

WASHINGTON STATE
B A R A S S O C I A T I O N

Board of Governors Meeting

Late Late Materials

September 17-18, 2020
Webcast and Teleconference

WASHINGTON STATE
BAR ASSOCIATION

Board of Governors

BOARD OF GOVERNORS MEETING Late Late Materials September 17-18, 2020 Webcast and Teleconference	
Description	Page Number
BOG Retreat - Strategic Goals	LLM-3
Malpractice Insurance Disclosure Feedback	LLM-12

STRATEGIC GOAL SESSION

SEPTEMBER 17, 2020
9-12 PM

WHAT WE WILL COVER

- Public Comment
- Landscape Analysis
- Challenges/Needs Scan
- Goal Brainstorm
- Prioritize Goals

LANDSCAPE ANALYSIS

- Examine goals from other state bars:
 - Oregon State Bar Association
 - State Bar of Michigan
 - State Bar of Arizona
 - State Bar of Nevada

CHALLENGES/NEEDS SCAN

- Outcome - Identify some of the challenges facing WSBA, see where there are trends/themes.
 - What could we improve on?
 - What do our members need?
 - What does the public need?
 - What challenges/threats/environmental factors will the WSBA face in the next 6 months, 12 months, etc.?

GOAL BRAINSTORM

LANDSCAPE ANALYSIS THEMES

CHALLENGES/NEEDS SCAN

WHAT DO YOU PRIORITIZE?

WSBA Strategic Plans and Goals - History

1998 – The BOG adopted the 1999-2003 *Raising the Bar Strategic Plan*. This was the first strategic plan for WSBA. In each successive year, the plan was reviewed and an operational plan, derived from the LRSP for the coming year, was adopted.

2003 – The BOG adopted the 2003-2006 *A Blue Print for Change Strategic Plan*.

2007 – The BOG adopted the 2008-2011 Strategic Goals and Guiding Principles. At the same time WSBA underwent an intensive and systemic program review that was part of the 2008-2011 Strategic Goals.

2010 – The BOG adopted the 2011-2013 Strategic Goals and an Operational Priorities document took place of the Operational Plan. This plan was an internal document that guided how the strategic goals were implemented every fiscal year.

2012 – The BOG adopted the 2013-2015 Strategic Goals.

2015 – The BOG adopted the 2016-2018 Strategic Goals.

2019 – The LRSP Committee went on a hiatus and no updated strategic goals were adopted.

WSBA STRATEGIC GOALS

For historical context, below are the strategic goals for the most recent and current cycles.

2008-2011

- WSBA engaging in a systematic review of all its programming.
- WSBA strengthening its connection with its membership.
- BOG improving its relationship with the WSBA staff.

2011-2013

The WSBA should use existing programs, and should implement new programs, to improve our members' level of satisfaction with their lives and with the practice of law. In order to implement this goal, WSBA will work to:

- Enhance the culture of service within WSBA membership.
- Provide more assistance to lawyers with the business of law practice.
- Provide more assistance to lawyers in avoiding or dealing with the stress of law practice.
- Conduct a detailed study of the composition of the legal profession and retention rates within the profession in the state of Washington.

2013-2015

- Prepare and equip members with problem-solving skills for the changing profession.
- Foster community with and among members and the public.
- Promote equitable conditions for members from historically underrepresented backgrounds to enter, stay, and thrive in the profession.
- Support member transitions across the life of their practice.

2016-2018

- Equip members with skills for the changing profession.
- Promote equitable conditions for members from historically marginalized or underrepresented backgrounds to enter, stay, and thrive in the profession.
- Explore and pursue regulatory innovation and advocate to enhance the public's access to legal services.

Criteria for Strategic Goals:

- The goal should be something that WSBA either has not been doing or something that WSBA has been doing, but that the resources devoted to that activity should be dramatically increased to take that activity to a much higher level.
- The goal should be achievable and measurable.
- The goal should be a goal in and of itself and not a means to another.

