we prove ourselves to be "real" lawyers.

Another hurdle of determining whether we qualify for one of the exemptions will discourage innovations or putting our legal skills to work for our community. Attorneys who do not fit into the old mold may give up trying to create new ones. We celebrate diversity in the practice of law in Washington. Let's not quash it.

Additionally, this idea is unduly sweeping in the midst of the substantial re-structuring of the WSBA under the Washington Supreme Court Bar Structure Work Group. Perhaps considering *requiring identified classes of lawyers* to maintain malpractice insurance would be appropriate under that venue.

I am keeping my comments for the record short, in respect for your time. Please reach out to me if you have any questions or would like clarification. I may be reached at (206) 412-8986 or Walter.HeidiKay@gmail.com.

Thank you,
Heidi Kay Walter

Heidi Kay Walter
Attorney, Public Policy
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WSBA 43678
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From: Alton
To: Mandatory Malpractice Insurance Task Force
Subject: Fwd: Mandatory insurance a mistake
Date: Wednesday, May 1, 2019 4:05:31 PM

Sent from my iPhone

Begin forwarded message:

> **From:** Alton <[redacted]t>
> **Date:** May 1, 2019 at 9:36:33 AM PDT
> **To:** insurancetaskforce@wdba.org
> **Subject: Mandatory insurance a mistake**
>
> For the record, requiring mandatory malpractice insurance for all WS PA members would be extremely wasteful, and would only benefit certain insurance providers. I believe that this is a completely fake problem, and would add another burden to many small practitioners.
> Alton Gaskill
> Bar number 15283
>
> Sent from my iPhone

From:	Harold Federow
To:	Mandatory Malpractice Insurance Task Force
Subject:	comments on task force report
Date:	Wednesday, May 1, 2019 4:08:16 PM
Attachments:	malpractice letter draft 2.docx

Attached please find some comments on the mandatory malpractice insurance report. I did not have time, given today's deadline, to properly footnote everything. I would have liked to, but my word processing program totally deleted the first draft.

I should say that i primarily practice for a government agency. I do, however, do a reasonable amount of work on the side. I have tried to obtain malpractice insurance from different carriers over the years; however, none of them would provide me a quote.

Harold Federow

It is a capital mistake to theorize before
one has data.
Insensibly one begins to twist facts to suit theories,
instead of theories to suit facts.
Sherlock Holmes, A Scandal in Bohemia

Sadly, this epigraph is all too applicable to the report of the Mandatory Malpractice Insurance Task Force ("Report"). This report contains very little evidence to support a determination that there is a problem, and even less to support its supposed solution. And, it is clear the Task Force did not seem to do the math on what information they do provide.

Worse, however, is there is virtually no evidence to suggest there is a problem. The problem stated derives from Supreme Court Rule GR 12.1, with the first item being protection of the public; although the full quotation is that "In regulating the practice of law in Washington, the Washington Supreme Court's objectives include: (a) protection of the public;...(e) delivery of affordable and accessible legal services; (f) efficient, competent and ethical delivery of legal services; (g) protection of privileged and confidential information;...". Just these few objectives can contradict each other. From reading the Report one might assume that (a) is the most important, yet we know that the list can create competing priorities which are not always resolved in favor of protection of the public. For example, under RPC 1.6, a lawyer is required to not divulge confidential information in most cases even though disclosure might protect a large number of people.

But, if we assume for the moment that the problem is protection of clients from malpractice by lawyers, which more nearly corresponds to GR12.1(i) than it does to (a), the questions are what is the magnitude of the problem, how often does it occur, and how do we resolve it? At least with respect to Washington State, we simply do not know. We do know that nationwide a little less than 2/3 of the claims (and it is worth noting that the Report does not really distinguish between a *claim* of malpractice and a finding of malpractice) in a 4 year period were made against firms with 5 or fewer people (Report Section Key Findings 4(a)). However, that is true whether the number of claims in total is 6, with 4 against small firms, or 600, with 400 against small firms. Which is it? Numbers matter. Nationwide, 45 to 49% of practitioners are solos, 14 to 15% are in firms of 2 – 5, or somewhere between 59% and 64% are in firms under 5. Yet the claim is also made that solos are underrepresented in claim levels, although the percentage of lawyers in firms under 5 match their approximate share of claims or may be somewhat less.

