From: Deirdre Glynn Levin
To: Mandatory Malpractice Insurance Task Force
Subject: FAVOR mandatory malpractice insurance
Date: Sunday, December 2, 2018 1:22:10 PM

Dear Task Force members
I wish to have my voice heard on this important issue.
I FAVOR implementation of mandatory malpractice insurance. Consumers of legal services deserve to have this security. We all make mistakes.

Thanks for your work on this important issue.

Deirdre

Deirdre Glynn Levin, J.D.
DGL Law, PLLC
1300 N. Northlake Way, #200
Seattle, WA 98103
www.dgllaw.net
deirdre@dgllaw.net
tel: (206) 422-6378

From: vacliffordattorney@comcast.net
To: Mandatory Malpractice Insurance Task Force; SAIL solo practice list serve
Subject: Mandatory malpractice insurance
Date: Monday, December 3, 2018 11:55:22 AM

I am in favor of it, but am **only in favor of requiring coverage in the private market**. This is the equivalent to minimum mandatory auto insurance, in which bad drivers pay extra for their coverage. It will protect the public with a minimum basic requirement, but make lawyers with excessive claims pay for that poor track record. If it makes it prohibitive to pay for coverage after many past claims, that is a self-policing process which indirectly serves the citizens of the state of WA- bad lawyers won't practice. Other practitioners may choose to pay for more than minimum coverage, and can advertise this fact if they wish.

Mandatory payment through a state bar association (like in Oregon) is poor practice, will generate excessive premiums and will trigger litigation by lawyers who don't agree to pay extra in the new system. I have paid about $2500 for good coverage for the past 12 years in WA, and I see no reason why I should pay $3300 (the going rate in Oregon). Don't confuse protecting the public on a basic level with a revenue source for the WSBA. If it is in some way run by the WSBA, or if the WSBA gets paid in any way in the process, you will have a revolution on your hands.

Virginia Clifford
Law Office of Virginia A. Clifford PLLC
2952 Limited Lane NW Suite A
Olympia, WA 98502
360 357-3007
Fax 360 357-3071

Please respond to all emails at vacliffordattorney@comcast.net

From:	Jenny Coates
To:	vacliffordattorney@comcast.net; Mandatory Malpractice Insurance Task Force; SAIL solo practice list serve; author.nameemail
Subject:	Re: [SAIL_WA] Mandatory malpractice insurance
Date:	Monday, December 3, 2018 12:27:33 PM

Wow…if this change could force premiums up to $3300 a year, that's a really scary thought!

Jenny Coates Law, PLLC
Tax and Business Law Attorney
www.jennycoateslaw.com
Bainbridge Island, Washington
tel: 206–780-7934; fax: 206-458-6051

From: <sail_wa@googlegroups.com> on behalf of "vacliffordattorney@comcast.net" <vacliffordattorney@comcast.net>
Date: Monday, December 3, 2018 at 11:55 AM
To: "insurancetaskforce@wsba.org" <insurancetaskforce@wsba.org>, SAIL solo practice list serve <sail_wa@googlegroups.com>
Subject: [SAIL_WA] Mandatory malpractice insurance

I am in favor of it, but am **only in favor of requiring coverage in the private market**. This is the equivalent to minimum mandatory auto insurance, in which bad drivers pay extra for their coverage. It will protect the public with a minimum basic requirement, but make lawyers with excessive claims pay for that poor track record. If it makes it prohibitive to pay for coverage after many past claims, that is a self-policing process which indirectly serves the citizens of the state of WA- bad lawyers won't practice. Other practitioners may choose to pay for more than minimum coverage, and can advertise this fact if they wish.

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Fax 360 357-3071

Please respond to all emails at vacliffordattorney@comcast.net

violation of the law to read, discuss, retain or disclose a confidential communication which you receive in error.

--
The author of this post is solely responsible for its content.

Jenny Coates Law, PLLC Tax and Business Law Attorney www.jennycoateslaw.com Bainbridge Island, Washington tel: 206–780-7934; fax: 206-458-6051
Jenny Coates Law, PLLC Tax and Business Law Attorney www.jennycoateslaw.com Bainbridge Island, Washington tel: 206–780-7934; fax: 206-458-6051

From: Melinda
To: Jenny Coates
Cc: vacliffordattorney@comcast.net; Mandatory Malpractice Insurance Task Force; SAIL solo practice list serve; author.nameemail
Subject: Re: [SAIL_WA] Mandatory malpractice insurance
Date: Monday, December 3, 2018 12:33:17 PM

Virginia has hit it spot on. A Base minimum, on the open market, provides safety for the public, without bringing unnecessary and costly extra layer.

Misspelled from my iPhone

Melinda

Law Office of Melinda K Grout
[redacted]
Monroe, WA 98272
(360) 794-4322. Tel
(425) 744-6745. Fax

On Dec 3, 2018, at 12:27 PM, Jenny Coates <jenny@jennycoateslaw.com> wrote:

> Wow…if this change could force premiums up to $3300 a year, that's a really scary thought!
>
> Jenny Coates Law, PLLC
> Tax and Business Law Attorney
> www.jennycoateslaw.com
> Bainbridge Island, Washington
> tel: 206–780-7934; fax: 206-458-6051

From: <sail_wa@googlegroups.com> on behalf of "vacliffordattorney@comcast.net" <vacliffordattorney@comcast.net>
Date: Monday, December 3, 2018 at 11:55 AM
To: "insurancetaskforce@wsba.org" <insurancetaskforce@wsba.org>, SAIL solo practice list serve <sail_wa@googlegroups.com>
Subject: [SAIL_WA] Mandatory malpractice insurance

I am in favor of it, but am **only in favor of requiring coverage in the private market**. This is the equivalent to minimum mandatory auto insurance, in which bad drivers pay extra for their coverage. It will protect the public with a minimum basic requirement, but make lawyers with excessive claims pay for that poor track record. If it makes it prohibitive to pay for coverage after many past claims, that is a self-policing process which indirectly serves the citizens of the state of WA- bad lawyers won't practice. Other practitioners may choose to pay for more than minimum coverage, and can advertise this fact if they wish.

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Jenny Coates Law, PLLC Tax and Business Law Attorney www.jennycoateslaw.com
Bainbridge Island, Washington tel: 206–780-7934; fax: 206-458-6051

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The author of this post is solely responsible for its content.

You received this message because you are subscribed to the Google Groups "SAIL_WA - Solo and Independent Lawyers of WA" group.
To unsubscribe from this group and stop receiving emails from it, send an email to SAIL_WA+unsubscribe@googlegroups.com.
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To view this discussion on the web visit https://groups.google.com/d/msgid/SAIL_WA/F9676EC2-E4A0-49D5-B683-2595CF2B0261%40jennycoateslaw.com.
For more options, visit https://groups.google.com/d/optout.

From: [redacted]
To: Mandatory Malpractice Insurance Task Force
Subject: Mandatory Insurance isn"t for everyone.
Date: Monday, December 3, 2018 4:06:38 PM
Attachments: clinton.vcf

I have had to cut back my practice considerably due to a metabolic condition that sometimes limits the hours I can work. At this point in time I am largely unable to work but still perform limited services for existing clients, simple wills and pro bono work . . . and the occasional criminal case.

Many of the past 10 years my income from my legal work was less than 10K. I did make well in excess of 100K a couple years back.

Mandatory insurance would essentially remove me from the legal field as an attorney.

You will note I am an experienced attorney that has never been sued for malpractice. I have had three bar complaints over the course of my career. All involved a client seeking to avoid paying fees, or in one case, a client seeking to avoid legal obligations to another. All were reviewed by the bar and found to have no merit.

I suspect I am not the only one in this boat.

Who are you protecting with mandatory liability insurance? My clients? My competition? or insurance companies?

--
Michael J. Clinton
Attorney at Law
(509) 323-1111

From: Douglas P. Becker
To: Mandatory Malpractice Insurance Task Force
Subject: NO on mandatory malpractice insurance
Date: Tuesday, December 4, 2018 11:28:26 AM

I oppose mandatory malpractice insurance because it will inevitably lead to fewer practicing attorneys and become a disproportion burden on attorney who are just beginning their career or who practice in less-affluent parts of the state.

Douglas Becker
WSBA #14265

From:	Katheryn Bilodeau
To:	Mandatory Malpractice Insurance Task Force
Subject:	The holes with mandatory insurance will impact pro bono work
Date:	Wednesday, December 5, 2018 9:08:29 PM

Task Force,

I know this information is late, and I apologize--I have been engulfed in other deadlines. But, I think my story is one of which you should be aware as Washington considers mandatory malpractice. But, I would like you to know how mandatory malpractice plays out for staff attorneys interested in pro bono work on the side.

I am licensed to practice law in Idaho and Washington. Idaho (where my primary office is) requires malpractice insurance for private attorneys representing folks--it passed this new requirement last year. Before I was hired on as a staff attorney for a nonprofit, I had a primary practice and insured myself for that practice. While my career focus is environmental law, I did several pro bono cases for veterans appealing their disability-claim denials. This involves representation before the Department of Veterans Affairs and sometimes the Court of Appeals for Veterans Claims. I help veterans--who often face an incredibly byzantine agency by themselves (the Department of Veterans Affairs)--understand and navigate the process of benefits claims. This is often compounded by the VA doing something unlawful in this "pro-veteran" system.

I have two veteran clients, both of whom I began representing when their appeals were before the Court of Appeals for Veterans Claims. One I received through a volunteer attorney organization that covers volunteer-attorney malpractice. The other veteran found me privately and I agreed to represent him because the VA violated the law in denying his case and I have a healthy sense of rage against unlawful decisions. As a private law office, I had malpractice that covered all my cases. I was successful for both of these veterans on appeal to the Court of Appeals for Veterans Claims, and both cases were remanded to the Department of Veterans Affairs. I agreed to continue representing my clients before the VA pro bono, as I've learned in my short time helping veterans that the VA usually manages to do something unlawful and costs veterans years of waiting for claims decisions. The volunteer organization is still covering malpractice for the client it gave me clients. The other is covered by my own malpractice insurance.

This past year I was hired as a staff attorney for an environmental nonprofit at almost full-time. As a result, I am no longer taking private cases and, because I am a staff attorney, do not need private malpractice insurance. The only cases I have are the two pro bono veteran cases that I took on the side. The one I received through the volunteer organization is still covering that malpractice before the VA. The veteran who came to me privately (not through the volunteer lawyer organization) is the only case for which I need malpractice insurance according to state-bar regulations. I am now paying $1,700 per year (which will go up next year) to represent this one client pro bono. I am not going to withdraw because he really needs my help, but when this case resolves, I am giving up the malpractice insurance and will take no more cases

from clients who need help but haven't come through a volunteer-lawyer organization with malpractice insurance to cover me.

The other day I was approached by another veteran about representation before the VA. One of the reasons I had to decline was because I can't afford to continue paying such steep malpractice for one new pro bono case that will likely last several years after my current one concludes. It pisses me off that not taking this case pro bono is a monetary decision specifically connected to my ability to pay for malpractice. The Idaho State Bar (where my office is) has forced this situation, but if it hadn't, the Washington State Bar might have forced the same outcome in situations with Washington veterans. I will nonetheless have to decline this veteran because I am a nonprofit attorney and simply can't afford such a high price of malpractice for pro bono work.

I understand the idea behind malpractice. But, as the task force goes forward, it should consider this specific set of facts and how malpractice insurance requirements could indirectly impact those who need representation the most by making it cost-prohibitive for attorneys who would otherwise donate their time and expertise. From the side of the public interest--the side often times without financial means or political connections, it's easy to view law as an institution where justice has a price. A blanket rule on mandatory malpractice is another example of the institution raising that price.

Good luck with your task force.

Katie Bilodeau
Bilodeau Law Office, PLLC
P.O. Box 9775
Moscow, ID 83843
Tel: (208) 301-8707

www.bilodeaulawoffice.com

Erik Marks
Attorney. Strategist. Advisor.

2255 Harbor Ave SW
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206-264-4598
erik@egmrealestate.com

December 5, 2018

WSBA Board of Governors
via email to Margaret Shane (margarets@wsba.org)

Re: Apparent Bias in Work by Mandatory Malpractice Insurance Task Force

Dear Governors,

I write to alert you to an apparent bias in the work by the Mandatory Malpractice Insurance Task Force ("Task Force"). It appears to me that the Task Force is biased toward imposing a requirement for mandatory insurance, and that as such it is misinterpreting and miscategorizing the comments provided by WSBA Members.

I initially suspected that such a bias might exist when I reviewed the Interim Report from the Task Force dated July 10, 2018 ("Report"). It jumped out at me that the Report said (page 7) that in comments received from WSBA members, only 8% of the comments indicated support for mandatory coverage. But there was no (zero) discussion of the apparent incongruity of the Task Force concluding that the WSBA should proceed with mandatory coverage, when only a tiny minority of members expressed support for such a rule.

I requested copies of the comments that the Task Force received, and how they classified them. The Task Force sent me materials indicating that it received 146 comments, and classified them as follows:

In Favor	14	9.6%
Opposed	55	37.7%
NotIndicated/Unclear	77	52.7%
Total	146	100%

I suspected that with such a large percentage of WSBA members reporting opposition to the proposed mandatory coverage, and with an apparent Task Force bias toward imposing mandatory coverage, there may have been bias in the classifications of the comments received. To test this theory, I reviewed all 148 emails received and looked for (a) emails classified as NotIndicated/Unclear that were in fact in opposition and (b) emails classified as In Favor that were in fact not expressing support for mandatory coverage. I found both. I am attaching the misclassified emails that I found.

Attachment A contains 16 comments that were classified as "NotIndicated/Unclear", but that seem to me to be clearly expressing opposition to mandatory coverage. The comments include the following:

- "Something about the concept of making it mandatory bothers me….[Malpractice insurance] is mandatory in my mind. But that does not mean it should be mandatory for everyone."
- "I think of [malpractice coverage] as a consumer preference issue. I would not alter the current practice."
- "I do want to let someone know that I am very concerned about this mandatory malpractice idea."
- "I think the Malpractice idea is susceptible to the charge that it is a fine Solution in search of a Problem."
- "I am writing to express my concern about the proposal to require nearly all Washington attorneys to purchase coverage….The statement in the report that "uninsured lawyers pose a distinct risk to their clients and themselves" reflects a paternalistic attitude…."
- "It is totally backwards to punish those who do the right thing (by making them add malpractice insurance) in order to reward those to do the wrong thing (giving them pooled resources to pay for their sloppy work).
- "I recently heard from a friend that the bar is considering mandatory malpractice insurance. This is very disappointing and I'm concerned many members are not aware of this initiative."
- "In general, I believe the purchase of malpractice insurance should be based on the attorney's evaluation of risk, rather than being mandated."

All of those quotes are from letters that the committee classified as having expressed no opinion on the question of whether malpractice coverage should be mandatory!

At Attachment B are two letters that were classified as being "In Favor," but clearly are not expressing support for mandatory coverage.