State Bar Strategic Goals Landscape Analysis

<p>Oregon State Bar Association</p>	<p>1. Regulate the Legal Profession and Improve the Quality of Legal Services. – Our goal is to protect the public by ensuring competence and integrity and by promoting professionalism in the legal profession.</p> <p>2. Support the Judiciary and Improve the Administration of Justice. – Our goal is to protect and advance the quality, integrity, and impartiality of the judicial system.</p> <p>3. Advance a Fair, Inclusive, and Accessible Justice System. – Our goal is to foster trust in, respect for, understanding of, and access to the justice system.</p>
<p>State Bar of Michigan</p>	<p>Goal 1: The State Bar of Michigan provides resources to help all of its members achieve professional excellence and success in the practice of law and in service to the public.</p> <p>Goal 2: The State Bar of Michigan champions access to justice and builds public trust and confidence in the justice system in Michigan.</p> <p>Goal 3: The State Bar of Michigan maintains the highest conduct among its members, and initiates and advocates for improvements that facilitate accessible, timely justice for the public.</p> <p>Goal 4: The State Bar of Michigan structures itself to achieve its strategic goals in a responsive and cost-efficient manner.</p>
<p>State Bar of Arizona</p>	<p>Goal 1: Competency. Provide Arizona attorneys with the knowledge and tools to develop and enhance the skills necessary to meet the needs of their clients and to promote the administration of justice.</p> <p>Goal 2: Ethics. Promote and when necessary enforce the highest ethical conduct of our members.</p> <p>Goal 3: Professionalism. Promote an environment in which lawyers can work together in a collegial spirit to serve their clients and promote the administration of justice.</p> <p>Goal 4: Administration of and Access to Justice. Promote efforts to improve the administration of justice and make the legal system equally accessible to all Arizonans.</p> <p>Goal 5: Organizational Excellence. Demonstrate excellence in every area: operations, programs, resource management, policy and planning, and citizenship.</p>
<p>State Bar of Nevada</p>	<p>Our Goals are...</p> <ul style="list-style-type: none"> * To govern the legal profession in the State of Nevada, subject to the approval of the Supreme Court; * To aid in the advance of the science of jurisprudence and in the improvement of the administration of justice; * To promote reform in the law and in judicial procedure; * To uphold and elevate the standard of honor, integrity, and courtesy in the legal profession; * To encourage higher and better education for membership in the profession; * To promote a spirit of cordiality and true friendship among members of the Bar; and * To manage the business of the State Bar in a prudent manner.

MEMO

To: President Rajeev Majumdar and the WSBA Board of Governors

From: Sara Niegowski, Chief Communication and Outreach Officer

Date: Sept. 16, 2020

Re: Feedback re: proposed amendment to RPC 1.4 to require malpractice insurance disclosure

The feedback in this memo is meant to inform governors as they consider the corresponding agenda item on Friday, Sept. 18: APPROVE PROPOSED RPC AMENDMENT AS RECOMMENDED BY THE AD HOC COMMITTEE TO INVESTIGATE ALTERNATIVES TO MANDATORY MALPRACTICE INSURANCE.

Following the Board of Governor's discussion at its August meeting regarding the proposed RPC amendment, WSBA did the following to inform members about potential action in September and to invite member comment on the proposed rule amendment through a survey: Created a webpage with information, including the language of the proposed amendment and background information (note: this page was updated to reflect the ad hoc committee's revised recommendation after its meeting on Sept. 9); and distributed the link to that web page via Take Note (e-newsletter to all members), homepage slider, social media posts, and outreach to stakeholders such as county bar leaders.

The informational webpage can be viewed here: <https://www.wsba.org/news-events/latest-news/news-detail/2020/09/04/malpractice-insurance-disclosure>

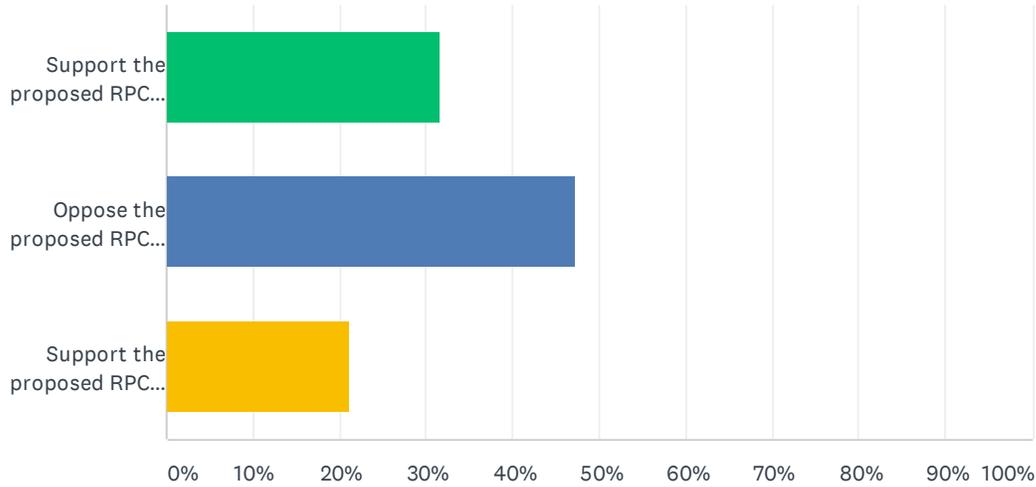
As of Sept. 16, we received 18 responses to our feedback survey. Here's a high-level summary:

- 32% support the rule change.
- 21% support the rule change with a caveat.
- 47% do not support the rule change.

