

Mandatory Malpractice Insurance Task Force

Interim Report to Board of Governors

July 10, 2018

On September 28, 2017, the Board of Governors established the Mandatory Malpractice Insurance Task Force and issued a Charter to guide the Task Force's work. The Charter asked the Task Force to focus on the nature and the consequences of uninsured attorneys, to examine current mandatory malpractice insurance systems, and to gather information and comments from WSBA members and other interested parties. The Charter also charged the Task Force with determining whether to recommend mandatory malpractice insurance in Washington, developing a model that might work best in this state, and then drafting rules to implement that model.

The Task Force has 18 members, including attorneys, a federal judge, a limited license legal technician (LLLT), industry professionals, and members of the public. The list of members is attached. We were asked to provide an interim report at the July 2018 Board of Governors meeting, and the Charter directs submittal of a final report by January 2019. The group has met monthly since last January. This Interim Report summarizes:

- Key information acquired by the Task Force thus far,
- Concerns raised by the membership in comments to the Task Force,
- Possible regulatory approaches, including a free market model the Task Force is tentatively considering recommending, and
- The need for certain categories of exemptions.

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.

This Interim Report describes the Task Force's tentative conclusion that:

- Malpractice insurance should be mandated for Washington-licensed lawyers, with specified exemptions;
- Several categories of attorneys should be exempt. In Oregon, for example, exempt groups include, among others: government attorneys; in-house private company lawyers; attorneys providing services through non-profit entities, including pro bono services; retired attorneys; full-time arbitrators; and judges and law clerks;
- Minimum coverage levels should be mandated, *e.g.*, \$100K/\$300K, \$250K/\$250K, \$250K/\$500K, or \$500K/\$500K;
- Attorneys should be required to obtain minimum levels of professional liability insurance in the private marketplace, rather than establishing a "captive" single-carrier system. And the basic requirements should be simple and straightforward, avoiding multiple requirements that would interfere with the insurance market's ability to offer flexible and affordable policies.

The balance of this interim report describes our findings thus far, the concerns we have heard from WSBA members, a description of the options we considered, and more detail on where the Task Force is headed. With an approach tentatively identified, the next steps for the Task Force include developing the details of a practicable free market approach for Washington State and exploring in detail what potential limits, coverage levels, other requirements and exemptions should be included—keeping in mind the concerns raised by WSBA membership. We continue to receive useful technical assistance from ALPS, the WSBA's endorsed professional liability insurance provider, as well as from mandatory program administrators in Oregon and Idaho.

The Task Force will continue to meet in the coming months to discuss modeling and to draft its proposal, including any necessary rule changes, for the Board's consideration. We expect to publish an article in the September issue of *NWLawyer* updating the membership on our work and our preliminary recommendations, with the intent of soliciting additional member comments. After considering member suggestions, the Task Force will finalize its proposal for submission to the Board by January 2019.

If the Board of Governors desires further information on the specifics of the Task Force's work, the Board is encouraged to review the Task Force's detailed meeting minutes and meeting materials available at <https://www.wsba.org/insurance-task-force>.

TASK FORCE APPROACH TO INFORMATION-GATHERING

Since its first meeting in January 2018, the WSBA Mandatory Malpractice Insurance Task Force has focused on gathering the information necessary to make a considered recommendation on whether professional liability insurance should be required in some form for Washington lawyers. During this information-gathering phase, the Task Force obtained information from the following sources, among others:

- WSBA data on Washington attorneys, their practice areas, how they practice (*e.g.*, solo/small firm/large firm/in-house), malpractice insurance levels, WSBA disciplinary information, and information about the Client Protection Fund;
- Jurisdictions with mandatory malpractice insurance programs in place or under consideration (Oregon and Idaho mandate malpractice insurance, and Nevada and California are considering doing so);
- A jurisdiction (Illinois) that implemented a proactive management-based regulation (PMBR) model;
- A law professor regarding empirical research on lawyers who go uninsured, other academic studies of the subject, and an ABA study of malpractice insurance (*2015 ABA Profile on Legal Malpractice Claims*);
- Experienced insurance industry professionals, including insurance brokers and underwriters;
- A legal malpractice plaintiff's lawyer;
- WSBA members through comments submitted to the Task Force.