If the letters I have attached are reclassified as I suggest, the results will look like this:

In Favor	12	8.2%
Opposed	71	48.6%
NotIndicated/Unclear	63	43.2%
Total	146	100%

A very small minority of WSBA members support the proposed mandatory malpractice insurance. I hope that the WSBA Board of Governors insist that the Task Force address its apparent bias toward imposing mandatory coverage, and fully discuss in its final report the incongruity between a decision to proceed with mandating malpractice insurance, when so few WSBA members support such a rule.

Sincerely,

Erik Marks
WSBA #23458

cc: Hugh D. Spitzer, Task Force Chair, spith@uw.edu

ATTACHMENT A

From:	Paula Littlewood
To:	Doug Ende; Kim Risenmay (kim@risenmaylaw.com)
Cc:	Ann Holmes; Doug Ende; Frances Dujon-Reynolds; Jean McElroy; Terra Nevitt; Robin Haynes; Brad Furlong (brad.wsba@furlongbutler.com); Bill Hyslop; Jill Karmy; Ann Danieli [redacted]
Subject:	FW: Mandatory malpractice isurance
Date:	Tuesday, May 30, 2017 10:29:23 PM
Attachments:	Untitled Untitled

FYI – in response to Chris's district update.

Thanks,
Paula

From: Chris Meserve [mailto:meservebog@yahoo.com]
Sent: Tuesday, May 30, 2017 8:20 PM
To: Paula Littlewood
Subject: Fw: Mandatory malpractice isurance

Sent from Yahoo Mail. Get the app

On Tuesday, May 30, 2017 6:26 PM, "lovinger@juno.com" <lovinger@juno.com> wrote:

Dear Christine,

Thank you for your warning about the proposal to make the purchase of malpractice insurance mandatory.

I am one of the people you mentioned in your summary that are in active status but have no private clients. That status allows me to occasionally pick up a contract from the Legislature of the state for brief employment, usually on an emergency basis. While I am mostly retired, I enjoy being able to help out in an emergency and put my skills and many years of experience to good public purpose. If I am forced to purchase malpractice insurance, I will have to switch to inactive and the state and its taxpayers will lose a valuable, and inexpensive resource.

I know that I am not the only attorney in this situation and hope that we, as full WSBA dues paying members, will be considered when this issue arises again.

Thank you for your time and service,

Martin Lovinger

From: Mike DeWitt
To: Mandatory Malpractice Insurance Task Force
Subject: My thoughts on mandatory malpractice
Date: Tuesday, November 14, 2017 7:48:02 PM

Something about the concept of making it mandatory bothers me. This may be ironic, given that I have always had malpractice insurance and always will - it is mandatory in my mind. But that does not mean it should be mandatory for everyone. There are a lot of new lawyers and solo practitioners with small (maybe even part time) practices that may not be able to afford it. Take my wife, for example - a licensed attorney in the state of Washington but one who has not practiced law in several years (since the birth of our first child). It is hard enough having to pay her bar dues and section membership fee every year, but to add malpractice insurance on top of that would be unreasonable, in my opinion. I think there are a lot of small firms and solo's who would be adversely affected by making it mandatory. I also wonder what that would do to rates - insurers may not have to be as competitively priced if they know we are required to purchase it.

These are the thoughts off the top of my head. Of course, I have not heard the evidence as to why this is a good or bad idea. I reserve the right to be persuaded either way.

Thank you for soliciting input - Mike DeWitt, WSBA No. 31687

--
DeWitt Law, PLLC
1226 State Avenue N.E.
Olympia, Washington 98506
(360) 701-0864

From: John Groseclose
To: Mandatory Malpractice Insurance Task Force
Subject: Mandatory insurance
Date: Thursday, November 16, 2017 12:39:02 PM

I have a small firm. We employ 5 attorneys and have 3 others that work with our firm as of counsel. In general, it would appear to me to be possible to practice as a lawyer and not really screw something up of significance that would trigger an insurance claim.

However, in my years of practice I have encountered attorneys that have messed up and have elected to not have any insurance.

It would appear that insurance is an added expense.
It would appear that the same group of people that do not buy insurance are the same sort of people that cannot pay a claim if they do something wrong.
As a small business owner I am tired of paying various expenses and bills that increase overhead for my business. I like having a choice.

But, as a practicing attorney, there is a lot to be said about making insurance mandatory.

My feelings about it being a customer service issue sorta override my preference to make everyone have insurance. The WSBA has a spot that tells consumers whether there is or is not insurance and I think of it as a consumer preference issue. I would not alter the current practice. However, I also will not have heartburn if it were to be mandatory.

JOHN GROSECLOSE
Attorney at Law

GSJONES LAW GROUP, P.S.
1155 Bethel Avenue
Port Orchard, WA 98366
Tel: (360) 876-9221
Fax: (360) 876-5097

From: Randy Brook
To: Mandatory Malpractice Insurance Task Force
Subject: comments from a retired attorney
Date: Tuesday, November 28, 2017 7:11:24 AM

Greetings,

I am currently out of the country. For that reason, rather than calling, I am emailing a few brief comments. Bottom line: I would retire from WSBA if I were forced to carry malpractice insurance for which I have no need.

I was admitted to the WA Bar in 1973. I spent my entire career in Seattle as a US government litigator, appearing in federal district and bankruptcy courts around the country. I retired in 2008. I live on my pension in Twisp, WA.

Since retirement, I have maintained my full membership in WSBA. I have not represented individual clients in any significant way. For this reason, I have not sought malpractice insurance. To the extent I have done any legal work, it has always been *pro bono.* In part, this has simply been to advise friends and neighbors about legal issues, always distinguishing situations where they should hire an attorney in active practice.

On occasion, I have helped someone with an "attorney letter." This has mostly been in cases where they were unfairly or unlawfully being pursued by debt collectors. Even at this minimal level, I have always disclosed that I do not carry malpractice insurance.

The other part of my *pro bono* work has been to prepare *amicus curiae* appellate briefs for various non-profit organizations. I generally have had an attorney in active practice review my briefs before filing.

If I were forced to retire from WSBA to avoid the burden of paying for insurance, I would have two choices. The simplest would be to refuse all further requests for *pro bono* assistance with *amicus* briefs. The second would be to ask some other attorney to put his or her name to a brief I authored, without my signature appearing. Neither choice would be desirable or beneficial, in my opinion.

I know of other, essentially retired attorneys who are in a similar situation to mine. I sincerely hope you will take our situation into account. I will be back in the US around December 17. I would be happy to discuss this further by phone if that appears useful.

Yours truly,
Randy Brook
Bar # 4869

From: Alexis Merritt
To: Mandatory Malpractice Insurance Task Force
Subject: Opinion of a Stay at Home Mom WSBA Member
Date: Wednesday, May 09, 2018 3:18:14 PM

Hi,

I'm not sure if this is the best forum to provide an opinion. However, I do want to let someone know that I am very concerned about this mandatory malpractice idea. I am currently a stay at home mom to a toddler and a baby on the way. We have moved out of state to be near our families during these early childhood years. I have still kept my WSBA license active and pay my dues on time every year. It is a huge financial burden to do this, but I do it because the effort to attend and excel in Law School and then to pass the Bar Exam on the first try was a huge personal and family accomplishment. We incurred numerous financial, family, and mental stresses in order to do this. I have not gone inactive because the guidance by WSBA currently indicates that I will need to submit a whole new application for review when I am ready to come back, and based on the length of inactivity, may be required to retake the bar exam! This is all while still paying a very large yearly fee to be inactive.

After all the sacrifices my family and I made to help me achieve success, I do not want to take any steps backwards in my career potential. Plus, we may not always live out of state, or I may return to work for the federal government someday.

So please make sure the wording for this "mandatory malpractice insurance" is not hinged on whether a WSBA member is registered as "inactive." There are very valid and normal reasons, especially for women taking time out to raise kids, why we would choose to keep paying the high cost of staying active, but would be very burdened in having to pay even more money for malpractice insurance we would never need.

Best Regards,

Alexis Merritt

From: tyler@wilsonlaw.pro [mailto:tyler@wilsonlaw.pro]
Sent: Wednesday, May 16, 2018 12:57 PM
To: Hugh D. Spitzer
Cc: tyler@wilsonlaw.pro
Subject: concerns about mandatory malpractice Insurance

Dear Professor Spitzer,

As a legal practitioner licensed in the State of Washington I have been monitoring the Washington State Bar Association's ("WSBA") inquiry into mandating professional malpractice insurance for Washington lawyers. I am also licensed in the State of Idaho, which recently implemented mandatory malpractice insurance for active attorneys. The purpose of my email is to highlight a number of issues with malpractice insurance from the perspective of someone (me) who has been sued for malpractice (albeit, maliciously) in the past while being covered by malpractice insurance provided by ALPS. Here are a number of issues that I dealt with or lessons I learned that I believe the Task Force should be aware of:

1. A claim of malpractice can be used by opposing litigation counsel (either as an initial claim or counter-claim) in an attorney dispute to draw an insurance carrier into a matter to force a settlement by making a policy limits demand, thus providing the claimant with a potential windfall whether or not merited.

2. Insurance carriers manage their risk of loss and that risk of loss is without regard to the merits of the attorney's position. If an attorney has a policy that is not conducive to the litigation process and a potential pay out (i.e. a small policy), the carrier will settle the matter upon receiving a policy limits demand from opposing counsel.

3. Malpractice insurance does not exist so that an attorney can have an opportunity to disprove claims of malpractice or defend his/her reputation.

4. A carrier will take the position that their role is limited to eliminating the malpractice claim; nothing more.

5. The amount of coverage an attorney carries directly correlates to the carrier's negotiating power in a settlement and the carrier's decision to settle a matter or continue with litigation.

I don't have the figures, but I would suspect very few malpractice claims are fully litigated.

6. Attorneys with malpractice insurance can be targets for malicious claims from disgruntled clients or those dealing with financial difficulties.

7. An attorney has little control over the malpractice settlement process. If an attorney refuses to settle a matter the carrier will require signed documentation to the effect that if litigation continues and it exceeds policy defense costs will be the personal obligation of the attorney, as will any settlement or judgment – this is prohibitive to continuing.

8. Insurance carriers will require a lawyer to sign a Reservation of Rights Agreement ("RRA"), which protects the carrier from the attorney in the event the attorney takes a course of action contrary to the carrier. These are essentially contracts of adhesion, but you waive that claim in the RRA.

9. Coverage limits less than $1,000,000 per occurrence/claim are **worthless**. I've personally had an insurance carrier representative tell me that if I had a larger policy they would have fully litigated the malpractice claim that was brought against me. Instead, they settled and I was later dropped from coverage.

10. If a lawyer experiences a claim (valid or not) the annual cost of malpractice insurance goes up approximately 10X. Before ALPS dropped me my annual premiums were approximately $3,500/year, my options after I had a "loss run" exceeded $30,000 per year.

I'll leave you with my story of being sued for malpractice (all of this is in the public record) – it was from this experience that I learned the above stated lessons:

In 2011 I left the firm I was working for and started my own practice. I landed a client that operated a commercial real estate backed hard money lending business. The business was backed by passive limited partners who invested capital privately. Over the course of a couple years the client and I had a good working relationship. I prepared their private placement memorandum and drafted commercial loan documentation, but did not assist with due diligence or business operations. In early spring of 2014 the client's CPA informed me that funds were being transferred in an out of an entity that was dormant and it appeared new client investments were being used to pay returns to older investors and they were concerned about the legality of this. I investigated and uncovered what I believed to be an extensive ponzi-like scheme. I drafted a letter to the client detailing my findings and advised that I would no longer be representing the client. Upon terminating my engagement the client asked me if I was covered by malpractice insurance to which I answered affirmatively – boy was that a mistake! A month after I withdrew I received a demand letter for the client's losses – approximately $5.6 million at that time. In the letter the client specifically made a demand to my malpractice carrier and put them on notice. Litigation commenced. At the time I had $500,000 in coverage, of which $250,000 could be used defense costs – I mistakenly thought this was enough coverage. During the course of litigation the client amended the complaint and increased its claim for loss twice with the total loss claim exceeding $15 million dollars. After a year and half of litigation, despite clear facts in my favor and a strong testimony by an expert witness

that I had exceeded the standard of practice, my carrier informed me that their financial risk of loss and exposure was too high regardless of my position in the suit and they settled the matter upon receiving a policy limits demand from opposing counsel. I later learned that the former client had sued his last four lawyers for malpractice and used malpractice claims as a litigation and business technique. I was the sucker.

I leave you and the Task Force with a compound question: Why do you think insurance carriers are so supportive of mandatory malpractice insurance and does malpractice insurance primarily benefit a harmed client or the insurance carrier?

I would be happy to provide further insight if you would like. Thank you for your time.

Best Regards,

Tyler B. Wilson, Esq.

Wilson Law Group, PLLC

3325 Burke Ave. N.

Suite 423

Seattle, WA 98103

(509) 953-3059

Dear Angus,

Thank you! I think you describe something which some other states have used. I am forwarding on your suggestions to Hugh Spitzer the Chair of the task force, and P.J. Grabicki and Dan Bridges the governors (or soon to be governors) on the task force as well.

Warmly,

Rajeev D. Majumdar, President Elect
Washington State Bar Association
(360) 332-7000
FAX: (360) 332-6677

From: Angus Lee [mailto:angus@angusleelaw.com]
Sent: Monday, July 30, 2018 6:39 AM
To: Rajeev Majumdar
Subject: Malpractice Insurane

President-elect:

Just a thought on the malpractice insurance issue. As you know, many are against forced entry into a market they see as unnecessary and cost wasting. No doubt you have heard from semi-retired members who only do public interest charity work or help out friends, who would give up their license before paying for coverage.

Why not just make it an RPC that any lawyer practicing without insurance must give written notice to the client that they are not covered by malpractice insurance?

Those of us who practice in criminal defense often use a "fixed fee" agreements that the RPCs already require be in writing and provide certain notices to the client.

I don't think anyone could object to being required to provide a truthful notice to clients. This notice would let the client decide if the lack of insurance is an issue but they would never be surprised.

Many client's would balk at being represented after at such notice, meaning the market would incentivize the uninsured lawyer to seek out coverage when and if necessary.

This approach respects the freedom of individual lawyers not to insure if they so choose. It is an easy first step. If it does not work, the mandatory insurance rule could be readdressed.

Angus Lee Law Firm, PLLC
www.AngusLeeLaw.com
MAIL: 9105A NE HWY 99 STE 200, Vancouver WA 98665
Phone: 360.635.6454
Fax: 888.509.8268

From: [redacted]
To: Mandatory Malpractice Insurance Task Force
Subject: Exemption for mandatory malpractice insurance
Date: Thursday, August 02, 2018 11:53:56 AM

WSBA Board,

On your considerations of a new rule to make Malpractice Insurance a mandatory term, from my 53 years of practice and the last 46 in Family Law, one of my aims in life is to deal with reality. For six years I have been retired and moved from my Seattle office and friends back to my childhood town, Spokane, and I have kept my license active, BUT I only have done and taken fee-free cases/clients, doing everything pro bono and this is mostly family-law work, so I don't need malpractice insurance, and I provide a lot of good, useful, and free advice to people, mostly employees of this retirement home in which I now live. So for active lawyers who do everything "pro bono" and no income, they/we should not be required to pay the cost of having that insurance. Require insurance and you will knock out pro bono service to society which will make lawyers have a new great reputation for being in this practice only for money, costs to clients, especially those who cannot afford it. So make pro bono practice an exclusion for the requirement.