Please read the following pages for more information from the survey respondents as well as the written comments from member Barnaby Zall.

Q4 Do you generally:

Answered: 19 Skipped: 0



ANSWER CHOICES	RESPONSES	
Support the proposed RPC amendment?	31.58%	6
Oppose the proposed RPC amendment?	47.37%	9
Support the proposed RPC amendment but with an important caveat?* (See next question)	21.05%	4
TOTAL		19

Q5 * If you generally support the proposed rule with a caveat, what is the caveat (a modification or addition or subtraction to the recommended rule, perhaps)?

Answered: 7 Skipped: 12

#	RESPONSES	DATE
1	N/A	9/15/2020 1:24 PM
2	I am retired but like to keep my bar membership up because "you never know". So if I am not actively practicing, I should not be required to have that expensive insurance. The only things I do are update the employee handbook with L&I things and review contracts for a salmon nonprofit, as a member of its board and the board has its own malpractice insurance.	9/15/2020 10:40 AM
3	I would like this tied into the people who just got licensed without taking or passing the bar exam	9/14/2020 4:41 PM
4	I believe requiring malpractice insurance is a better course. I believe the engagement agreement should reference this, and in bold type in the same size font as the rest of the agreement.	9/14/2020 4:18 PM
5	Hi, I have been disciplined by the WSBA in the past. I was also sued by that client and he won a judgment against me. I had insurance to cover that loss. I actually do not understand why lawyers are not required to carry professional liability insurance. I have not participated in that discussion so I am ignorant of the arguments against that rule. It seems foolish to not carry this type of insurance for ANY profession in my opinion. What if your doctor made a mistake on your kidney transplant and you were not able to recover money damages because they had no insurance? We see these kinds of disasters occur frequently in residential construction projects. I think it is important from a consumer's standpoint to know if their attorney is insured. I practice real estate law and it is not uncommon for me to talk to clients about checking on whether a contractor they are using has at least an L&I insurance bond. Most people want to know but they don't think of this on their own. What if an attorney missed the deadline for registering a patent for a client invention and someone else stole the idea? Shouldn't the lawyer have insurance for that loss? So I think even if most consumers are not thinking about suing a lawyer they use, it probably is not a bad idea to require this disclosure, as it can be added to the client-attorney services agreement when the client hires the attorney, or in short time situations where an agreement may not be executed for the job, the attorney can still at least email the client and have proof they disclosed whether they have insurance or give them a short form document containing this disclosure and get the client signature and keep a copy of that document. My caveat is this: does the lawyer have to show the client a copy of their insurance declarations page showing the amounts of coverage? Or can these insurers provide insured attorneys with an "insurance card" like with car and motorcycle insurance? That way the lawyer can flash that card when the client is told they have insurance.	9/14/2020 3:41 PM
6	If the RPC is to be amended, I urge the Board and the Court to maintain the exception for retired lawyers who volunteer with Legal Services Providers, those which cover the volunteers with malpractice insurance.	9/10/2020 11:50 AM
7	Notice need not be on every communication with every client every time (section 3 i and ii), especially if each of these notices must be recorded (section 4), assumedly separate. It is enough to include notice in solicitations (but not in advertisements), engagement letters (client consent by marking initials next to the notice in the letter), and of course, communications to clients about a change from covered to not covered. In other words, informed consent at the outset of a relationship and at the change of insured status should be adequate rather than a constant barrage of reminders in every communication.	9/9/2020 1:49 PM

OTHER OPEN ENDED COMMENTS?