KEY FINDINGS

What follows is the most significant data acquired by the Task Force regarding problems associated with lawyers who go uninsured, characteristics of malpractice insurance, and other relevant information.

1. Approximately 32,000 lawyers have active Washington licenses to practice law.
2. Over the last three reporting years, 14% of Washington lawyers in private practice have consistently reported being uninsured. The vast majority of Washington attorneys representing private clients carry malpractice insurance. (This excludes the 39% of licensed Washington lawyers who annually report that they are not in private practice. This excludes, for example, lawyers who work in public sector positions or in-house counsel jobs—attorneys who typically do not carry professional liability insurance.)
3. Lawyers who practice in solo or small firms are most likely to be uninsured. According to 2017 voluntary demographic information reported by Washington lawyers as part of the annual licensing process, approximately 28% of solo practitioners reported being uninsured.

4. Solo and small firm practitioners represent a disproportionate share of the malpractice claims. According to the *2015 ABA Profile on Legal Malpractice Claims (2015 ABA Profile)*, claims against lawyers in firms of five or fewer lawyers represented over 65% of claims during the period of 2012-2015. In Oregon, that state's Professional Liability Fund in 2015 paid out \$6.52 million in claims against solo practitioners, only \$1.64 million in claims against lawyers in small firms (2-5 lawyers), and \$1.71 million in claims against attorneys in large firms (15 or more).
5. According to the *2015 ABA Profile* and information received from ALPS, the practice areas of personal injury, real estate, family law, estate planning, certain corporate practices, and collection/bankruptcy have the highest incidences of malpractice claims. Not surprisingly, insurance premiums tend to be higher in those practice areas.
6. Most attorney misconduct grievances and disciplinary actions involve solo and small firm practitioners.
7. Malpractice plaintiffs' lawyers report numerous instances of worthy claims that they must reject for representation because the defendant lawyer is uninsured, making a recovery much less likely.
8. Over the last five years, WSBA Client Protection Fund application statistics indicate that 11% of applications were denied because they described instances of malpractice rather than theft or dishonest conduct. (The Client Protection Fund compensates clients only for lawyer theft or dishonest activities.)
9. According to an ABA study, 89.1% of national malpractice claims are resolved for less than \$100,000 (including claims payments and expenses). 95.2% of malpractice claims are resolved for less than \$250,000. ALPS reports that based on its experience, over the past 10 years in Washington State, about half of all its claims were resolved without payment, and 97% of its closed claims were resolved for less than \$250,000, including defense costs; where payments were made, its average loss payment was \$60,000, and average loss expenses were about \$20,000.
10. Malpractice insurance premiums vary significantly based on many factors, including among others: years in practice, area of practice, size and practice mix of a firm, attorney history with malpractice claims and disciplinary actions, state characteristics, and whether lawyers are practicing full-time or part-time.
11. In Idaho, where mandatory malpractice began this year (2018), the average premium was approximately \$1,200 for ALPS policies newly issued to solo practitioners (the primary demographic of uninsured lawyers). That amount will likely increase annually by about 15% as the lawyer's length of exposure grows year-over-year until they are fully matured after 6 years. Average premium number, however, can vary broadly based on the firm's principal area(s) of practice.
12. New lawyers pay noticeably lower malpractice insurance premiums than more experienced lawyers. This is because virtually all malpractice insurance policies are written on a "claims made" basis, meaning that if a claim is filed against an insured

attorney today for an event that occurred two years ago, that lawyer's *current* insurer covers the claim, whether or not that insurer provided a policy when the claimed event occurred. Insurers set premiums to provide resources to pay claims on incidents that happened in the past. A first-year lawyer was not practicing in the past, and thus represents a lower risk to insurers. New attorneys can expect their premiums to gradually increase by an average of 15% year-over-year for the first five years after they start practice, and then those premiums level off.