Ed Huneke, WSBA #565

From: [redacted]
To: Mandatory Malpractice Insurance Task Force
Subject: Mandatory Insurance
Date: Thursday, August 02, 2018 12:39:30 PM

This is a conundrum for dual licnesed attorney and CPAs. CPA E & O insurers don't issue policies if you are both. E & O carries for law practices excludes any accounting work but provides coverage with that exclusion but it is an empty promise. The clients when I do both won't be covered although my defense costs could be. The costs of running two separate practices and having two insurance policies does not provide better client protection and only will increase costs of legal services which goes against access to justice for all.

There is one company through an association that offers dual coverage through Lloyds of London and it is not cheap.

If you are truly wanting to increase the costs to the practice and the clients then set up a self-insurance fund through the bar that covers all acts but limits the amount of a claim so that the fund can remain solvent. Attorneys can then elect separate coverage if they so decide to do so..

Michael R. Jones, PLLC
Michael R. Jones
Off. (208) 385-7400
Cell (208)863-7787

From: Sara Niegowski
To: Mandatory Malpractice Insurance Task Force
Subject: Fwd: comment on Interim Report
Date: Thursday, August 02, 2018 12:59:07 PM

—Sara Niegowski

Begin forwarded message:

From: Questions <Question@wsba.org>
Date: August 2, 2018 at 12:28:37 PM PDT
To: Sara Niegowski <Saran@wsba.org>
Cc: Margaret Shane <Margarets@wsba.org>
Subject: FW: comment on Interim Report

A query-?

Kris McCord | Service Center Representative
Washington State Bar Association | 800.945.9722 | krism@wsba.org
1325 Fourth Avenue, Suite 600 | Seattle, WA 98101-2539 | www.wsba.org

From: Ralph Stemp [mailto[redacted]
Sent: Thursday, August 02, 2018 12:24 PM
To: Questions
Subject: comment on Interim Report

Please pass on to the Malpractice Task Force.

I read the Interim Report. It showed a lot of good research. But, it never really stated the size of the Washington problem. How many Washington clients are hurt by not having their claims remedied by the offending attorney? Perhaps it is hard to find that data but, to me, it is unacceptable to simply guess at that critical matter and move on to pose elaborate Solutions.

Without the above data I think the Malpractice idea is susceptible to the charge that it is a fine Solution in search of a Problem.

--
Ralph Stemp

From: Kenneth Dehn
To: Mandatory Malpractice Insurance Task Force
Subject: Mandatory Malpractice Insurance Proposal
Date: Friday, August 03, 2018 5:44:06 PM

I am writing to express my concern about the proposal to require nearly all Washington attorneys to purchase coverage that is expensive and in some cases unnecessary. Just to be clear, I have malpractice insurance, but I think the ridged, "one size fits all" approach of the task force will unnecessarily force many solos out of the profession. I think the July 10th report reflects a bias toward large and medium-sized firms that can easily afford the coverage, and against solos who, like me, have never had a complaint or a claim against them. To me, the report smacks of elitism.

I think the recommendation that "policies should not be permitted that exclude attorney acts prior to the current year" is a real problem, and I'm surprised that there is no analysis in the report to support it. Whatever the cost of a new policy, prior acts coverage will double it for any lawyer who has been practicing for five or six years, so that the $1,200 average premium figure is not very representative. Lawyers should be able to decide for themselves whether to forego prior acts coverage if they have had a period of doing little or no legal work for whatever reason. Maybe the underwriters at the insurance company will figure the period of relative inactivity into the premium quote, or maybe they won't.

The statement in the report that "uninsured lawyers pose a distinct risk to their clients and themselves" reflects a paternalistic attitude that completely dismisses the ability of a lawyer to make a reasoned, sound decision that in some situations going without coverage (at least temporarily) may make sense, or that going without prior acts coverage may make sense. Does the task force really believe it can foresee all the possible situations and say that insurance is needed in all of them? Likewise, I think the task force is dismissing the ability of smart, sophisticated clients to make an informed decision to choose to use a lawyer who has no malpractice coverage. In some situations, that may be completely reasonable. Clients ought to be free to choose the lawyer they want.

Here are some examples of situations in which I think a lawyer could reasonably decide to forgo coverage, or to forego prior acts coverage:

1. The lawyer primarily works in-house or for the government, but does small legal projects on the side for family and friends;

2. The lawyer primarily works as a non-lawyer, but does small legal projects on the side for family and friends;

3. The lawyer takes a long sabbatical;

4. The lawyer has a period of little or no activity due to the need to care for a sick family member;

5. The lawyer has a period of needing to work drastically reduced hours due to his or her own temporary health condition;

6. The lawyer has a period of little or no activity due to transitioning from working in-house or for the government to working in private practice; and

7. The lawyer is semi-retired and only does occasional legal work for family, friends and a few long-time clients.

I hope the task force will reconsider this proposal. Unless the rule can be crafted so that no attorneys will be unjustly priced out of the practice of law, it should be rejected. The fact that large and medium-sized firms in other states have succeeded in shutting out a large portion of their state's solo attorneys does not mean it is the right thing to do here in Washington.

Respectfully,

Ken Dehn

Dehn Law Office, PLLC

(206) 484-9790

From: [redacted]
To: Mandatory Malpractice Insurance Task Force
Subject: Mandatory or not?
Date: Monday, August 06, 2018 9:53:59 AM

Friends:

My father (a 50+ year lawyer) advised that it takes two things for a malpractice suit: 1) A serious mistake by a lawyer, and 1) An unhappy client. Careful practice may prevent the first, but any lawyer can prevent the second by making the client better than whole again once a mistake is discovered.

In 45 years I've never had (or needed) malpractice insurance because I'm very careful in my work and I have the resources to make my clients better than whole if I do make a mistake. In my opinion, I'm doing it the right way. Your task is to deal with the lawyers who do it the wrong way. It is totally backwards to punish those who do the right thing (by making them add malpractice insurance) in order to reward those who do the wrong thing (giving them pooled resources to pay for their sloppy work).

Recommendation: Reward those with no claims for 20+ years (or whatever) with an exemption from insurance. Maybe even have two tiers within the lower years to encourage no claims. Use the carrot rather than the stick.

- John Panesko
Chehalis, WA #5898

From: Alan Burnett
To: bill@wdpickett-law.com; Dan@mcbdlaw.com; athan.papailiou@pacificalawgroup.com; jkang@smithfreed.com; rajeev@northwhatcomlaw.co; whyslop@lukins.com; Mandatory Malpractice Insurance Task Force
Subject: Mandatory Malpractice Insurance
Date: Monday, August 06, 2018 9:37:51 AM

Hello Bill, Dan, Athon, Jean, Rajeev, and Bill,

I would like to add my input to your consideration of mandatory malpractice insurance. I have intentionally not carried insurance for my solo patent attorney practice. Why? In part because about 15 years ago some partner at Fish and Richardson failed to file a patent application in Europe, and the resulting malpractice award was $30M. Overnight, that raised the malpractice insurance rates for patent attorneys by an order of magnitude or more. Although I haven't checked recently, the minimum coverage levels that are suggested in the interim report (e.g., $100K/$300K, $250K/$250K, $250K/$500K, or $500K/$500K) are likely not available to me. Although malpractice claims against patent attorneys are rare, the typical cost of defending a claim is significantly more than in other areas of practice, resulting in substantially higher premiums.

I have one primary client (Intel) and recently brought on some other work from a top-5 (in the world) company. Another portion of the work I do is not (technically) legal work. There is zero chance that any of my clients are going to sue me for malpractice, but that doesn't matter to the insurance underwriter. I do some pro-bono work, but not in a legal capacity (no attorney-client relationship is established – rather, I merely provide advice to people who might contact me, and to friends and family).

Forcing someone like myself to carry malpractice insurance purchased on the private market is going to add a substantial expense without providing any benefit to the legal profession within Washington state (at large).

Regards,

R. Alan Burnett
Law Office of R. Alan Burnett
4108 131st Ave SE
Bellevue, WA 98006
425 417-4729

From: Questions
To: Rachel Konkler
Subject: FW: Mandatory Malpractice Insurance Initiative
Date: Friday, August 10, 2018 8:17:00 AM

Thanks
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

-----Original Message-----
From: Adam Dockstader [mailto:[redacted]
Sent: Thursday, August 09, 2018 11:51 PM
To: Questions
Cc: Adam Dockstader
Subject: Mandatory Malpractice Insurance Initiative

To the WSBA,

I recently heard from a friend that the bar is considering mandatory malpractice insurance. This is very disappointing, and I'm concerned many members are not aware of this initiative. I have not seen one email notification specific to this topic; you must be burying it in other news. Not good.

Proposed rules imposing fees on business owners should be noticed with considerable specification. Have you have received few comments compared to the number of bar members? If so, this is a good indication that sufficient notice has not been given.

When are comments due before a decision is made?

Please forward these questions/concerns to the appropriate person/department at the WSBA.

And I look forward to hearing back soon.

Adam Dockstader
WSBA No. 27872

From: Susan Barley
To: Mandatory Malpractice Insurance Task Force
Subject: comment: Mandatory Malpractice Insurance
Date: Monday, August 13, 2018 2:12:57 PM

Task Force: As a 35 year veteran of legal practice is WA, I express my concern about a possible requirement for malpractice insurance.

I have spent the past 23 years providing special project legal services as a contractor to local companies. I augment inhouse capabilities: replacing an attorney on leave or providing extra manpower for a specific project or period of time where the existing inhouse capacity needs support. This function is as an inhouse lawyer, not an outside attorney (either solo or in a practice). These companies do not want to hire outside lawyers, are not bargaining for outside lawyer services and acknowledge that I do not have malpractice insurance. They are fully capable of understanding the risks and benefits and protecting their interests. Indeed, I would not accept work where these distinctions were not acknowledged and confirmed. Companies are eager to find experienced resources to augment inhouse capability when needed and appreciate the ability to flex up and down as appropriate.

A requirement that I have malpractice insurance would negatively affect this flexible work alternative. I started this practice after my second child, when I left my GC role to have more work/life balance. I believe an insurance requirement for lawyers in my position runs the risk of disproportionately negatively affecting women.

As important, insurance would not benefit the companies with whom I work: they do not want malpractice insurance protection and indeed, they would pay more for my services, if they were available at all.

Finally, malpractice insurance is not inexpensive in general, and certainly not for reasonable coverage. Most (at least older) lawyers are going to want more than minimal coverage (most of us are not risk takers); $300,000 for example is ridiculous. As I believe coverage can incent lawsuits, I would need extensive coverage (millions) at this point in my life. It is difficult to get in sufficient amounts at a reasonable cost. Also, advice on financings and IP licensing trigger supplements and supplemental expense, although these activities are routinely handled by inhouse lawyers.

In conclusion, I recommend that if there is a requirement for licensed lawyers to have malpractice insurance, that the exceptions include inward (not outward)-facing contract lawyers as well as inhouse/government lawyers. A blanket requirement for all contract lawyers to have insurance would, in my opinion, eliminate many if not all opportunities for "inhouse" contract work.

Thank you.

Susan Barley
[redacted]

From: Swenson, Raymond T <Raymond_T_Swenson@rl.gov>
Sent: Thursday, August 16, 2018 5:37 PM
To: Mandatory Malpractice Insurance Task Force; danclarkboard@yahoo.com
Cc: Swenson, Raymond T
Subject: Mandatory Malpractice Insurance

I have practiced law for 40 years. For four years I belonged to national law firms, which took care of professional liability for us. During fifteen years of work in the Air Force JAG Corps, I was exempted by statute from professional liability. For the past 21 years I have served as corporate counsel, with a single client who is also my employer.

I am planning to retire from my current employment next year, but have been considering the possibility of working part time on a consulting basis for my current employer and for other companies in our particular industry, where I am known. These clients are people who know me and my professional abilities, and have their own in-house counsel who must weigh the advice I give before they implement it. They are free to consult other counsel about the same questions. Just as I have with my current client, I would not be guaranteeing outcomes, but identifying options and assessing risks. It seems very unlikely to me that any of these clients could ever make a malpractice claim against me, or would want to. For that reason, purchasing and maintaining malpractice insurance looks like an unnecessary expense, especially if it is not priced in relation to the actual risk for my practice (effectively zero) and the revenues I earn from this work. I don't want to be subsidizing the coverage for attorneys who have higher risk practices, when I get no benefit from their work. Forcing me to carry malpractice insurance could become a self-fulfilling prophecy, with a client who would not otherwise file a claim, simply doing so because he knows the fund is available, and the harassment value of a claim would force a payment.

In general, I believe the purchase of malpractice insurance should be based on the attorney's evaluation of risk, rather than being mandated. Even if a mandatory requirement of some kind were instituted, I believe that an exception should be made for attorneys who (1) intentionally work part time (e.g. less than 1,000 hours per year), or (2) serve only business and institutional clients who manage the liability from their own decisions and do not need to sue outside counsel to protect themselves from risk, or (3) have significant expertise and experience in their fields, such that only another expert practitioner would be qualified to assert that their advice was outside the scope of reasonableness.

A rule that exempts attorneys who intentionally limit their billable hours can support attorneys who have other income (such as retirement income or a working spouse) and need to devote much of their time to other matters, such as raising small children, caring for a disabled spouse, dealing with their own physical limitations, pursuing other opportunities (such as teaching, community volunteering, pro bono service, managing a [non-attorney] small business, writing professionally, attending graduate school, or transitioning into a new, non-attorney career). These activities are beneficial to society, and should not be impeded by a financial burden that the attorney does not judge to be necessary.

Raymond Takashi Swenson
Senior Counsel
WSBA # 27844

CH2M HILL Plateau Remediation Company
Richland, Washington
509-376-3511 Office
509-713-0966 Smartphone
509-376-0334 Fax
Raymond_T_Swenson@rl.gov

ATTACHMENT B

From:	Paul Majkut
To:	Mandatory Malpractice Insurance Task Force; Steve Cook; Nancy Duhnkrack; Kelley Beamer; Mike Running
Subject:	Mandatory Malpractice Insurance Task Force Interim Report
Date:	Saturday, August 04, 2018 9:41:15 PM

Your taskforce recommends "Malpractice insurance should be mandated for Washington-licensed lawyers, with certain exemptions," including for "attorneys providing services through nonprofit entities, including pro bono services." I heartily endorse this exemption as I currently advise land trusts in Oregon and Washington through the Coalition of Oregon Land Trusts. The Coalition provides me malpractice insurance it has obtained at a much reduced rate.