Answered: 14 Skipped: 5

#	RESPONSES	DATE
1	Good. professional attorneys will already do this. I think it is not too much to ask that the WSBA/WA Supreme Court mandate a rule for disclosure/informed consent. It is a step in the right direction, but only a 1st step.	9/15/2020 3:15 PM
2	I have malpractice insurance, and I still don't believe that this should be mandatory nor should that there be additional requirements for disclosures.	9/15/2020 1:24 PM
3	The proposed RPC amendment is, simply, a back-door means of imposing mandatory malpractice insurance. Not surprisingly, it exempts those members of our profession, who possess the most status/clout. You need to listen to your members. WE DO NOT WANT MANDATORY MALPRACTICE INSURANCE! We clearly see this proposed amendment, for the ploy that it is. Thank you for allowing me to express my sentiments. I think you will find that they are widely shared. I will close by saying, once more, that you need to listen to your members. Sincerely, Stanley D. Bonner, WSBA #22604	9/15/2020 1:16 PM
4	I strongly support making this disclosure to clients mandatory. It should also be prominently displayed. I support this because it is the right thing to do for prospective clients. I do NOT support requiring lawyers to say THEY HAVE malpractice insurance. That should be voluntary	9/15/2020 11:29 AM
5	I guess #5 said it. Those who are not taking clients but want to keep their bar membership up as retired but wanting that "honor" because of decades of hard work and that godawful bar exam should get to do so without making some insurance company rich. And FYI, some of us worked for tiny Indian tribes or tiny nonprofits, have very little retirement other than SS, and can barely afford the bar dues. You will just push us out and keep the rich retired ones, if you make this rule.	9/15/2020 10:40 AM
6	I still think malpractice insurance should be mandatory but I think this compromise is a good one. It protects clients and will make solo practitioners think twice about not having insurance. I like this amendment and hope it passes.	9/14/2020 5:27 PM
7	Malpractice insurance is insanely expensive as is. If required, there is no doubt premiums would steeply increase. As a solo, I do have malpractice, fidelity, and business insurance but am afraid I wouldn't be able to afford it if it becomes mandatory. The policy of disclosure and consent also discriminates against solos and small firms. Insurance information can be found on the WSBA website if clients are concerned.	9/14/2020 4:45 PM
8	Why not tie this into the people who didn't pass the bar exam. I think the disclosure could require the insurance notification as well as if they didn't pass the bar.	9/14/2020 4:41 PM
9	In construction, contractors performing work on structures other than those they own are required to be registered, bonded and insured. The contractor must notify the client of its registration number in the contract, and prior to certain other actions (in filing lien notices, etc.). Are lawyers less professional than that? The Dept. of Labor & Industries maintains the website reflecting the contractor's status, identifying the bonding company and insurance carrier. I agree that lawyer's own website should show this, also.	9/14/2020 4:18 PM
10	I believe I submitted comments on this issue earlier, on August 17, 2018 and on May 11, 2020.	9/10/2020 11:50 AM
11	I've been licensed 20 years; I've practiced a little over ten. It seems to me that there is an ongoing desire of some of the rulers on the Board -- and I purposely use that word "rulers" -- an ongoing desire to destroy the small practices, through the constant imposition of little rules that quietly make it financially impossible to practice. I am bemused at this desire to destroy the solos. If you people didn't live in an ivory tower, you would have noticed that there is a glut of lawyers, and most of them end up as solos. It's a crowded profession with a lot of struggling practitioners. If you destroy the solos, you destroy your "tax base", so to speak. You're attacking the people who pay for YOU with dues, who pay for the Bar Association, and things like its nice downtown Seattle offices, with the enormous rents, when you could have an office in a cheap section of Olympia, or in south Seattle. But we serfs have to pay for you to be in downtown Seattle. Meanwhile, you look for ways to price us out of business, to destroy us. This malpractice requirement is one of them. Malpractice insurance is extremely expensive, and the bar has done nothing I know of to alleviate that. I smell the vile stink of social Darwinism in this hunger to wipe out the practitioners of modest means. This "free market", neo-liberal, social Darwinist impulse runs counter to the WSBA's myth about itself, which is that it is a progressive institution with an undercurrent of compassion. I read the minutes of some meetings, and I saw how some of the members of the Board want to destroy solos.	9/9/2020 2:50 PM

Malpractice Insurance Disclosure: WSBA Board to Consider Sending a Rule Proposal to the WA Supreme Court