There are similar problems with other parts of Key Findings, Section B.4. For example, part (b) discusses claims by practice area. Presumably the percentages provided are the percent of claims made by area, but they could also be the percentage of lawyers in each area that have had a claim made against them. Either way, some sense of absolute numbers to help assess the size of problem is lacking. Again, this is a report of claims made. In section d) ALPS (the Washington State recommended provider) states that one-half of all claims over the past 10 years were resolved without a payment of any kind. I would have expected ALPS to be able to provide numbers as well as percentages to assess the size of the problem. We do have a lower bound on the number because Section 6 of the report states that the Client Protection Fund, over the period from 2013 to 2017 received 598 applications for compensation, of which a total of 66 were denied because of an allegation of malpractice was an element of the application. Since this is over a five-year period, the average annual number of claims alleging malpractice would have been 13.2. I think it is safe to say that this is an underestimate; many clients with a malpractice claim would not file a claim with the CPF. If we decide that the actual number of claims is five times this number, that would be 66 instances of malpractice per year. Of which only 33 (one-half of 66) would lead to a payment.

It is important to provide some perspective. If we assume that Washington State tracks to the nationwide percentages discussed above, about 60% are in firms of five or less. According to Appendix C to the Report, there are 26,060 active attorneys in Washington, so about 16,700 attorneys in these smaller firms. Assume that each of these attorneys handles 75 matters per year (which I would guess is an underestimate). That would be about 1.25 million matters per year. If we divide the 66 instances of possible malpractice by the total number of matters, and assume ALL the malpractice occurs in small firms, that is about 5 matters per 100,000 (or one per 20,000) that will lead to a claim (not a finding) of malpractice. Of these, about 1/2, based on the ALPS information above, represent compensable malpractice. This is scarcely an instance of lawyers without malpractice insurance "posing a significant risk to their clients". (Summary of Report)

Now that we have determined the probability of a claim on any given matter, we should consider the amount of a

successful claim. The Report, Section 4(d) provides some information from ALPS. However, the information is somewhat confusing in that two sequential sentences provide different numbers for average claim payments, without explaining the difference. I will use the higher number although it may overstate the amounts in question. The Report states that ALPS's average loss payment is slightly under $120,000. If we accept the number of potential malpractice claims that will get paid in an average year as 33 (as calculated above). The average total loss payment in an average year is $3,960,000. In order to put this in perspective it would be helpful to know some estimate of the average premium. However, as the Report demonstrates in Section C(1), there is a range of likely premiums depending on location of the lawyer, type of practice, deductible and experience. Also premium are likely to increase to a plateau and level off. The initial estimated range is from about $1,000 per lawyer to about $1,500 per lawyer, rising eventually to $1,250 to as much as $3,100 per lawyer. For the purposes of this discussion, I will assume initially $1,250 per lawyer, rising eventually to $2,000 per lawyer. According to the demographic appendix to the Report, there are 26,060 active lawyers, with 14% uninsured Initially, then, premiums from just the currently uninsured lawyers would be $4.5 million, rising eventually to $7.3 million. Both of these numbers exceed the estimated average total loss payments. These amounts are, of course, much less than the total malpractice premiums since the total includes those who already carry it. To be fair, the average claim expenses were about $40,500, which would add about $1.3 million to the above amount. It certainly raises the question of whether a bar provided malpractice insurance, together with a third party administrator might not be cheaper overall and better for the profession, since some excess funds could be used to help reduce the occurrence of claims and, therefore, the amounts paid and still likely charge lower overall premiums.

I believe the Report is also riddled with bias. For example, the Report states that what South Dakota does is not relevant due to the larger number of lawyers in Washington. Yet, Idaho, which also has fewer lawyers than Washington is held up as a model (Idaho requires mandatory malpractice insurance). However, both New Jersey and California, which have, I would expect, many more lawyers than Washington, have chosen not to implement mandatory malpractice. Yet the Report does not explain why what happened in those two states should be ignored in favor of implementing mandatory malpractice. Unless, of course, mandatory malpractice was the chosen answer no matter what.

The Report frames malpractice insurance as an access to justice issue. However, the normal concern of access to justice is whether lower income people have access to help with legal issues in the first place, not with whether they might be able to pursue a claim in the event of malpractice. Worse, the Report itself, in Section C.3 acknowledges significant concern about the actual effect on access to justice issues. The Report contents itself with saying that lawyers can be become affiliated with "Bar-approved" pro bono providers who provide malpractice insurance. However, these are already available for affiliation (Section C.3). Presumably any lawyer who wanted to has already affiliated. And, there are many avenues for pro bono and low bono that do not come through the "official" organization. Again, let us try to quantify the effect: The Report states that malpractice insurance leads to a higher rate of claims. Above, we estimated that there were about 66 claims per year in Washington. Let us assume that the rate increase of claims increased by 10%, to about 73, or an increase of 7 claims. As stated above, there are about 3,600 lawyers in Washington with no malpractice insurance. If only 5% of them (about 180) provide pro bono or low bono assistance to clients, and if each of them reduce such assistance by one client per year due to having to purchase malpractice insurance, that is 180 clients who do not receive assistance! With this simple model, we are asked to trade 7 additional claims for 180 clients not receiving assistance by requiring malpractice insurance. This is an access to justice issue, just not the one presented. Regulating in the interest of the public is supposed to help the public.