I have an additional request. By mandating such insurance for "Washington-licensed lawyers," the task force may be requiring such insurance for active and inactive members of the Bar. In Oregon inactive members of the Bar may provide legal advice through Bar approved pro bono programs without providing their own malpractice insurance. Those programs provide malpractice insurance for participants. Please exempt from mandatory malpractice insurance inactive members of the Washington Bar providing services through nonprofit entities, including pro bono services. This will encourage more retired attorneys like me to provide such services because we will not have to pay full time bar dues and attend 45 hrs of CLE every 3 years to be able to advise them. Thank you. Paul Majkut OSBar #872900 Wash Bar #6523 OSBar #872900

From: Steve Cook
To: Paul Majkut; Mandatory Malpractice Insurance Task Force; Nancy Duhnkrack; Kelley Beamer; Mike Running
Subject: RE: Mandatory Malpractice Insurance Task Force Interim Report
Date: Tuesday, August 07, 2018 1:56:13 PM
Attachments: image001.png
image002.png
image003.png
image004.png

I wholeheartedly concur in Mr. Majkut's comments.

At Columbia Land Trust we benefit greatly from pro bono services provided by both retired (inactive) and active bar members in both Washington and Oregon. Rules that facilitate that pro bono work for non-profits like ours help us stretch scarce dollars to better accomplish our mission work.

Steve Cook, Wash Bar #45687

Stephen F. Cook | Deputy Director & General Counsel

Columbia Land Trust
850 Officers' Row | Vancouver, WA 98661
Direct: (360) 213-1208 | Main: (360) 696-0131
Also in Astoria | Portland | Hood River
www.columbialandtrust.org

From: Paul Majkut [mailto:paulsmajkut@gmail.com]
Sent: Saturday, August 4, 2018 9:41 PM
To: insurancetaskforce@wsba.org; Steve Cook <SCook@columbialandtrust.org>; Nancy Duhnkrack <[redacted]; Kelley Beamer <kelley@oregonlandtrusts.org>; Mike Running <mike@oregonlandtrusts.org>
Subject: Mandatory Malpractice Insurance Task Force Interim Report

Your taskforce recommends "Malpractice insurance should be mandated for Washington-licensed lawyers, with certain exemptions," including for "attorneys providing services through nonprofit entities, including pro bono services." I heartily endorse this exemption as I currently advise land trusts in Oregon and Washington through the Coalition of Oregon Land Trusts. The Coalition provides me malpractice insurance it has obtained at a much reduced rate.

I have an additional request. By mandating such insurance for "Washington-licensed lawyers," the task force may be requiring such insurance for active and inactive members of the Bar. In Oregon inactive members of the Bar may provide legal advice through Bar approved pro bono programs without providing their own malpractice insurance. Those programs provide malpractice insurance for participants. Please exempt from mandatory malpractice insurance inactive members of the Washington Bar providing services through nonprofit entities, including pro bono services. This will encourage more retired attorneys like me to provide such services because we will not have to pay full time bar

From:	Martin W. Anderson
To:	Mandatory Malpractice Insurance Task Force
Subject:	Comments on mandatory malpractice insurance
Date:	Thursday, December 6, 2018 7:04:55 AM

Dear Sir,

I am an attorney at law and a recently admitted member of the Washington State Bar Association.

I support the adoption of a state-run, single-provider mandatory malpractice insurance program by the Washington State Bar Association similar to the program currently in place in the State of Oregon.

I hope, however, that the program will allow attorneys who do not maintain an office in Washington to opt-out of the program, subject to the requirement that the attorney have other insurance to cover legal services performed in Washington. The State of Oregon has a state-run, mandatory malpractice insurance program and it allows a similar opt-out.

Thank you for considering my comments.

Martin W. Anderson | Attorney | The Anderson Law Firm
Tel: (714) 516-2700 | Fax: (714) 532-4700
2070 N. Tustin Ave., Santa Ana, CA 92705

Erik Marks
Attorney. Strategist. Advisor.

2255 Harbor Ave SW
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206-264-4598
erik@egmrealestate.com

December 7, 2018

WSBA Board of Governors
via email to Margaret Shane (margarets@wsba.org)

Re: Apparent Bias in Work by Mandatory Malpractice Insurance Task Force
FOLLOW-ON REPORT, to my letter dated December 5, 2018

Dear Governors,

I think you will find this interesting. In my December 5 letter, I said that I thought 16 of the comments that the Task Force classified as "NotIndicated/Unclear" were clearly intended by the authors to be "Opposed" to the mandatory coverage. But I was not entirely sure that my opinion was reliable, so I wanted to test it.

I researched the email addresses of those 16 authors, and I succeeded in finding emails for 11 of them to ask if they intended for their comment to be classified as "neutral" or as "opposed" to mandatory coverage. I heard back from 10 of the 11 that I emailed, and 100% of them told me that they were in fact opposed to mandatory coverage, and wished for their comments to be classified as such. The responses included the following (please read these - they are colorful; the capitalization is as I received it):

- *I am OPPOSED to the mandatory malpractice insurance requirement….The fact that my comment was mis-characterized as neutral adds further concern and disappointment with the WSBA and their efforts regarding this requirement.*

- *I do not understand how my comments could have been interpreted as neutral…. I belong in the category of comments that are in opposition to the proposal as currently written.*

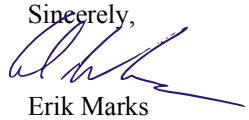
- *I am EXTREMELY opposed to mandatory malpractice insurance and when I calm down, I'll write an email to [the Task Force] telling them to shove it…in the nicest possible way, of course….*

- *I cannot imagine how anyone could conclude that my email reflected that I am "neutral" on this proposal. I am not; rather I am vehemently opposed to it.*

With this new information in hand, it is now my opinion that many more than the 16 "neutral"-classified comments that I attached to my earlier letter, were in fact intended by their authors to be classified as "opposed."

I have brought to your attention a bias in the Mandatory Malpractice Insurance Task Force's classification of WSBA Member comments. If such a bias is present in one part of the Task Force's work, that bias likely pervades the remainder of their work, and I hope you will be appropriately circumspect in accepting the fact-finding and recommendations that the Task Force may bring you.

Sincerely,



Erik Marks
WSBA #23458

cc: Hugh D. Spitzer, Task Force Chair, spith@uw.edu

From: Hugh D. Spitzer
To: Thea Jennings; Rachel Konkler
Subject: FW: There may not be a market for malpractice insurance for lawyers in some practice areas
Date: Friday, December 14, 2018 7:56:16 AM
Attachments: Attachment A.docx
Attachment B.pdf

Here you go!

From: John Myer <john@myercorplaw.com>
Sent: Thursday, December 13, 2018 2:56 PM
To: Hugh D. Spitzer <spith@uw.edu>
Cc: Mark Beatty <mark@markbeatty.law>; Paul S <pswegle@gmail.com>
Subject: There may not be a market for malpractice insurance for lawyers in some practice areas

Dear Mr. Spitzer:

As **Attachment A** discusses in more detail, a few years ago my malpractice carrier refused to renew my policy and I was unable to find coverage after a reasonably diligent search. Recently, in response to the activities of the Mandatory Malpractice Insurance Task Force, I resumed my search. Today I spoke to Julie Patterson at ALPS who flatly told me that they do not cover lawyers who work on EB-5 offerings (please see: http://www.myercorplaw.com/eb5) I reached out to ALPS because the WSBA on its website states that "ALPS is the WSBA-endorsed professional liability provider, offering discounts and services specially designed for members like you."

I then reviewed the minutes of the July 18th meeting of the Task Force, and found the following statement therein: "Additionally, the Task Force discussed its concerns about lawyers who, in good faith, may be unable to obtain coverage from an insurance carrier under a mandatory insurance model. Although insurance industry experts who have met with the Task Force are optimistic that a policy will likely exist for every lawyer, it was noted that some lawyers who have histories of material malpractice claims or discipline may need to evaluate their ability to competently protect the public from errors and harm." https://www.wsba.org/docs/default-source/legal-community/committees/mandatory-malpractice-insurance-task-force/mandatory-malpractice-insurance-task-force-meeting-materials(00430769)6f6463f2f6d9654cb471ff1f00003f4f.pdf?sfvrsn=63bd06f1_3

I'm writing to you today to emphasize the point that some lawyers cannot find insurers to cover them because of their practice areas. I'm clearly one of them. I have no history of claims or discipline. The problem is instead that other lawyers who are not as well trained stumble into transactional securities work and commit malpractice. That makes it difficult for those of us who know what we are doing to obtain coverage. If the Task Force does not address this issue and instead simply assumes that people like me can obtain coverage, and the WSBA enacts a rule that does not take this issue into account, "I fear that . . . my license to practice in Washington would be worthless." (citing **Attachment B**).

If you feel that the Task Force has adequate information on this issue, please let me know. In the alternative, if this is an issue that you believe needs more attention by the Task Force, then by all means proceed with such efforts.

I have copied Mark Beatty and Paul Swegle on this email. Mark Beatty chairs the Securities Law Committee of the WSBA. Paul Swegle is the chair of the Corporate Counsel Section of the WSBA, serves on the WSBA Securities Law Committee and is a member of the Board of Governors of the WSBA. I also serve on the Securities Law Committee.

Please contact me with any questions or concerns.

Sincerely,

John A. Myer

MYER LAW PLLC

2101 Fourth Avenue, Suite 1900
Seattle, WA 98121-2315

www.MyerCorpLaw.com

[redacted]

MYER LAW PLLC

2101 Fourth Avenue, Suite 1900, Seattle, WA 98121 T [redacted] F 206.922.5516 john@myercorplaw.com

Attachment A

I, John A. Myer, worked with Mark R. Beatty, the author of the letter dated September 27, 2018 to the Mandatory Malpractice Insurance Task Force of the Washington State Bar Association. Mark and I agreed that I would add additional materials to his letter in the form of these attachments.

On September 12, 2017, I sent an email to NW Lawyer Magazine regarding the proposal on mandatory professional liability insurance for Washington lawyers. The editors published my email in the November 2017 edition of the magazine. I've included a copy of the page of the magazine on which my email was reprinted as Attachment B to this letter.

I would like to take the opportunity to add some background information to my original email. I launched Myer Law PLLC on September 1, 2009. I contacted Mainstreet Legal Malpractice Insurance, a broker (http://www.mainstreetlawyersinsurance.com/) and they obtained coverage for me. I was covered by Professionals Direct Insurance Company for two years. As of September 1, 2011, Professionals Direct declined to renew my coverage. I had made no claims against the policy. Further, I have never had an action filed against me for professional malpractice or been the subject of a bar complaint. My practice and background are described at: http://www.myercorplaw.com/home/

In the months prior to September 2011, I filed applications with Zurich Insurance (https://www.zurichna.com/en/prodsols/zpm/professional/lawyers) and with Synergy Professional Associates (http://www.synergy-ins.com/about.aspx), a broker. I filed the application with Zurich because they had covered me in 2003 and 2004 when I was a partner at Friedbauer & Myer LLC in Miami, Florida. I filed the application with Synergy because the sales agent there assured me that they could find a carrier who would underwrite my practice.

Zurich declined to bid. Synergy was unable to find a carrier that would bid. In addition, Mainstreet Legal Malpractice Insurance was unable to find a carrier to replace Professionals Direct Insurance Company. Thereafter I spoke with numerous sales agents all of whom urged me to apply but none of whom were able to describe a realistic path forward. I have practiced without insurance to this day.

Submitted September 27, 2018

John A. Myer

Inbox

Let us hear from you! We welcome letters to the editor on issues presented in the magazine. Email letters to nwlawyer@wsba.org. NWLawyer reserves the right to edit letters. NWLawyer does not print anonymous letters, or more than one submission per month from the same contributor.

MANDATORY MALPRACTICE INSURANCE

I just read the article in the September issue of *NWLawyer* about mandatory insurance ["WSBA Board of Governors Explores Mandatory Malpractice Insurance"] and, as a result, I am sending in my first comment in 25 years of practicing law in Washington. Our small office has always maintained insurance for our speeding ticket/DUI practice. We pay $750 for each attorney for $250,000 per claim/$500,000 aggregate of coverage. I hope that you consider small firms such as ours as you continue your investigation. Oregon's apparent one-size-fits-all $3,500 per lawyer assessment is ridiculous and bears no relation to the true cost of insuring a small firm like ours. Should you adopt a similar requirement, you would be creating an unnecessary financial burden for many small firms.

$3,500 for each lawyer? $7,000 for what currently costs us $1,500? What an outrage that would be.

Valerie Shuman, Tacoma

I searched diligently and filled out numerous applications, but I reached the conclusion that there is no market for malpractice coverage for transactional securities lawyers in solo practice. It appears that from the insurer's perspective, the underwriting costs exceed the expected profits at anything other than prohibitive rates. The last time I looked into this (and that was a number of years ago), every insurer I contacted refused to give me an offer at any price.

I'd like to note that I was trained in my practice area at Sullivan & Cromwell in New York, am 61 years old, and have never had a claim made against me. I also have impeccable academic credentials, which include an MBA equivalent from MIT.

If Washington decides on mandatory insurance, I would favor a professional liability fund. I fear that otherwise my license to practice in Washington would be worthless.

John A. Myer, Seattle

I am writing in response to the article "WSBA Board of Governors Explores Mandatory Malpractice Insurance" in the September 2017 issue of *NW Lawyer*.

As an attorney licensed to practice in both Oregon and Washington, I have had the opportunity to compare the professional liability insurance requirements of both states— disclosure in Washington and mandatory coverage in Oregon. I do not support mandatory coverage as it provides a questionable value at substantial cost while reducing the availability of legal services, particularly for moderate income citizens.

The first question to ask is "How much benefit does mandatory coverage actually provide to the average client?" I do not have the statistics but I encourage the Board to obtain this information before passing an expensive "feel good" measure. Although there are certainly horror stories out there about bad lawyers and the damage they cause, I question the value that mandatory coverage would provide to those clients when considered in the context of the aggregate cost and the thousands of clients who receive professional legal representation from lawyers with and lawyers without professional liability coverage.

The second question is "How would mandatory coverage affect low and moderate income citizens who need legal representation?" The difficulty finding pro bono coverage for low-income clients is well known, although there are programs that provide professional liability coverage to enable this important work to be done. From my experience, the great bulk of under-represented citizens are moderate income people who cannot afford an attorney yet do not qualify for pro bono representation.

In addition to my income-producing work, I have represented Washington citizens needing assistance with no-contact orders, a homeowner whose property was eroding due to the failure of a city to properly maintain a storm run-off system, individuals who were presented with scam damage reports by rental car companies, and others who had damaged credit reports due to fraudulent use of their identity. I may soon retire from my "day job" but hope to keep providing this type of unpaid service to moderate-income individuals. I am saving for retirement and certainly am not in the position to divert funds to pay for professional liability coverage. If coverage becomes mandatory, I fear I will be required to become an inactive member of the bar and will no longer be able to serve this under-represented group. I am sure there are many other attorneys in the same situation.