12	<p>In my 51 years of practice I have done a significant amount of Plaintiff's legal malpractice I have been somewhat reluctant in the past to support measures such as this as I would be susceptible to self interest We are first and foremost ALWAYS fiduciaries to our clients Isn't this proposal totally in alliance and consistent with that fiduciary duty. In my view as fiduciaries we owe malpractice coverage to our clients. This measure should absolutely be supported by the BOG</p>	9/9/2020 2:30 PM
13	<p>This is a terrible idea and rule. You might well as just make malpractice insurance mandatory. Who wants to discuss representation with a potential client, and then make them sign a document that tells them you don't have malpractice insurance or at the level the bar feels is necessary? That is not the way to start an attorney-client relationship. If you are going to have the rule, it should be at the \$100/\$300k limits, which was what the bar was going to require with the mandatory malpractice amendment. But I think the whole idea is a very very bad one. It requires the attorney to immediately sow distrust into attorney-client relationship, right at the outset. Please rethink this. I'd rather have the mandatory malpractice rule if it's a choice between one or the other.</p>	9/9/2020 2:14 PM
14	<p>I don't support the amendment, which is a solution in search of a problem. However, the proposal for mandatory informed consent is far less objectionable than the proposal that insurance status be incorporated into letterhead. Assuming, arguendo, that clients should know their lawyer's insurance status, what purpose does it serve to also alert opposing counsel, courts, witnesses, and other correspondents of that status? The letterhead portion of the proposal is little more than an attempt to brand uninsured attorneys with a scarlet letter. The rule proposal as a whole is an attempt at appeasement for the mandatory insurance backers. Much like mandatory insurance, this proposal is over broad and overburdensome when compared to the lack of any real evidence of a "problem" that must be fixed.</p>	9/4/2020 9:22 PM

Barnaby W. Zall

Attorney At Law

685 Spring St. #314

Friday Harbor, WA 98250-8058

(360) 378-6600

(fax) 360-539-5358

E-mail: bzall@aol.com

Comment to the WSBA Board of Governors On Proposed Amendment to RPC 1.4 Expanding Disclosure Requirements of Malpractice Insurance Coverage September 11, 2020

Sometimes, it's a kindness to be direct: I would not send this hastily-drafted, unsupported, burdensome and counterproductive proposed amendment to the Supreme Court of Washington. Especially not so soon after recent decisions on compelled commercial speech from the Ninth Circuit and Supreme Court of the United States on very similar issues. *See, e.g., Am. Beverage Ass'n v. City & Cnty. of S.F.*, 916 F.3d 749, 756 (9th Cir. 2019, *en banc*) (a compelled notice about a commercial service must be "noncontroversial", "purely factual," and cannot be "unjustified," or "unduly burdensome,") *quoting National Institute of Family & Life Advocates v. Becerra*, — U.S. —, 138 S.Ct. 2361 (2018) ("NIFLA") and *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985) (regulation of lawyers' advertising). This proposal would likely never survive the Washington Supreme Court's review.

I have previously addressed mandatory malpractice insurance coverage before the Mandatory Malpractice Insurance Task Force, the WSBA Board of Governors, and the Washington Supreme Court. Most recently, I submitted to the Supreme Court a 21-page detailed and substantiated analysis of the proposed mandatory insurance amendment to APR 26. Barnaby Zall, "Comments on Proposed Amendment to APR 26," ("Zall APR 26 Comments"), https://www.courts.wa.gov/court_Rules/proposed/2019Dec/APR26/Barnaby%20Zall%20-%20APR%2026.pdf. My comments noted that the mandatory malpractice insurance proposals were unsupported, would be a financial windfall for insurance companies while providing a pittance in compensation for claimants, and would cause serious problems with access to justice and "legal deserts" in Washington. These are the same concerns that troubled the BoG last year, and that recently caused several states, including California, New Jersey, and Nevada, to reject similar mandatory malpractice proposals. *Id.*, at 3, 5-6. The New Jersey Bar, for example, told its Supreme Court that:

Frankly, there is no evidence that either requirement [insurance or disclosure] is necessary or will resolve any demonstrated problem in connection with the ability of consumers to obtain quality legal services and to have recourse in the event of negligent representation. There is evidence, however, that, if mandated, both requirements will engender more confusion than clarity for the public, and will pose a myriad of problems for attorneys, and those offering legal services in high-risk, consumer-oriented practice areas.

Letter from Robert B. Hille, President N.J. State Bar Ass'n, to Hon. Glenn A. Grant, Acting Admin. Dir. N.J. Court, (Jan. 15, 2018), at 1, <http://perma.cc/YDQ9-HWY8>.