The discussion of "moral hazard" (Section C.5) is likewise flawed and terminated by a pious statement about whether lawyers would shirk their duty or otherwise abdicate their professional duties because they have malpractice insurance. Moral hazard occurs when one party takes risks, but another party bears the costs. The classic example is that health insurance tends to lead to over use of the health system. Which is why co-pays and deductibles were instituted—to have the using party bear some of the costs. I agree with the Report that it is unlikely that a lawyer would abdicate professional duties as a result of the moral hazard issue. However, this misstates the issue. Thus, a lawyer might be led to recommend a riskier course of action to the client, which is likely to have a higher payoff, figuring that if it doesn't work, the client will have recourse to the lawyer's malpractice insurance. Or, in pursuit of aiding the client, the lawyer might engage in some riskier behavior on the same theory. And, if the client is aware of the lawyer's malpractice insurance, the client might require a riskier approach, figuring that if the approach fails the client could attempt to blame the lawyer and recover from the malpractice insurance. None of these examples violates RPC 1.1, which is what is quoted in the report. All involve moral hazard.

One final comment. In its rush to secure the idea of mandatory malpractice, the Report brushes off what Illinois is trying to do (see Report B.8.c). From the description Illinois seems to be focusing on improving the ability of lawyers to manage their law firms. This seems to be similar to numerous other efforts and process/quality improvement in such places as hospital operating rooms, manufacturing floors. The goal is to reduce the number of errors by introducing repeatable reliable processes. Then if there is some other source of an error, it is more likely to be visible and also something that can be dealt with. Would such a program reduce lawyer errors (and malpractice)? Based on the experience of other industries, it seems the answer would be yes. Does it reduce the number of errors to zero, probably not. BUT, should the fact that it is unlikely to reduce the number of errors to zero be a reason to totally dismiss it. I don't think so. One aspect of this question, is that I wonder how most clients would answer the question: "Would you prefer the State Bar institute a requirement that lawyers be educated in how to reduce the number of errors or that lawyers have malpractice insurance to cover any errors that become malpractice?"

There may be a case for compulsory malpractice insurance. There may even be a strong case. (Although, the choices made by New Jersey and California should give pause to that notion.) But the case presented in the Report is not such a case.

Harold Federow

From: Elizabeth Fry
To: Mandatory Malpractice Insurance Task Force
Subject: Mandatory malpractice ins.
Date: Friday, May 3, 2019 10:29:43 PM

Greetings. I have been a tribal judge with a law practice in Okanogan County since 1983, specializing in Indian law. I have represented hundreds of individuals. I paid for malpractice insurance only during a short period.
I have never been sued by a client. I would like to continue practicing but it would not be possible if I have to pay for malpractice insurance. I do not think malpractice insurance should be mandatory. Sincerely, Elizabeth Fry, # 11613.

From: ROSEMARY IRVIN
To: Mandatory Malpractice Insurance Task Force
Subject: Comment re Mandatory Malpractice Insurance.
Date: Friday, May 3, 2019 3:00:05 PM

Dear Task Force Members:

Thank you for your efforts to resolve this issue and move forward.

I've held my WSBA license since 1978. After listening to some of the panel discussions, I expect I will surrender my license when mandatory insurance is passed. I have effectively retired and have kept my license to continue involvement in the legal community. A colleague of mine has told me she expects to do the same. Both of us served as tribal court judges and have directed significant portions of our practices to low bono clients.

My legal career has included, among other things, insurance defense, criminal defense, and working as an attorney for the Washington State Medical Quality Assurance Commission.

During the course of my career the legal and medical communities have evolved from being "professions", very relational, dedicated first and foremost to the client/patient and the public good, to more transactional professions. Along with this has come a different dynamic in delivery of services. Both lawyers and doctors used to do considerable pro bono and low bono work. This is no longer necessarily true. Also, both professions used to be highly regarded. Clients gave gifts to their attorney/ doctor during holidays and were very grateful for their services. Malpractice claims were rare to non-existent. Today there are many more both legitimate and frivolous claims. The availability of insurance may actually increase the number of both legitimate and frivolous claims.

This brings me to my biggest concern re mandatory malpractice: Affordable insurance for those providing pro bono and low bono representation, sole practitioners, part-time practitioners, and highly specialized practitioners. Not all legal practice is profitable but the work needs to be done. Part-timers may not make enough income to afford high premiums. Many new graduates expect to open their own solo practices and will not be in a group that makes premiums more affordable. And highly specialized attorneys may have premiums that will drive them out of practice.

The medical profession has seen a huge escalation of private medical malpractice premiums which has forced good practitioners to quit. Both the affordability and how legal malpractice premiums will escalate over time needs to be considered to prevent this from happening to our profession.

Thank you for your time.

Sincerely,

Rosemary J. Irvin

Sent from my iPad