Bill Murphy, Vancouver, WA

PROFILING

Some WSBA members have fallen into the quagmire of lecturing about "white privilege" ("Inbox," SEP *NWLawyer*). However, it is unclear from their statements what white persons are supposed to do to atone for the total happenstance of being born white . . . pay reparations, take sensitivity classes, forfeit their law degree to a person of a different race?

No one should be denigrated for the color of their skin, including whites. White privilege is just another imaginary problem being conjured up by some leaders of the WSBA.

Certainly we all owe a duty of politeness and decency to every

From:	Hugh D. Spitzer
To:	John Myer
Cc:	Mark Beatty; Paul S; Doug Ende; Thea Jennings
Subject:	RE: There may not be a market for malpractice insurance for lawyers in some practice areas
Date:	Thursday, December 13, 2018 4:24:41 PM

Thanks very much, John. I may follow up with some additional questions.

Hugh

From: John Myer <john@myercorplaw.com>
Sent: Thursday, December 13, 2018 2:56 PM
To: Hugh D. Spitzer <spith@uw.edu>
Cc: Mark Beatty <mark@markbeatty.law>; Paul S <pswegle@gmail.com>
Subject: There may not be a market for malpractice insurance for lawyers in some practice areas

Dear Mr. Spitzer:

As **Attachment A** discusses in more detail, a few years ago my malpractice carrier refused to renew my policy and I was unable to find coverage after a reasonably diligent search. Recently, in response to the activities of the Mandatory Malpractice Insurance Task Force, I resumed my search. Today I spoke to Julie Patterson at ALPS who flatly told me that they do not cover lawyers who work on EB-5 offerings (please see: http://www.myercorplaw.com/eb5) I reached out to ALPS because the WSBA on its website states that "ALPS is the WSBA-endorsed professional liability provider, offering discounts and services specially designed for members like you."

I then reviewed the minutes of the July 18th meeting of the Task Force, and found the following statement therein: "Additionally, the Task Force discussed its concerns about lawyers who, in good faith, may be unable to obtain coverage from an insurance carrier under a mandatory insurance model. Although insurance industry experts who have met with the Task Force are optimistic that a policy will likely exist for every lawyer, it was noted that some lawyers who have histories of material malpractice claims or discipline may need to evaluate their ability to competently protect the public from errors and harm." https://www.wsba.org/docs/default-source/legal-community/committees/mandatory-malpractice-insurance-task-force/mandatory-malpractice-insurance-task-force-meeting-materials(00430769)6f6463f2f6d9654cb471ff1f00003f4f.pdf?sfvrsn=63bd06f1_3

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If you feel that the Task Force has adequate information on this issue, please let me know. In the alternative, if this is an issue that you believe needs more attention by the Task Force, then

by all means proceed with such efforts.

I have copied Mark Beatty and Paul Swegle on this email. Mark Beatty chairs the Securities Law Committee of the WSBA. Paul Swegle is the chair of the Corporate Counsel Section of the WSBA, serves on the WSBA Securities Law Committee and is a member of the Board of Governors of the WSBA. I also serve on the Securities Law Committee.

Please contact me with any questions or concerns.

Sincerely,

John A. Myer

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Cc:	Mark Beatty; Paul S; Doug Ende; Thea Jennings
Subject:	RE: There may not be a market for malpractice insurance for lawyers in some practice areas
Date:	Thursday, December 13, 2018 6:02:01 PM

Hugh,

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I did look at surplus line in 2011 and recall that the quotes were prohibitive and I did not pursue them. In addition to practicing law, I'm involved in family businesses that require my attention. As a result, my practice is relatively small and it wouldn't make sense to buy non-standard policies. While the quote for the first year might not be prohibitive, in subsequent years as the coverage period extends further back, the price would keep increasing. In addition, I will turn 63 this coming year, and I'm in the process of tailing off my law practice. However, I would dearly like not to be forced into retirement by the recommendations of your task force.

As to EB-5 transactions, that is only one of the issues I face when filling out insurance application. I also advise on hedge fund formation, and this area also scares the insurance underwriters. In addition, I represent issuers who are listed on OTC Pink. There are a number of companies listed on the Pink Sheets that are sketchy at best. My surmise is that there are a number of lawyers who practice in transactional private securities who have no idea what the issues are and what risks they are incurring. EB-5 was a hot field because of interest from China, and that has tailed off. Hot fields tend to attract all sorts of people including lawyers who ought to know better but apparently don't.

I believe it would be unreasonable for the WSBA to require me to buy insurance from a pool that is priced to cover the lawyers who regularly commit malpractice. If I were forced to make a choice, I would let my membership in the WSBA lapse and modify my professional activities accordingly.

I believe that there are a number of issues with mandatory insurance provided by the market. Many of these were laid out in the letter I worked on with Mark Beatty and was sent to the task force. Assuming the task force has worked through all of these and decides to nonetheless recommend mandatory insurance that needs to be procured in the market, I would think that you would want a rule that compares the lowest cost quote obtained, the revenue that a lawyer earned in the previous year and an acceptable threshold. If the quote exceeded the threshold, that lawyer would be exempt. This would address many of the concerns of lawyers who have non-standard practices that provide advice and representation in areas that clients need but are not particularly remunerative.

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The insurance broker on our task force has expressed skepticism about lawyers being unable to find insurance, and suggests that the issue always boils down to the premium cost. Have you reached out to various insurers and then found that the *cost* of insurance is just too doggone expensive?

Also, I'd be interested in knowing why EB-5 work poses such a challenge in terms of insurance. Feel free to give me a call if you would like to talk about it further.

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From: [redacted]
To: Mandatory Malpractice Insurance Task Force
Subject: Mandatory Malpractice Insurance
Date: Saturday, December 15, 2018 2:16:42 PM

Dear Task Force Members,
I have read your interim report and generally agree with the conclusion for mandatory insurance for actively practicing members. You note the Oregon rules for some exemptions and that includes retirees such as me. Having had my own legal malpractice insurance for the past 50 years, I certainly have recognized the need for it even though I never had a claim brought against me personally. I am now at the point of being a mentor for young lawyers, serving on moot courts to assist young law students and occasionally helping relatives, neighbors and friends on small matters and without any compensation to me. It provides some help for other people and I can still contribute in a minor way. It keeps me in touch with my lawyer friends and allows me to have a measure of dignity that is lost as you reach your elder years. I am still active in skiing, hiking and travel and although my life does not depend on the law, it is a part of my personality. I would urge you to follow the Oregon example of allowing retirees to be exempted. I am not conversant with the language of Oregon's requirement so it does not have to be exactly the same.
Thank you for taking these matters into consideration.
Yours Truly, Croil Anderson Bar Number 491

From:	Three Pines Law
To:	Mandatory Malpractice Insurance Task Force
Subject:	Formal Comments Attached
Date:	Monday, December 17, 2018 12:13:50 AM
Attachments:	Proposed Mandatory Malpractice Insurance Formal Comments - 12-14-18.pdf

Task Force:

I was informed last week that I could submit comments for consideration, which are attached. I attended the member forum, and mistakenly thought we were told the comment period ended on December 31. I was just informed you have published your draft report, but I implore you to review my comments as you move forward toward a recommendation.

Thank you for your time,
Kate Hawe

Kate M. Hawe
Owner
Three Pines Law & Consulting Group, Inc.
206.909.4642
[redacted]
Providing legal and regulatory consulting services to the natural resources client
Licensed attorney in Washington State and Oregon State

Proposed Mandatory Malpractice Insurance
Comments

TO: **Insurance Task Force, Washington State Bar Association**
FROM: **Kate M. Hawe**
Owner/President
Three Pines Law & Consulting Group, Inc.
DATE: **Submitted Monday, December 17, 2018**
FORMAT: **Sent via email as attachment**

Thank you for this opportunity to present formal comments on the proposed mandatory malpractice insurance requirement for members of the Washington State Bar Association (WSBA). I presented a brief subset of these comments during the member forum, and those comments are repeated herein. These comments are not presented in any particular order of importance, rather, they hold equal weight of concern.

My comments are followed by recommendations on Page 8.

I want to highlight that I recently moved to Oregon and am now a member of the Oregon Bar. Because of this experience, *I am adamantly opposed to this proposal.*

COMMENTS

1. **Mandatory malpractice insurance will be unduly burdensome to solo practitioners who are members of other state Bar associations. Oregon solo practitioners are not all in favor of mandatory insurance requirements.**

   As a resident of Oregon State, I was precluded from doing ***any*** work related to my field of expertise -natural resource science, regulations, and policy - until I became a member of the Oregon Bar. This included consulting work on federal regulations per a verbal restriction by Oregon Bar General Counsel supported by numerous court memorandum on the subject.

   Consequently, I was unable to earn an income from clients in Washington during the time it required to waive into the Oregon Bar (approximately 10 months). Further, I was precluded from marketing my services until I was an Oregon Bar member. Meanwhile, I maintained my license in Washington, paying Bar fees and Continuing Legal Education (CLE) fees, and I maintained my membership with the American Bar Association (ABA). Additionally, waiving into the Oregon Bar was an expensive process, and I had to

concurrently maintain my corporate business, which required fees to a new accountant, new marketing materials, office setup. This was a tremendous financial set back, and my 401k plan could not be funded while unemployed.

Once I was admitted into the Oregon Bar, I was required to begin paying malpractice insurance, but I had no clients or income. It has been several months, and I am still marketing to support my practice. I was successful with an unemployment exemption to the insurance requirement, but this is the only exemption I will ever be eligible for even though my practice is to provide federal regulatory assistance that is completely vetted via other attorneys of record. I am never the final arbitrator of legal decision-making in my practice. Consequently, my liability risk is extremely low.

The Oregon Bar is very expensive, and is not particularly user-friendly. I find it bureaucratic and heavy-handed. The malpractice requirement with so few exemption options is particularly distasteful. Contrary to what representatives of the Oregon Bar are stating, *I have not met one solo practitioner in Oregon who is in favor of the malpractice insurance requirement*.

2. **Mandatory malpractice insurance would penalize solo practitioners operating under Rule of Professional Responsibility 5.7, Responsibilities Regarding Law-related Services.**

A large portion of attorneys do not practice in a traditional manner. Many of us function as consultants to clients; offering a legal background, but who are not hired as the client's attorney. Under Rule of Professional Responsibility (RPC) 5.7, those in these unique roles bridge the gap between law and technical work. For example, real estate agents, architects, environmental consultants, certified public accounts, etc. may also be members of the WSBA, but are not in any way considered to be hired as attorneys by their clients. In other words, clients are not seeking legal advice from their environmental consultant, and it would be egregious and unnecessary to carry insurance when WSBA members are not holding themselves out to be hired attorneys.

As a key example, I was hired as a consultant by a federal agency to manage an environmental program under a federal law. I was not hired as an attorney by the agency's General Counsel's office, and all consulting work was vetted through General Counsel before decisions were made by agency management. While I was instrumental in assisting General Counsel and bridging the technical gap with biologists due to my science background, no liability attached to my consulting work. I simply could not be sued by the client (e.g., the federal government) for any duties related to management of this particular program because I had no legal authority.

3. **<u>Mandatory malpractice insurance will be financially unduly burdensome to solo practitioners managing small businesses</u>.**

   The cost of managing a business is considerable. This proposal will unjustly penalize WSBA lawyers choosing not to practice as employees of large, corporate firms. Solo practitioners pay their own Bar-related expenses in addition to marketing expenses (travel, meals, materials), office equipment and lease expenses, and accounting fees to prepare state, local, and federal taxes among other duties. Further, we fund our own retirement and health care plans. Adding the cost of required insurance, which in Oregon is currently at $3,500 per year and will likely continue to increase, may be the tipping point for practitioners who do not garner significant profit margins. Consider that the cost of insurance alone may equate to 10% or more of a solo practitioner's gross income if earning $35,000 annually.

   I ended my membership with the ABA after becoming a member of the expensive Oregon Bar in addition to WSBA fees. I may be forced to become inactive in Washington if insurance is imposed. I simply cannot afford to pay for insurance in two states, support my business, pay taxes, pay license requirements, fund my retirement, and cover health care costs because I am not in a practice that garners high billing rates.

4. **<u>Mandatory malpractice insurance may change the structure of legal services made available to the public; would be a disincentive to small, women-owned, or minority-owned business operations because it supports only the traditional, big business model</u>.**

   As an agency of the State, the WSBA should consider carefully how this requirement may impact business structure in Washington. If solo practitioners cannot afford to be covered by liability insurance, they may likely migrate to corporate firms. This scenario is evidenced by the same economic movement in the medical profession; very few, if any, physicians have independent practices, which is solely a function of malpractice and other insurance mandates. Is this the limited structure the WSBA wants to support?

   Those of us uninterested in working for other attorneys, or who are physically precluded from this option because we live in another state, will simply stop practicing in Washington Stat due to the expense of managing a business. This would be an unfortunate outcome and contrary to Washington State economic policies that *promote women-owned, small-business, and minority-owned businesses.*

5. **Insurance companies will be inserted into the legal profession.**

   Linking the legal profession with the insurance sector is risky in itself. Members will become regulated by their insurance carries just as physicians have become. This is a scenario that would negatively affect legal, economic enterprise; small business practices; and ultimately the practice of law by solo, independent attorneys.

6. **Mandatory malpractice insurance would penalize the majority of solo practitioners who are responsible, diligent professionals with no history of malpractice claims.**

   This proposal is being presented to WSBA members under the guise of protecting the public from a significant number of unprofessional, solo lawyers. However, the insurance task force has not proven this premise to be fact. Please review the statistic-related comments below.

   The task force has a duty to support its premise with proven facts that demonstrate a significant portion of solo practitioners are offenders of improper legal practice. It is difficult to believe this is premise is true. Consequently, responsible solo practitioners view this proposal as an unjust penalty for operating our businesses independent of corporate firms.

7. **Mandatory malpractice insurance would disproportionally disadvantage one class of WSBA members.**

   This proposal favors deep pockets and the financially advantaged while penalizing small firms with less income and narrow profit margins to absorb the cost of insurance premiums. Related to other comments about the unfairness of this proposal on solo practitioners, this requirement would disproportionately disadvantage a class of practitioners who likely make considerably less income than those who would not be financially affected by the requirement. Those working for large firms garner higher wages and benefits than solo practitioners (who have no paid benefits); additionally, their malpractice insurance would be paid by their firms.

8. **Mandatory malpractice insurance will result in reduced hours devoted to pro bono work by solo practitioners.**

   Due the increased cost of maintaining a private practice that would include malpractice insurance at a cost of at least $3,500 annually, solo practitioners will need to bill more hours to compensate for this business expense. The focus on billable hours will result in less hours devoted to pro bono work.

9. **<u>The WSBA should not assume the entire burden of protecting the public from malpractice. Clients/public can obtain information about insurance coverage prior to hiring any attorney and, therefore, have the ability to make informed hiring decisions.</u>**

   The task force's interim report in support of mandatory malpractice insurance is solely based on the duty to protect the public from malpractice by WSBA members. This premise completely removes any responsibility on the part of the public to be informed about personal protections when hiring an attorney. As with any endeavor or contractual arrangement, such as retaining a real estate agent, opening a bank account, purchasing a car, consumers should be self-informed about their protections. Prospective clients can easily obtain information on whether their attorney has insurance coverage by contacting the WSBA or by merely asking their prospective attorney. Armed with this information, the client can retain or not retain any particular attorney; they are not required to hire an attorney that does not have malpractice insurance.