This new proposal, intended to punish lawyers who do not have malpractice insurance in

order to “encourage” them to obtain insurance, https://www.wsba.org/docs/default-source/about-wsba/governance/bog-meeting-materials-2019-2020/board-of-governors-special-meeting-materials-aug.-29-2020.pdf?sfvrsn=fa1008f1_8, at 4, adds a new and problematic element of compelled speech, and does so in a way that makes it difficult to defend under the current First Amendment standards. “By compelling individuals to speak a particular message, such notices ‘alte[r] the content of [their] speech.’” *NIFLA*, 138 S.Ct. at 2371, quoting *Riley v. National Federation of Blind of N.C., Inc.*, 487 U.S. 781, 795 (1988). The fact that this would be compelling highly-regulated professionals to speak does not diminish their protection, except in limited circumstances. *NIFLA*, 138 S.Ct. at 2371, 2372 (reversing Ninth Circuit decision distinguishing “professional speech”), citing, *inter alia*, *Zauderer* 471 U.S. at 651 (“the disclosure of ‘purely factual and uncontroversial information about the terms under which ... services will be available,’ ... should be upheld unless they are ‘unjustified or unduly burdensome.’”).

The burden of defending the proposed compulsion is on the proponent, which in this case, would be the Ad Hoc Committee. *Am. Beverage Ass’n*, 916 F.3d at 756. For example, the August 19, 2020, Memorandum from Ad Hoc Committee Chair Kyle Sciuchetti to the WSBA BoG explained the purpose of the proposed amendment was “to encourage a lawyer to voluntarily insure or disclose the lawyer’s insurance status to clients when the lawyer is uninsured or underinsured.” https://www.wsba.org/docs/default-source/about-wsba/governance/bog-meeting-materials-2019-2020/board-of-governors-special-meeting-materials-aug.-29-2020.pdf?sfvrsn=fa1008f1_8, (“August Board meeting materials”) at 4.

The only way to defend such “encouragement” is to lay out a compelling case that the requirement is “noncontroversial” and “purely factual,” and not “unjustified or unduly burdensome.” The proposed regulation can’t meet any of those four standards, and all four must be satisfied. *Am. Beverage Ass’n*, 916 F.3d at 756. In *Am. Beverage Ass’n*, the Ninth Circuit stopped after analyzing only the burdensomeness of the compelled speech. *Id.*, at 757.

Unduly Burdensome: The proposed amendment is confusing and internally-contradictory. This language is far different from, and conflicts with, that used in other Rules. For example, RPC 1.18 recites duties to “prospective clients” including notice to clients and a lawyer’s ability to “condition” consultation on client disclosures that might conflict the lawyer in the future. What is the significance of the clear difference between the proposed RPC 1.4(c)’s use of the term “possible client” and RPC 1.18(a)’s definition of a “prospective client?” Does the lawyer have to include this long disclosure language and keep records for six years for every possible client, or only those who have actually consulted about possible representation?

Similarly, in the proposed RPC 1.4(c), there is a clear temporal and responsibility disconnect between Subsection 1.4(c)(1)’s “before or at the time of commencing representation of a client” and Subsections 1.4(c)(3)’s “(i) on each written communication with a client or possible client” and 1.4(c)(4)’s “after the representation is terminated.” Reading proposed Subsection 1.4(c)(1), it may have been the Committee’s intention to limit these disclosures to the

communications with a logical nexus to solicitation of new clients, but the language is far more expansive than that. For example, proposed Subsection 1.4(c)(3) (Sept. 9 revised version) says: “A lawyer not covered by lawyer professional liability insurance shall provide clear and conspicuous notice of that fact: (i) on each written communication with a client or possible client.” Thus, BOTH clients and “possible clients” – whoever those may be – are to be notified, with no temporal limit as in proposed Subsection 1.4(c)(1). Similarly, although proposed Subsection 1.4(c)(3)(ii) refers solely to solicitations to “possible clients,” Subsection 1.4(c)(3)(iii) does not limit the notice on a firm’s “home page,” viewable by all.

In *Am. Beverage Ass’n*, the Ninth Circuit struck down a compelled speech requirement for a notice that was perhaps 10% larger than needed. 916 F.3d at 757, quoting *NIFLA*, 138 S.Ct. at 2378. Here is an example of a hypothetical e-mail required by the proposed Amendment to RPC 1.4 to include a disclosure notice many times the size of the underlying message:

TO: S*** (S***@gmail.com)
FROM: Barnaby Zall (b***1@gmail.com)
September 17, 2023
Subject: HAPPY BIRTHDAY!!!!