10. **<u>The task force has not supported its interim findings with valid or reliable statistics</u>.**

    Additional information on statistics used to support the conclusion that malpractice insurance should be mandated primarily because of solo and small firm practitioner liability is required before a proposal recommendation can be made in good faith. As presented in the Interim Report Key Findings, your statistics are highly misleading.

    Key Findings #2 and #3 - The task force reports that only 14% in private practice are uninsured. From Key Finding #3, you then state that 28% of solo practitioners are uninsured. How do these two statistics correlate? Is one statistic incorrect? Of, do we interpret your findings as 28% of the 14% are uninsured? If so, this conclusion would be *<u>highly statistically insignificant</u>* and cannot support any recommendation for mandatory insurance based on the public risk posed by uninsured solo practitioners. More information is needed to link these two statistical findings. Furthermore, 14% or 28% of all solo practitioners is, in itself, an insignificant percentage of uninsured attorneys.

    Key Finding #3 - Similarly, the statistic that 28% of solo practitioners do not carry malpractice insurance is completely irrelevant. So what? This information has no meaning unless it is compared to a statistic describing what percentage of this 28% group has had claims requiring the expense of a defense.

    In other words, if only 1% of the 28% of uninsured solo practitioners (or 14%, whichever statistic is correct) have had claims brought against them, then, again, the data are statistically insignificant and *cannot possibly support the conclusion that solo practitioners pose the greatest risk to protecting the public*. On the other hand, if 90% of the 28% of uninsured solo practitioners have had claims brought against them, then

the data are more statistically important, but maybe not enough to warrant mandatory insurance since 28% overall is only 1/4 of all WSBA members.

Finally, a conclusion that *solo practitioners* pose the greatest risk to protecting the public is not valid unless comparable statistics are presented demonstrating the percentage of non-solo practitioners who have claims brought against them.

Key Finding #4 – The task force concludes that solo and small firm practitioners represent a disproportionate share of malpractice claims, *but you provide NO evidence that this statement is true for members of the WSBA*. Your conclusions are supported by national data only. Key Finding #4 is supported only by dollar expenditures in Oregon suggesting that solo firms are the most costly in terms of claim defense. This key finding is completely irrelevant because it is not related to the total percentage of all solo practitioners in Oregon. For example, was $6.5 million expended on only 10% of all the solo practitioners in Oregon in 2015? If so, this is, again, an insignificant percentage. Further, and most importantly, *how do Oregon Bar expenditures relate to WSBA expenditures for solo practitioners*?

Key Finding #6 - Finally, the task force concludes that "most attorney misconduct grievances and disciplinary actions involve solo and small firm practitioners." Why? Likely it is because clients can easily target their solo attorney and are less likely to take on the "deep pocket" of a large firm. The task force has a duty to determine why solo practitioners receive the most malpractice claims before it recommends penalizing all solo practitioners with an expensive license requirement. The cause should be addressed before a penalty is implemented!

More importantly, this is another misleading conclusion because, even if true, it means nothing without supporting data indicating what percent of solo and small firm practitioners in the WSBA have had to defend claims of misconduct.

Summary Regarding Statistical Information used to Support the Task Force Interim Report - If the task force intends to recommend penalizing the majority of solo practitioners who are practicing responsibly with a substantial, mandatory fee, the task force then has a heightened duty to support its rationale for doing so with reliable and valid statistics *applicable specifically to WSBA conditions*. None of the key findings provide such data, rather they present data in a misleading manner because, on their face, they seem significant and inflammatory, but they are merely single data points with no relevance since (1) they lack comparative data with WSBA statistics, and (2) they cannot be correlated as presented.

11. <u>A proposal to impose mandatory malpractice insurance is not supported by the 2018 WSBA bylaws, and is not an intended authorized activity by the Supreme Court</u>.

The Washington Supreme Court adopted General Rule 12.1, which establishes the general purposes of the WSBA and specifies its authorized activities. General Rule 12.1 is incorporated into the WSBA Bylaws as Article I (WSBA website).

The Bylaws do not provide any specified authority for the WSBA to impose a requirement for mandatory malpractice insurance coverage. Consequently, the Bylaws would require an amendment or modification prior to imposing this requirement.

Under Section 1, Subsection B, *Specific Activities Authorized*, Item 5, the WSBA is merely authorized to "inform and advise its members regarding their ethical obligations." Further, no other specified authorized activity allows the WSBA to require members to obtain insurance or any other related expense outside of what the WSBA itself imposes as licensing fees (see Item 22 establishing the amount of license and other related Bar fees). Clearly, the Supreme Court limited the WSBA authorities to advisory in regards to ethical obligations, such as informing clients of whether malpractice insurance is maintained.

The Supreme Court does identify public protection as its first regulatory objective under General Rule 12.1, but it is silent on the issue of insurance where it could have easily added this requirement to the list of WSBA authorities since it included related activities to maintain a client protection fund (Section 1, Subsection B, Item 13) and for the WSBA to administer an effect disciplinary system for misconduct (Section 1, Subsection B, Item 6). These specific, identified activities addressing public protection are then detailed in the Admission and Practice Rules. If the Supreme Court was this detailed about client protection, it would have also included the authority to require mandatory insurance coverage for malpractice claims in the interest of public protection, but it did not. Arguably, there is no intent by the Supreme Court to allow the WSBA to have such authority.

Additionally, there is no mention of mandatory malpractice insurance under any subsection within Section III, Membership.

12. <u>Requiring members to carry liability insurance while not requiring Board of Governor members to do the same would be unethical and inequitable</u>.

Imposing mandatory malpractice insurance requirements on members of the Bar would be inconsistent with the procedure for identical liability risk linked to Board of Governor unprofessional behavior. Bylaws Section V, *Appropriations and Expenses*, Subsection B, Item 3 states "Any liability incurred by any Bar entity, or by its members, in excess of the funds budgeted, will be the personal liability of the person or persons responsible for incurring or authorizing the liability." This bylaw establishes that if a Board member

mismanages Bar funds, it is their personal liability; the bylaw does not extend to a requirement for Board of Governor members to carry liability insurance to protect WSBA members. The WSBA cannot justify imposing mandatory malpractice insurance requirements on its members while not also requiring its Board of Governor members to carry liability insurance to protect WSBA members from misuse of Bar funding.

RECOMMENDATIONS

1. **<u>Maintaining malpractice insurance should be voluntary</u>.**

   A significant percentage of WSBA solo practitioners (72% or 86% depending on the correct statistics from the Interim Report Key Findings) carry liability insurance voluntarily. Concurrently, the task force has offered no proof that the small percentage of uninsured solo practitioners *in Washington State* are a significant risk to public protection. Further, of this small percentage (14% or 28%), it is likely that many uninsured practitioners are working under RPC 5.7, whereby, insurance coverage would be irrelevant because there is no liability risk, or they cannot afford insurance. Without valid and reliable evidence to the contrary, the voluntary system has been successful and should be maintained.

2. **<u>Administrative rule for mandatory disclosure versus mandatory Insurance</u>.**

   Instead of imposing a requirement to carry malpractice insurance, the WSBA should impose an administrative rule requiring written notification to clients in Agreement Letters/Terms of Representation. The RPCs are clear that clients must be advised about several matters prior to representation. Adding an RPC requiring written notification can be inclusive of all RPC notice requirements and can include information on malpractice insurance and dispute remedies. Further, this approach could be monitored for 2 or 3 years as a test of its effectiveness, and the insurance proposal revisited at that time.

   An example Terms of Representation letter includes the following subjects:

   - **Client Name**
   - **Matter Summary**
   - **Date of Initial Representation**
   - **Referenced Rules (i.e.,** These terms are governed by the Washington State Bar Association Rules of Professional Conduct.)
   - **Matter Objectives**
   - **Scope of Representation (what is covered, what is not covered)**
   - **Scope of Representation Disclaimer (if any)**
   - **Confidentiality**

- **Conflict of Interest**
- **Other Representation**
- **Location of Representation**
- **Fee Agreement**
- **Safeguarding Property**
- **Malpractice Insurance**
- **Misconduct (i.e.,** If client believes the attorney has been negligent, fraudulent, or unprofessional in her representation, or the client has other grievances against the attorney, the client may notify the Washington State Bar Association who will engage in a disciplinary investigation on behalf of the client.)

3. **<u>Two-strike rule versus mandatory requirements on all members</u>.**

The WSBA should impose a two-strike rule whereby attorneys with two malpractice claims would be required to carry liability insurance. This targets offenders, not the majority of uninsured solo practitioners who have not had malpractice claims brought against them. Further, it would serve as an ample warning system to possibly prevent malpractice and to encourage communication with clients about insurance coverage.

4. **<u>Numerous exemptions if the mandatory insurance proposal becomes a requirement</u>.**

The Oregon Bar has very few exemptions for its members to not carry malpractice insurance. For several reasons stated above, this is unjust and burdensome on solo practitioners. I strongly recommend the following exemptions apply if a mandatory requirement is implemented.

- Financial hardship (liberal parameters)
- Unemployment
- Retired members
- Inactive members
- Practicing under RPC 5.7, Law-related Services
- Insurance is provided by a client
- X% of a solo practitioner's practice is for pro bono work
- Contract attorneys who are not employees of a client, and where the client has other legal representation as "attorneys of record" (i.e., the contract attorney is not the final authority on legal matters) [similar to RPC 5.7]
- Carries malpractice insurance as a member of another state Bar
- New attorney member of the WSBA (either by waiver/reciprocity or via Bar examination). In these cases, a 2-year exemption should be allowed while the new attorney is becoming financially secure

SUMMARY

In comparing the Oregon Bar with the WSBA, I have always felt, hands down, that the WSBA is an exemplary organization. I have been served well by the WSBA and have been proud to be a member. Additionally, I have met other lawyers in Oregon who have relayed their good impressions of the WSBA by reputation.

I am concerned that this initiative will become a slippery slope to other burdensome proposals and rules affecting our members, and will lead to undue influence on our profession by the insurance sector. The proposal feels bureaucratic, weakly justified, and unsupported by valid statistics pertinent to WSBA members.

I strongly encourage the task force to recommend against mandatory malpractice insurance in favor of mandatory disclosure requirements in Letters of Representation/Agreement Letters. This approach could be monitored for 2 or 3 years as a test of its effectiveness, and the insurance proposal revisited at that time. This is a much more prudent, phased, and congenial approach than an imposed requirement on the majority of solo practitioners who have not demonstrated malpractice patterns.

From:	Stan Sastry
To:	Paula Littlewood
Cc:	Mandatory Malpractice Insurance Task Force
Subject:	Re: WSBA
Date:	Monday, December 17, 2018 10:05:39 AM

To whom it may concern:

I am writing this e-mail letter regarding mandatory malpractice insurance proposal and the organizational structure review of the WSBA.

I find it quite contradictory and irreconcilable that there are two parallel tracks going on in the workings of the WSBA as of now. On the one hand, the Washington Supreme Court is conducting a complete organizational structural review of the WSBA and there is a task force (work group) on that issue, and on the other hand, there is a parallel task force, unaccountable to the Washington Supreme Court, that is working on imposing mandatory malpractice insurance on its members. Strangely enough, the two task forces appear to be operating as if there is no nexus between them, like two ships passing in the night.

Let us say that the malpractice insurance task force (as it is likely to do) recommends to the Board of Governors (BOG) that mandatory malpractice insurance should be a condition for lawyer licensing. The BOG then approves the recommendation and there is a corresponding rule change. However, subsequently, suppose that the work group set up for the organizational structure review of the WSBA recommends to the Supreme Court that the WSBA be split up into multiple independent entities (e.g., licensing, discipline, and membership). The Washington Supreme Court, let us say, adopts that recommendation. This would render the status of the BOG, *ab initio,* uncertain because the fundamental structure of the WSBA has been changed by the Supreme Court. Does the current BOG's prior rule-making authority regarding mandatory malpractice insurance have any standing if the WSBA is split up as a result of the structural review of the Washington Supreme Court? The answer to this question is unknown. Since the Washington Supreme Court's order changing the WSBA structure, if that happens, has primacy over the actions of the BOG, logic would suggest that the BOG's adoption of the recommendations of the malpractice insurance task force would be *ulra vires* in light of the Supreme Court's order changing the WSBA structure. Thus the current BOG has no *locus standi* to vote on malpractice insurance coverage issue *before* the Supreme Court decides on the WSBA organizational structure issue. Thus logically the malpractice insurance task force should suspend its work *sine die* until the issue of organizational structure of the Bar Association is resolved by an order of the Washington Supreme Court.

It is important that the organization structure review of the WSBA be completed first and a decision of the Washington Supreme Court in that regard be rendered *before* any action on the issue of malpractice insurance (or other issues related to WSBA members) is considered by the BOG. Clearly, given the uncertainty surrounding the decision of the Washington Supreme Court over the very fundamental structure of the WSBA, any decisions by the current BOG on malpractice insurance would be subject

to suspect credibility.

In summary, I believe, because the WSBA is at an uncertain future, the workings of the malpractice insurance task force should be suspended until the issues surrounding the organizational structure of the WSBA are resolved by the Washington Supreme Court.

Sincerely,

Stanley Sastry
WSBA # 36391

From:	troy
To:	Mandatory Malpractice Insurance Task Force
Cc:	caa
Subject:	Nightmare story about attorney without professional liability insurance
Date:	Wednesday, December 19, 2018 9:11:23 AM

Good morning,

December 14, 2018 Judge Serko awarded my company summary judgment, dismissed all counter claims and third party claims and awarded the company CR11 Sanctions against “Attorney #1”. Attorney #1 destroyed financially 5 people, the business and its most valuable asset all in less than 1 year. I sought assistance of the WSBA in October of 2016 to prevent additional damages, the WSBA elected then to defer an investigation and take no action, this forced me to take on massive additional legal debt and other debt financially destroying the start-up company, its promising clean energy tech assets and its members to defend against Attorney #1 claims for a $9 million dollar fee.

Judge Serko said into the record she was “outraged” at the conduct of Attorney #1.

Judge Serko found that Attorney #1;

1. Did breach his duties to his client
2. Did violate a myriad of RPC’s
3. Did file frivolous claims and counter claims of which warranted CR11 sanctions

I would very much like the opportunity to share this story with this task force and explain why Attorney #1 had leverage he would have otherwise not enjoyed had he held a valid professional liability insurance policy. Attorney #1 gained additional leverage he would not have otherwise enjoyed had the WSBA took action.

This story is simply tragic on several levels, Attorney #1 has no liability insurance, he has no assets and the company will encounter another $100 - $200k in legal fees to go to trial for an award it will never collect.

I am the interim CEO of the company and was charged with trying to deal with Attorney #1 to prevent his outright extortion of the companies most valuable asset and its members.

Best regards,

Troy Dana

From:	Inez "Ine" Petersen
To:	Hugh D. Spitzer; John Bachofner; stan_bastian@waed.uscourts.gov; dan@mcbdlaw.com; christy@myllt.com; Gretchen Gale; PJ Grabicki; pl.isaki@comcast.net; Mark Johnson; [redacted] kara@appeal-law.com; evanm@jdsalaw.com; spierce@davisrothwell.com; pinkhamb@seattleu.edu; tstartzel@ks-lawyers.com
Cc:	Thea Jennings
Subject:	Shadow hanging over the conduct of MMI Task Force meetings
Date:	Thursday, December 20, 2018 12:02:20 AM
Attachments:	image001.png

Dear Prof. Spitzer and others on the task force:

Was any effort made to correct the erroneous categorizing of communications about mandatory insurance? These errors re the "unclear" category were pointed out by several attorneys, including myself. About two thirds of the comments last time I checked were marked "unclear." The "full steam" ahead task force leaders cannot ignore this.

Please confirm if any action was taken to correct the erroneous summarization of communications. Or, for that matter, any of the misleading information contained in the task force's Interim Report.

How often are task force meetings conducted without a quorum? I wasn't able to listen to the entire meeting today, but by telephone it sounded like two voices pretty much run the show. Maybe that is why some task force members don't take attendance seriously.

It appears to be "full steam" ahead and member comments are basically ignored. Trying to plug the hole in the dike today caused by the negative impact to *pro bono* attorneys was very interesting. It indicated to me that no matter what arguments are put forth, the leaders' goal is to minimize them and sweep them under the rug.

Those couple of voices so strongly in favor of mandatory insurance who run these meetings are so biased they can't conduct a meeting that in any way resembles a fair airing of the pros and cons of mandatory insurance.

I heard someone ask if a survey was sent to the *pro bono* attorneys. Someone answered, "I think so." Think so? And no one questioned whether one was actually sent and to whom. I never received one.

Inez Petersen
WSBA #46213

On Wed, Dec 19, 2018 at 11:49 AM Thea Jennings <theaa@wsba.org> wrote:

> Ms. Petersen,

For your information, Comments Themes Snapshot is now available on our website:

https://www.wsba.org/docs/default-source/legal-community/committees/mandatory-malpractice-insurance-task-force/mmi-task-force-comment-themes-snapshot.pdf

Thea Jennings | Disciplinary Program Manager | Office of Disciplinary Counsel

Washington State Bar Association |☎ 206.733.5985 | theaj@wsba.org

1325 Fourth Avenue, Suite 600 | Seattle, WA 98101-2539 | www.wsba.org

From:	Hugh D. Spitzer
To:	Inez "Ine" Petersen
Cc:	Thea Jennings; John Bachofner; stan_bastian@waed.uscourts.gov; dan@mcbdlaw.com; christy@myllllt.com; Gretchen Gale; PJ Grabicki; pl.isaki@comcast.net; Mark Johnson; [redacted] kara@appeal-law.com; evanm@jdsalaw.com; spierce@davisrothwell.com; pinkhamb@seattleu.edu; tstartzel@ks-lawyers.com
Subject:	December 19 Inquiry
Date:	Thursday, December 20, 2018 7:37:16 AM
Attachments:	image001.png

Dear Inez,

I recognize that you have strong views on this topic, views that we respect. But it doesn't make sense to suggest that the Task Force is up to something nefarious in going about its work. There simply isn't anything nefarious going on at all. And I don't think there are shadows hanging over anyone (except for the clouds…but…it's December!).

In response to your specific questions:

1. As far as categorization of comments is concerned, every member of the Task Force has received a copy of new comments each month. Many of us are reading them all. Some of us probably read a sample. We asked the staff to do a summary every month to get a big picture idea of the main concerns being expressed by WSBA members so that we could address those concerns one way or the other. Any sorting or categorizing of 500+ communications is going to be subjective. To keep things as simple as possible, for the Task Force members' convenience the staff put comments into the "opposed" category only if they were clearly opposed. A large number of comments raised concerns, such as, "If insurance is mandated, it shouldn't cover me because I'm a government lawyer," or, "there shouldn't be malpractice insurance if it covers people who aren't practicing law at all," or, "won't this have a negative effect on *pro bono* work by retired lawyers?" Comments like those could be treated as "opposed" or as something else. So for clarity the "opposed" comment batch are those clearly opposed. The summaries are public, as is everything regarding this Task Force. But the summaries were never meant to be used as the basis for arguing one way or the other on anything. Ultimately, the comments speak for themselves.

One other thought: The Task Force isn't gathering comments as some sort of unscientific "vote" by WSBA members. We're gathering comments to make sure that we're able to take into account all of the potential concerns and then make a decision one way or another with respect to each concern. The fact that some lawyers don't want to be required to purchase insurance is understandable. Some people don't want to pay taxes. Some people don't want to stop at red lights. Some people want to have camp fires even when it's the middle of summer and there's a high wildfire hazard. Ultimately, the State Supreme Court (not the regulated lawyers themselves) will decide whether or not it is in the interest of the public (*i.e.*, in the interest of the *clients*, not the *lawyers*) to require licensed attorneys to carry professional liability insurance.

2. The staff pointed out to us yesterday afternoon that we were short one person for a quorum. It's December, and people are busy with end-of-the-year wrap up. Consequently, because of the way the WSBA bylaws are written, we had to halt the meeting. Those who were left couldn't do anything but some editing, and we had to postpone deliberations, decisions and action to our January 30 meeting. We'll probably have to call another meeting in early February to wrap up our work on a final report to the Board of Governors. I don't think we have had this quorum problem before. Usually we have a room full of Task Force members, with two or three on the phone. Yesterday we had four or five in the room and everyone else on the phone. That is not conducive to full participation by everyone because of the sound problems. We get much more robust Task Force member participation when people are physically present.

3. I don't know what you are referring to regarding a survey of *pro bono* attorneys. A huge percentage of WSBA members do *pro bono* work of one kind or another, and that's a lot of people survey for I-don't-know-exactly-what. We have contacted the Legal Foundation of Washington and a number of Qualified Legal Services Providers to get an understanding of the ecology of *pro bono* services. That information has been quite helpful in giving us an idea of approaches to reducing the risk of a material adverse effect on those volunteer services from implementation of a malpractice insurance requirement.

I hope that's helpful.

Hugh

Hugh Spitzer
Professor of Law
University of Washington School of Law
Box 353020
Seattle, WA 98195-3020
206-685-1635
206-790-1996 (cell)
Papers on SSRN: http://ssrn.com/author=1514923

From: Inez "Ine" Petersen <inezpetersenjd@gmail.com>
Sent: Thursday, December 20, 2018 12:02 AM
To: Hugh D. Spitzer <spith@uw.edu>; John Bachofner <john.bachofner@jordanramis.com>; stan_bastian@waed.uscourts.gov; dan@mcbdlaw.com; christy@mylllt.com; Gretchen Gale <gretchen@halehana.com>; PJ Grabicki <pjg@randalldanskin.com>; pl.isaki@comcast.net; Mark Johnson <mark@johnsonflora.com>; [redacted]; kara@appeal-law.com; evanm@jdsalaw.com; spierce@davisrothwell.com; pinkhamb@seattleu.edu; tstartzel@ks-lawyers.com

Cc: theaa@wsba.org
Subject: Shadow hanging over the conduct of MMI Task Force meetings

Dear Prof. Spitzer and others on the task force:

Was any effort made to correct the erroneous categorizing of communications about mandatory insurance? These errors re the "unclear" category were pointed out by several attorneys, including myself. About two thirds of the comments last time I checked were marked "unclear." The "full steam" ahead task force leaders cannot ignore this.

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Inez Petersen
WSBA #46213

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> Ms. Petersen,
>
> For your information, Comments Themes Snapshot is now available on our website:
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> https://www.wsba.org/docs/default-source/legal-community/committees/mandatory-malpractice-insurance-task-force/mmi-task-force-comment-themes-snapshot.pdf

Thea Jennings | Disciplinary Program Manager | Office of Disciplinary Counsel
Washington State Bar Association | ☎ 206.733.5985 | theaj@wsba.org
1325 Fourth Avenue, Suite 600 | Seattle, WA 98101-2539 | www.wsba.org

From: Inez "Ine" Petersen <inezpetersenjd@gmail.com>
Sent: Wednesday, December 26, 2018 9:02 PM
To: Hugh D. Spitzer
Cc: Thea Jennings; Doug Ende
Subject: Re: Conducting Task Force meeteing w/o a quorum and other comments

Dear Prof Spitzer:

Yes, on the merits. That is how it should be--we at least agree on that point. No further comment at this time.

Sincerely,
Inez

On Wed, Dec 26, 2018 at 1:41 PM Hugh D. Spitzer <spith@uw.edu> wrote:

> Ine,
>
> I'll just have to disagree with you. It probably makes the most sense to focus on the substance of the issues. The Task Force will be making a recommendation to the BOG, and I imagine that you'll want to critique our recommendation on the merits. I the Board of Governors makes a recommendation to the Supreme Court, you'll have ample opportunity to make your arguments there as well.
>
> Hugh
>
> **From:** Inez "Ine" Petersen <inezpetersenjd@gmail.com>
> **Sent:** Wednesday, December 26, 2018 8:47 AM
> **To:** Hugh D. Spitzer <spith@uw.edu>
> **Cc:** theaa@wsba.org; John Bachofner <john.bachofner@jordanramis.com>; stan_bastian@waed.uscourts.gov; dan@mcbdlaw.com; christy@mylllt.com; Gretchen Gale <gretchen@halehana.com>; PJ Grabicki <pjg@randalldanskin.com>; pl.isaki@comcast.net; Mark Johnson <mark@johnsonflora.com>; [redacted]; kara@appeal-law.com; evanm@jdsalaw.com; spierce@davisrothwell.com; pinkhamb@seattleu.edu; tstartzel@ks-lawyers.com; Doug Ende <douge@wsba.org>
> **Subject:** Re: Conducting Task Force meeteing w/o a quorum and other comments
>
> Prof Spitzer:

Your response is a prime example of how "rationalization" works, and unfortunately your co-task force members in attendance rationalized right along with you.

What constitutes conducting a meeting? My answer, your words: When the members at the meeting "help edit some of the language of the draft we were working with."

Because you took committee action but not all action you could have does not alter the fact that you conducted a meeting without a quorum.

If even 50% of the active attorneys in private practice had time to look at what is happening at "WSBA Central," I predict there would be a major uprising against the overreaching and disregard for protocol and Bylaws which has occurred and is still occurring.

So what if you didn't make your deadline? Is it meet a deadline at all costs? It would appear so, since you have not gathered the facts and data needed to move ahead with mandatory insurance. You might have facts and data but not the ones needed to demonstrate a true need for this onerous move to require all attorneys to have insurance.

Respectfully,

Inez Petersen, WSBA #46213

On Wed, Dec 26, 2018 at 7:57 AM Hugh D. Spitzer <spith@uw.edu> wrote:

> **Inez,**
>
> **Unfortunately, we had to suspend meeting when we realized that we were short one person for a quorum. Those on the phone continued to help edit some of the language of the draft we**

were working with, but we had to put off making any substantive discussion or decisions until our next meeting. As I explained in an earlier email, we now may have to add an extra meeting in February if we can't complete our work at the January meeting. We will continue developing recommendations, and I expect we'll get our report to the Board of Governors in time for the March BOG meeting.

Hugh

From: Inez "Ine" Petersen <inezpetersenjd@gmail.com>
Sent: Sunday, December 23, 2018 10:00 PM
To: Hugh D. Spitzer <spith@uw.edu>
Cc: theaa@wsba.org; John Bachofner <john.bachofner@jordanramis.com>; stan_bastian@waed.uscourts.gov; dan@mcbdlaw.com; christy@mylllt.com; Gretchen Gale <gretchen@halehana.com>; PJ Grabicki <pjg@randalldanskin.com>; pl.isaki@comcast.net; Mark Johnson <mark@johnsonflora.com>; [redacted] kara@appeal-law.com; evanm@jdsalaw.com; spierce@davisrothwell.com; pinkhamb@seattleu.edu; tstartzel@ks-lawyers.com
Subject: Conducting Task Force meeteing w/o a quorum and other comments

Dear Prof. Spitzer:

HOW CAN YOU RATIONALIZE THE FOLLOWING FACT AWAY? YOU HELD THE MEETING WITHOUT A QUORUM. SO WHAT IF NO VOTES WERE TAKEN. YOU NONETHELESS **DID** CONDUCT THE BUSINESS OF THE TASK FORCE AND YOU DID IT WITHOUT A QUORUM.

Your meetings make a mockery of Task Force pleas for more comments from attorneys when you are forging ahead with making insurance mandatory and have not given proper weight to the comments you have received. In fact, the majority of the communications are miscategorized as "unclear" on your spreadsheet and you have made no attempt to correct this.

I am reminded of the words in the Interim Report where readers are given the impression that you are doing the work of the Gods and must not be impeded by relevant analysis of impacts to the attorneys who would be most affected.

> "Members of the Task Force started with **open minds** but widely divergent ideas about mandating malpractice insurance for lawyers in Washington. But as the group **deliberated carefully** over its potential recommendation and reached a tentative consensus, Task Force members expressed a belief that we should **move boldly** and **not to shy away from a difficult recommendation**. Task Force participants stressed that the WSBA has a duty to protect the public and maintain the integrity of the profession. **Consequently, the Task Force is focusing on the risk of injury to the public that arises from uninsured lawyers, who constitute a small percentage of Washington attorneys.** A license to practice law is **a privilege**, and no lawyer is immune from mistakes. The members emphasized that a key goal of this project is to recommend **effective ways** to ensure that clients are compensated when attorneys make mistakes. The Task Force members expressed that malpractice insurance (or lack thereof) has a significant impact on clients, and that it is appropriate for lawyers to ensure their own financial accountability."

At least you admitted a **small percentage** of Washington lawyers are uninsured. What you are forgetting is that this is a "sliver" of Washington lawyers, and the number of times a client suffers financially from legal malpractice at the hands of one of these lawyers "a sliver of a sliver."

Your Task Force was so "open minded" and "deliberated so carefully" that it overlooked surveying the uninsured lawyers to obtain real facts. And the Task Force overlooked surveying the other groups of lawyers most affected by your proposed mandatory insurance; namely, retired but active, solo, small law firms . . . and those working pro bono hours where a NPO does not pay their insurance (or they work pro bono hours outside of the umbrella of an NPO).

In my view, three years total have been wasted by the Mandatory Malpractice Insurance Work Group and your Task Force, plenty of time to have gathered accurate and complete stats on malpractice insurance. One reason for this I believe is that your main source of data comes from the very man whose company will benefit the most--ALPS. Of course, he would love to see the WSBA adopt mandatory insurance.

If your Task Force truly wants to **move boldly** and recommend **effective ways** to ensure that clients are compensated when attorneys make mistakes, then what about this?