Happy birthday, S***! It’s been a pleasure to work with you the last several years. I hope we can continue this effective partnership in the future.
Barnaby

PLEASE NOTE: Under Rule 1.4(c) of the Washington Rules of Professional Conduct, I must obtain your informed consent to provide legal representation, and ensure that you understand and acknowledge that I do not maintain any lawyer professional liability insurance (sometimes called malpractice insurance), of at least two hundred fifty thousand dollars (\$250,000) per occurrence, and five hundred thousand dollars (\$500,000) for all claims submitted during the policy period (typically 12 months). Because I do not carry this insurance coverage, it could be more difficult for you to recover an amount sufficient to compensate you for your loss or damages if I am negligent.
/s/

You are required to respond to this notice within ten days by signing the following statement, or I will not be able to be your lawyer or further communicate with you:
I acknowledge and supply this written consent, required by Rule 1.4(c) of the Washington Rules of Professional Conduct, that Barnaby Zall does not maintain any lawyer professional liability insurance (sometimes called malpractice insurance) lawyer professional liability insurance with at least minimum coverage of \$250,000 for each claim, and at least \$500,000 for all claims submitted during the policy period (typically 12 months), and I consent to representation by the lawyer.

Equally troubling is the Ad Hoc Committee’s cavalier approach toward the burden on

lawyers and their clients. The August 19 Ad Hoc Committee Report mentioned only three of the BoG's concerns over earlier mandatory malpractice insurance proposals: "expense, the perceived difficulty of obtaining reasonably priced insurance in specialized practice areas, or the very limited amount of work being performed by some lawyers each year." None of these three, or the other concerns expressed in the BoG's report to the Washington Supreme Court, were addressed in the Ad Hoc Committee's Reports to the BoG.

Many of the consequences which concerned the BoG (and several other states contemplating mandatory malpractice insurance, *see*, Zall APR 26 Comments, *supra*, at 4-6) will be triggered by this proposal's "encouragement." Most important, the economic consequences of requiring lawyers to include the proposed extensive statements will likely drive away many of the same lawyers who would have suffered under the mandatory coverage requirement. *See, id.*, at 15-21. Similarly, the grandiose and confusing language required in the disclosure will likely dissuade those most likely to need legal assistance from hiring not just those who give these notices, but other lawyers as well.

In addition, it is both elitist and inappropriate for the Ad Hoc Committee's Memos to suggest that "The premium cost difference between a \$100K/\$300K and \$250K/\$500K policy would not be substantial, typically no more than several hundred dollars annually", Committee Report, August Board materials, *supra*, at 5 (emphasis added). For lawyers who are not earning massive income, "several hundred dollars" is a significant burden. This indication that the Committee believed that cost increases of "several hundred dollars annually" would not have an economic effect on access to justice in Washington is troubling.

This is the same indifference to the realities of law practice that distorted the MMI Task Force Report. *See, e.g.*, Zall APR 26 Comments, *supra*, at 16-21. For example, the MMI Task Force chose, in the face of specific evidence from several members of inability to even get insurance companies to quote premiums, to falsely allege: "The Task Force has not been provided with documentary evidence supporting the assertion that any Washington State lawyer has been unable to obtain malpractice insurance due to a unique specialty." Mandatory Malpractice Insurance Task Force, *Report To WSBA Board Of Governors* ("MMI Task Force Report"), 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, at 36. This was not true, and the voluminous records of the earlier proposals show several specific presentations of such evidence. For specific examples and links to discussions between lawyers and the MMI Task Force, *see* Zall APR 26 Comments, *supra*, at 16-18. No matter how "encouraging" the Ad Hoc Committee intends to be, if insurance is not offered, its encouragement will be doubly frustrating, with no commensurate benefit to the public.

Unjustified: Before it can legislate on RPC 1.4(c) to compel speech, the Court must have actual evidence of – not "mere speculation" about – an identified problem to justify an infringement on protected First Amendment rights. *McCutcheon v. Fed. Election Comm'n*, 134

S.Ct. 1434, 1452 (2014) (“And – importantly – we ‘have never accepted mere conjecture as adequate to carry a First Amendment burden’”); *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 392 (2000). If there are any actual issues with the current Washington disclosure notice of malpractice insurance coverage required by APR 26(a)(2) and (3), the first step for the Ad Hoc Committee should have been to identify the specifics of those issues with particularity, and not just offer speculation and general concerns. That was not done here, nor by the Mandatory Malpractice Task Force or the proponent of the currently pending proposed amendment to APR 26 now pending before the Washington Supreme Court.