> Have your ALPS executive vice president create a legal malpractice insurance policy for the **clients of uninsured lawyers--a policy they could purchase** at a reasonable rate (or reduced rate) to cover them for that specific contract with an uninsured attorney. That would definitely do what the Task Force wants to do without huge impacts to the general membership. It would not generate a huge bump in ALPS bottom line however.

And speaking of survey opportunities missed over the past three years, clients of uninsured attorneys could have been surveyed to see if they would be interested in such a policy. A simple question as part of the attorney's intake interview could have provided a yes or no survey.

I do not have "strong views." I have "common sense views" which are badly needed at this time. Regarding your closing paragraph:

> If you don't know what questions should have been in the surveys that should have been conducted, then how can you be so sure you are making the best recommendation to the Board of Governors?

> With all the communications you received, you can't assess impacts to pro bono work? Your "ecology" search wouldn't identify me and others like me. So I don't believe you have an adequate grasp on the pro bono situation at all, at least not yet.

Respectfully,

Inez Petersen

WSBA #46213

From: Gail McGaffick [redacted]
Sent: Saturday, January 5, 2019 7:59 AM
To: Mandatory Malpractice Insurance Task Force
Subject: feedback on your report

Hello,

As a non-practicing attorney, I am concerned that I would somehow be required to purchase malpractice issue. The exemptions that you list don't include me. I'm not a government lawyer or in-house counsel. I'm a lobbyist, who maintains my bar license. I don't practice law. And in fact, when I explored malpractice insurance, I learned it wouldn't fit for lobbying because it's not practicing law.

If I don't practice law then I don't have to have a trust account, and therefore I shouldn't have to have malpractice insurance.

The broader question though is whether WSBA should require malpractice insurance. I favor the approach in the December bar news where practicing attorneys either have it or disclose to their clients that the don't. That requirement, by itself, would convince some attorneys to purchase it. (Inez Petersen, pages 14 and 15)

As someone who has worked in the legislative arena for most of her career, I note that requiring malpractice insurance is only being done in a small number of states. There's hardly a trend.

I write these comments understanding that it is very unfortunate when anyone suffers financial harm as a result of what a lawyer did or didn't do.

Another alternative, thinking out of the box, is to require practicing attorneys who don't have malpractice to take a course on preventing malpractice as part of their CLE's.

Perhaps because I work in the legislative arena, I always have to think about possible compromises or mid-steps that get each party something of what they want. As noted in the Task Force report, the comment was made about moving forward "boldly." "Boldly" never succeeds in Olympia where you have a truly democratic process.

Gail

Gail Toraason McGaffick, JD
[redacted]

From: Steve Strong
To: Mandatory Malpractice Insurance Task Force
Subject: mandatory malpractice insurance
Date: Wednesday, January 23, 2019 6:22:36 PM

I have a couple of questions. (1) Has the task force ascertained that malpractice insurance is always available? Several years ago this firm (and another I heard of) were denied insurance by all local insurance companies due to participation in employment class actions (without ever having a claim). We had to go to an out-of-state company to get insurance and we don't know that it will always be available. (2) Should the pro bono exceptions be so narrow that a person like my retired partner, who represents a neighborhood community group in a land use appeal, would have to spend a lot on insurance to do that kind of work. When I retire I might well have occasion to advise an arts organization with which I may be a volunteer. Would I have to spend a lot of money on insurance to give such an organization free advice (on legal issues or contracts (without being in a large firm that participates in groups like Lawyers Volunteers for the Arts, which advises some selected arts groups)? Steve Strong

From: Robert L Hayes
To: Mandatory Malpractice Insurance Task Force
Subject: INQUIRY
Date: Thursday, January 24, 2019 10:22:39 AM

I am a member of the Washington State Bar, and I have no malpractice insurance. What are the current exemptions for the proposal by the task force? Robert Hayes WSBA# 21239

From:	Mandatory Malpractice Insurance Task Force
To:	"Robert L Hayes"
Cc:	Mandatory Malpractice Insurance Task Force
Subject:	RE: INQUIRY
Date:	Thursday, January 24, 2019 2:20:13 PM
Attachments:	image001.png

Dear Mr. Hayes:

Thank you for submitting your question. The Task Force plans to address this in its final report to the Board of Governors, a draft of which is available in the December 19, 2018 meeting materials. You can find the proposed exemptions on page 761 of the draft report at https://www.wsba.org/docs/default-source/legal-community/committees/mandatory-malpractice-insurance-task-force/december-19-2018-meeting-materials.pdf?sfvrsn=396a00f1_2.

More information is also available on our website at https://www.wsba.org/Legal-Community/Committees-Boards-and-Other-Groups/mandatory-malpractice-insurance-task-force.

Best regards,

Rachel Konkler | Legal Administrative Assistant | Office of Disciplinary Counsel
Washington State Bar Association | ☎ 206.733.5904 | rachelk@wsba.org
1325 Fourth Avenue, Suite 600 | Seattle, WA 98101-2539 | www.wsba.org

From: Robert L Hayes <rlh2722206@aol.com>
Sent: Thursday, January 24, 2019 10:23 AM
To: Mandatory Malpractice Insurance Task Force <insurancetaskforce@wsba.org>
Subject: INQUIRY

I am a member of the Washington State Bar, and I have no malpractice insurance. What are the current exemptions for the proposal by the task force? Robert Hayes WSBA# 21239

From:	Lynch, Bill
To:	Mandatory Malpractice Insurance Task Force
Subject:	Request for clarification of scope of exemption for “corporate lawyers” or “private company lawyers” from requirement for malpractice insurance
Date:	Thursday, January 24, 2019 11:09:53 AM

To clarify the scope of the exemption for “corporate lawyers” or “private company lawyers,” the exemption should apply to independent contractors (as well as employees), at least if the independent contractors are either:

(A) engaged by the client that has annual revenues of more than $1 million (or other threshold indicating that the client does not need “consumer protections” and should be entitled to exercise its own judgment in the selection of outside counsel), or

(B) engaged by the client as the result of an internal process requiring approval by another attorney who is a full-time employee of the client (again, indicating that the client should be entitled to exercise its own judgment in the selection of outside counsel).

Please let me know if you have any questions. Thank you.

Bill Lynch, *WSBA # 11428*
t [redacted] **| c** (206) 550-2124
BECU TFC North | Mailstop 1048-2 | 12720 Gateway Dr. Tukwila, WA 98168

From: [redacted]
To: Mandatory Malpractice Insurance Task Force; bill@wdpickett-law.com; rajeev@northwhatcomlaw.com; BHMTollefson@outlook.com; athan.papailiou@pacificalawgroup.com; rknight@smithalling.com; alecstephensjr@gmail.com
Subject: Mandatory Malpractice Insurance
Date: Thursday, January 24, 2019 8:21:50 PM

Dear Sir or Madam:

I've read with interest articles regarding the likelihood that the WSBA will adopt some form of mandatory malpractice insurance for its members.

I've also read of the possibility of exempting "retired" attorneys from this burden; which is, of course, entirely logical.

However, I've read less about the fate of "licensed but not actively practicing" attorneys, such as myself.

For decades I've been a proud member of the WSBA. However, I've worked exclusively in non-legal areas for many years. Thus, even though I'm in no way "retired," there would be absolutely no reason for me to pay for malpractice insurance.

As a result, I---and I suspect a great many WSBA members---would simply let our dues lapse and resign our membership if we were required to pay for unnecessary insurance.

This would have several consequences, all of which are unfortunate:

1: It would decrease revenue to the WSBA via annual member fees.

2: It would decrease revenue to the WSBA via CLE fees.

3: It would reduce the diversity of WSBA members.

4: Finally, it would eliminate a significant group of attorneys who had been proud to call themselves members of the WSBA. Members who had heretofore shown fellow Washington citizens the utility of WSBA membership without necessarily actively practicing law.

It seems extraordinarily sensible to adopt a format analogous to what is required for IOLTA accounts: If an attorney is not actively practicing, then he or she does not need to maintain an account.

Thus, I strongly suggest that---in addition to providing an exemption for "retired" attorneys---that an exemption be made for licensed members who are not actively practicing law.

Otherwise, there will be an unexpected, unnecessary, and wholly preventable exodus of members from our fine organization.

Very truly yours,
Harold White
Silverdale, WA
WSBA 14133

From:	Rachel Konkler
To:	Alana Smith; Annie Yu; Bobby Henry; Brad Ogura; Brooke Pinkham; Christy Carpenter; Dan Bridges; Dan Bridges; Doug Ende; Evan McCauley (evanm@jdsalaw.com); Gretchen Gale; Hon. Stan Bastian; Hugh Spitzer; Jean McElroy; John Bachofner; Kara Masters; Lucy Isaki; Mark Johnson; P.J. Grabicki; Rachel Konkler; Rob Karl; Sara Niegowski; Stephanie Wilson; Suzanne Pierce; Thea Jennings; Todd Startzel
Subject:	FW: Comment Letter on Mandatory Insurance Proposal
Date:	Wednesday, January 30, 2019 1:37:03 PM

From: John Myer <john@myercorplaw.com>
Sent: Monday, January 28, 2019 11:13 AM
To: Hugh D. Spitzer <spith@uw.edu>
Cc: Joe Stansell <joe@stansell.law>; Mark Beatty <mark@markbeatty.law>
Subject: FW: Comment Letter on Mandatory Insurance Proposal

Hugh,

I corresponded with Joe Stansell over the weekend. With his permission, I have attached his original inquiry email addressed to Mark Beatty and me. Joe is a securities lawyer and a member of the WSBA's Securities Committee. His practice includes advising startups on angel and venture capital financing. His malpractice carrier abruptly refused to renew his coverage. As you'll read below, he has had trouble finding a carrier to replace this coverage on similar terms.

Unlike my practice, Joe isn't advising on hedge funds or EB-5 special purpose vehicles. Startup finance is the very bread and butter of what small securities law firms advise upon. Further, none of the issues that the many securities law insurance application supplements that I've filled out in my career, are impacted by Joe's practice. As I've written to you previously, unlike in public offerings, private placements rarely, if ever, involve legal opinions, and certainly no tax opinions. Also, as I noted previously, legal due diligence on the part of issuer's counsel is limited in private placements. In short, it makes little sense given what I've seen for Joe's insurer to drop him.

I know you've been assured by Chris Newbold and other insurance industry execs that the market is relatively easy to access and that it functions smoothly. It may look that way to Chris and his colleagues, but to us transactional securities lawyers trying to buy insurance, it looks nothing like that. Please consider that:

1. There is no uniform securities supplement we can fill out and then have our broker send to each insurer. For each application, we need to fill out a new supplement. Once you get good at this, it takes a full day to complete one. This is an unreasonable burden to put on a solo-practitioner. It means that in practice transactional securities lawyers complete one application at a time, and if we get a quote, we tend to take it. It also means that we never get a solid view of the market and remain in the dark as to whether we are getting a bargain or being raked over the coals.
2. The brokers we talk to tell us that the carriers willing to cover transactional securities lawyers are constantly shifting and sometimes the market goes soft altogether. That is why I didn't have coverage for the past seven year and only just now bought a policy.
3. Because the market for coverage for transactional securities lawyers is soft, it is also inefficient. As Joe wrote below, the new carrier his broker identified is asking that Joe

pay more than double what he was previously charged.

4. If this is what we transactional securities lawyers face, there must be other practice areas for which the insurance market is soft. As I mentioned in my earlier email, my agent, Laura Lilly, told me that she was having problems getting policies for solo-practitioners in trust and estates as well as patent law. I strongly suspect that the issue with solo-practitioners not buying coverage has as much or more to do with the market than with the applicants themselves. I cannot emphasize enough that the task force would be remiss in its efforts if it were not to get to the bottom of this issue.

Regards,

John A. Myer

Myer Law PLLC
1420 Fifth Avenue, Suite 2200
Seattle, WA 98101-1346
[redacted] **(voice)**
(SMS)

From: Joe Stansell <joe@stansell.law>
Sent: Sunday, January 27, 2019 11:39 AM
To: Mark Beatty <mark@markbeatty.law>; John Myer <john@myercorplaw.com>
Subject: Re: Comment Letter on Mandatory Insurance Proposal

Gents, due to my work as a sole practitioner focusing on start-up clients' fundraising needs, my insurance company recently informed me that it will not be renewing my policy and my broker just provided a quote form an alternative provider that will more than double the cost of the ridiculous amount I have been paying.

I'm wondering if either of you know the current status of the mandatory insurance coverage proposal and, even more so, what alternatives there might be for sole practitioners like us?

Thanks for any insights you can provide.

~joe

From: doug hinton
To: Mandatory Malpractice Insurance Task Force
Subject: Fwd: Mandatory malpractice insurance - exempt non-practicing
Date: Tuesday, January 29, 2019 7:26:04 PM

> I was informed I can still submit comments, so I hope those with decision-making authority read this and maybe the bar leadership should read it anyway.
>
> Please be smart and fair with this. People not practicing law should not have to pay thousands for malpractice insurance.
>
> The Bar seems to have a very constrained view of their members. You do know there are many, many licensed attorneys who are not working as attorneys, don't you? Some by choice, many not. They maintain their license because it was hard to earn and they think they may practice at some point. Going inactive and then active again is a hassle and may not happen quick enough for a particular job. Some comments submitted reflect this, yet you keep referring only to 'retired' or not active, as if you presume every licensed attorney practiced law, but a few are now retired or have changed to inactive status. You seem to mention those not practicing almost as an afterthought when discussing exemptions.
>
> Please understand that not everyone who gets licensed gets a job as an attorney or opens a practice and then progresses through a legal career. Many never practice or only do intermittently through short term gigs or attempts at running a practice. I hope the Bar is not oblivious to this. Please tell me you have paid at least some attention over the last 10 years to the multitudes of unemployed and under-employed JDs. Some were in this situation even before the Great Recession, and more so during and after. Some eventually practice, but if you don't get on that ship in the first few years you are unlikely to ever have a career as an attorney. Some are angry at law schools for not making clear the overabundance of JDs in the legal market. Regardless of whether one practiced before or may practice later, if they are not practicing presently, it is unfair and nonsensical to force them to buy insurance.
>
> Not understanding these facts means you don't understand a significant portion of your membership or the realities of the job market in the real world. Not understanding this means you are not serving the needs of this portion of your membership. Many of these members probably feel disengaged from the profession and may not fully admit their situation. They may not even be aware of this proposal or how it could affect them.
>
> Someone working as a bookkeeper or barista should not be placed in the same box as a practicing attorney with clients, or a job as a lawyer. We do not have clients. We are not practicing law. Who would you be protecting, and from what? It is different to require this insurance if one were to take on clients or get an attorney job.
>
> There are other good categories for exemption which you seem to be considering, such as some pro bono situations. I won't speak to these.
>
> Bottom line: You must exempt those not currently practicing law from this requirement. I know that is your tentative approach but you should make it more clear and solid, and acknowledge the many who are 'active' yet not practicing for a variety of reasons.
>
> Thank you
>
>
>
>
>
> Sent from my iPad