How many persons would be affected by the proposed amendment? We don’t know, because the Ad Hoc Committee didn’t say. What problems have been identified with the current insurance coverage disclosure? We don’t know, because the Ad Hoc Committee didn’t say. What other problems would the proposed language cause? We don’t know, because the Ad Hoc Committee didn’t say.

The lack of information by the Ad Hoc Committee is consistent with earlier efforts’ failure to provide even basic research and information. The MMI Task Force Report, for example, said it could not determine how many persons are injured in Washington each year due solely to a lack of malpractice insurance, even though, as I and others have demonstrated, the Task Force had gathered sufficient information upon which to base a reasonable estimate. Zall APR 26 Comments, *supra*, at 7-10. Instead, the Task Force Report conflated injuries with “claims,” a number which is far higher than the actual expected injuries, primarily due to the “claims made” nature of malpractice insurance policies. *Id.*, at 10-12. Similarly, the Task Force’s estimate of “hundreds of millions of dollars” in damages from a lack of insurance is refuted by the actual figures available on payouts by ALPS and the Oregon Professional Liability Fund. *Id.*, at 11-12. The Oregon Professional Liability Fund, for example, says its “average claim payment (including claims for which no payment was made) is approximately \$9,600. Roughly 40% of claim files are closed without payment of any claims expense, while 60% involve some claims expense. The average claims expense paid on a claim (including claims with no claims expense) is approximately \$11,400.” Oregon Prof’l Liability Fund, “About the PLF; Protecting Oregon Lawyers,” <https://www.osbplf.org/about-plf/overview.html> (“About the PLF”) (last visited September 11, 2020).

Not Noncontroversial: As shown by the August 19 memo, the proposed regulation is controversial: it is being proposed in the wake of rejection of mandatory malpractice insurance. *Zauderer* upheld a noncontroversial requirement that lawyers inform clients if they would be liable for fees and expenses. 471 U.S. at 650-653. Abortion – the underlying service in *NIFLA* – was “anything but an uncontroversial topic.” *NIFLA*, 138 S.Ct. at 2372. The earlier rejection by the BoG and other states of proposed mandatory malpractice insurance coverage likely would make this draft “encouragement” controversial. The superfluous inclusion in the proposed notice here of both insurance coverage amounts and the inflammatory sentence “Because [I][we] do not carry this insurance coverage, it could be more difficult for you to recover an amount sufficient to compensate you for your loss or damages if [I am][we are] negligent” (emphasis added) also

would likely be considered controversial.

I could continue with many other concerns over the proposed amendment, but in the interests of brevity, I will make only mention a simple and less-troubling alternative:

There's a simpler and easier solution to any legitimate concerns about the current APR 26 disclosure requirement. Without some actual research, it would be difficult to uncover any legitimate concerns about current insurance disclosure requirements under APR 26(a)(2) and (3). But one possible concern would be whether putting disclosures on the WSBA's clunky website is the most effective means of informing prospective clients about this issue. It would be a much less burdensome, clearer, simpler and likely more effective solution to any legitimate concerns to simply **require that lawyers include in any proposed representation letters** a simple sentence that they do not have malpractice insurance coverage. This type of less controversial, factual description of the terms of representation would be more defensible under *Zauderer's* "purely factual" and "uncontroversial" tests, but only if justified by a factual record and shown to be non-burdensome. Like other elements of a representation relationship, including those governed by RPC 1.18, one can expect prospective clients to inquire about specifics that trouble them. It is not much different from requiring lawyers to certify to the WSBA for public display their insurance coverage each year. And a simple sentence would not trigger size-and-space concerns like the present rule.

The Supreme Court of Washington is in the early stages of considering a proposed amendment to APR 26. Providing additional related proposals to the Court now for amendments to RPC 1.4(c) may unnecessarily delay the Court's consideration. In addition, there has been no time for WSBA members to review and comment on the proposed new Rule 1.4(c). Given the lack of substance in the Ad Hoc Committee's memorandum report to the BoG (*see point 3 ante*), member input would be very helpful in illuminating aspects that the Ad Hoc Committee did not consider. The hasty September 9 changes in the draft, for example, are an indication that this is not a finished product, and immediate consideration could waste both the BoG's and the Court's time.

The BoG should not recommend this proposed amendment to the Washington Supreme Court.

Respectfully submitted,

Barnaby Zall
WSBA #50976