13. Some malpractice insurance policies include a free extended reporting period for claims, or "tail" coverage for attorneys who have been with a specific insurance provider for a period of consecutive years (usually five) and retire. Tail coverage can be expensive (an unlimited tail can be up to 300% of the expiring premium) for retiring lawyers who do not qualify for a free extended reporting period endorsement or who do not have a relatively long history with a particular carrier.
14. In Washington State, approximately 56% of lawyers connect with their pro bono clients through legal assistance providers, other non-profit organizations, or bar groups. Organized *pro bono* programs provided through nonprofit organizations frequently provide malpractice insurance for participating attorneys.
15. There is a disparity in Washington's regulatory/financial responsibility requirements for different legal license types (LLTs/LPOs/lawyers). Court rules require that LLTs and LPOs demonstrate financial responsibility in order to be licensed, but lawyers do not have a similar requirement.
16. Virtually all physicians carry malpractice insurance because it is widely required by hospitals as a condition of admitting privileges.
17. On average, lawyers are practicing longer, and once lawyers reach the age of 71, the number in private practice who carry malpractice insurance drops precipitously.
18. Oregon-licensed lawyers with offices in that state must belong to the Oregon State Bar's Professional Liability Fund, paying a flat assessment (premium) of \$3,500 per year for coverage of \$300K/\$300K with a \$50,000 claims expense allowance and no deductible. The Oregon program was established in 1977, when lawyers were having difficulties obtaining malpractice insurance. The Oregon program provides a number of robust loss prevention programs and continues to be viewed favorably among attorneys in that state.
19. Idaho's malpractice insurance mandate began in 2018, based on a free-market model and requiring minimum coverage of \$100K/\$300K. Thus far, no Idaho attorneys have reported an inability to obtain the required insurance.
20. The State Bar of Nevada last month submitted a proposal to that state's supreme court recommending that Nevada attorneys be required to obtain \$250K/\$250K in coverage on the private market.
21. The vast majority of common law countries outside the U.S. (as well as civil law countries) require some form of malpractice insurance for lawyers in private practice.

For example, the minimum coverage requirements in most Australian states is either AUS\$1.5 million or AUS\$2 million (US\$1.11 million or US\$1.48 million); in British Columbia the required minimum is CDN\$1 million (US\$760,000); in Singapore the requirement is S\$1 million (US\$730,000); and for solicitors in England and Wales the minimum is £2 million (US\$2,628,000).

EXPRESSED CONCERNS FROM MEMBERSHIP

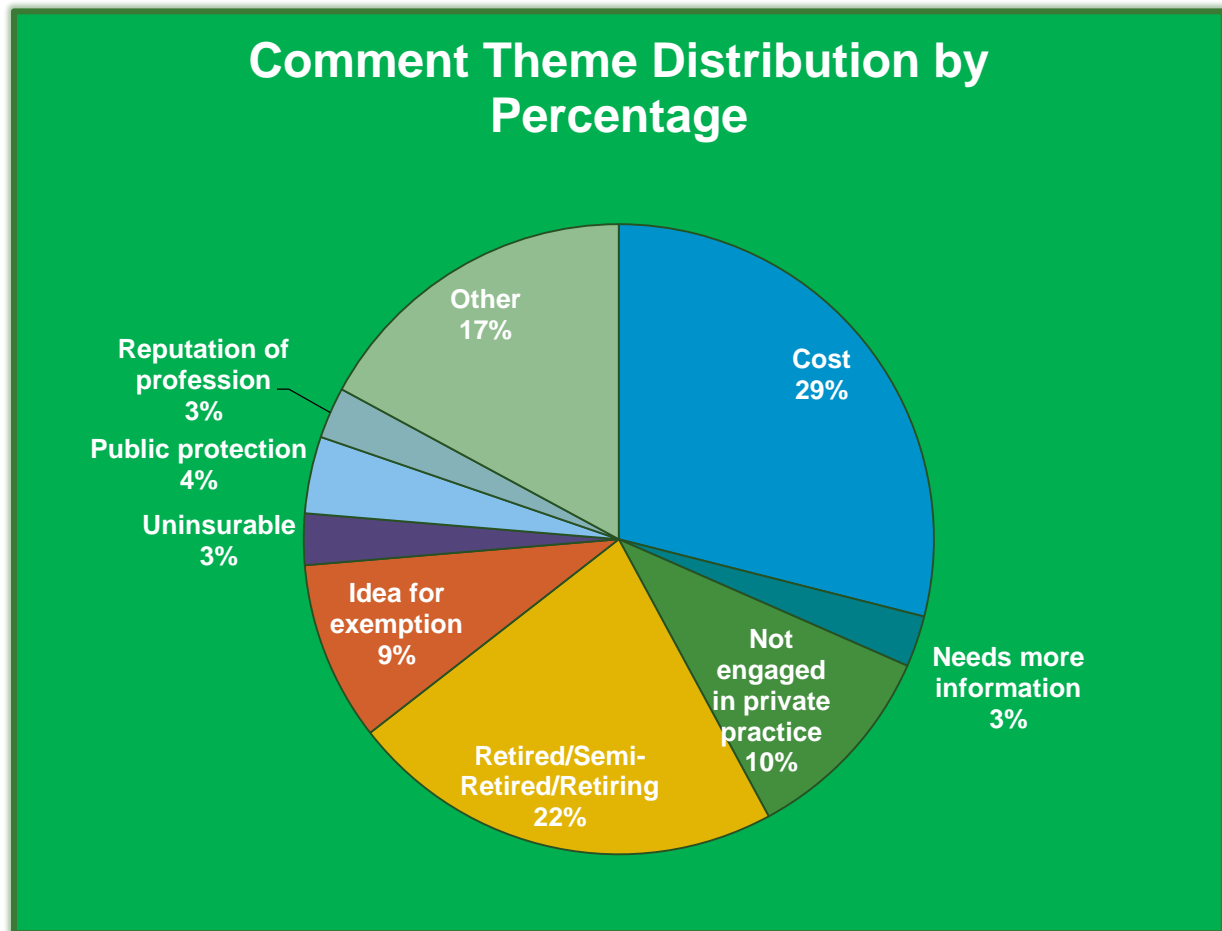
A number of concerns have been expressed by some WSBA members regarding the concept of requiring attorney malpractice insurance. The Task Force compiled comments primarily provided through letters and emails to the Task Force and letters to *NWLawyer*. As of June, 2018, 69 comments were received. The bulk of the comments expressed one or another of the following:

1. A concern about perceived prohibitive costs for insurance;
2. Concerns that retired/semi-retired/retiring attorneys will no longer be able to practice;
3. The desire to make malpractice insurance requirements inapplicable to lawyers not engaged in private practice (*e.g.*, government lawyers, in-house counsel, non-profit legal assistance or defense counsel);
4. Possible unfairness of requiring malpractice insurance for lawyers (often retired/semi-retired/retiring lawyers) who provide mainly pro bono services;
5. The perception of uninsurability (at reasonable cost) of attorneys in certain specialties, or attorneys who practice solely before specialized non-Washington State courts.
6. Ideas for exemption – commentator suggested one or more specific exemptions;
7. Needs more information – commentator expressed a need for more information;
8. Licensed but not actively practicing – commentator suggested insurance not necessary;
9. Public protection – commenter raised issues of public protection;
10. Reputation of the profession – commentator noted possible impact of imposing malpractice insurance on the public’s perception of the profession;
11. Retired/semi-retired/retiring – commentator noted possible impact of imposing malpractice insurance on retirees;
12. Uninsurable – commentator indicated he or she is unable to obtain insurance;
13. Malpractice insurance increases meritless claims against lawyers;
14. Malpractice insurance encourages sloppy practice because it reduces risk; and
15. The WSBA should primarily serve lawyers, not the public.

The vast majority of comments came from solo practitioners and small firm practitioners, many of whom do not currently carry professional liability insurance. 47% of the comments thus far

expressed opposition to an insurance mandate. 45% did not indicate support or opposition, and many of those suggested exemption categories, such as exemptions for government or corporate lawyers, exemptions for *pro bono* activities, or exemptions for semi-retired lawyers who engage in a limited private practice for family and friends. 8% of responders expressed support for mandating insurance.

The following chart displays the variety of concerns expressed.



TENTATIVE CONCLUSIONS AND POTENTIAL APPROACHES

After accumulating a considerable amount of data and other information, and after hearing from other states, from bar regulators, from industry professionals, and from attorneys, the Task Force reached a consensus that uninsured lawyers pose a distinct risk to their clients and themselves.

While it may be appropriate for attorneys to evaluate and assume personal risks created by lack of professional liability insurance, we concluded that it is simply not fair for the clients. Clients of uninsured lawyers often have a difficult time obtaining compensation from those attorneys after a malpractice event, and an even more difficult time finding legal representation for quite

legitimate claims against those uninsured lawyers—malpractice plaintiff lawyers simply cannot afford to handle those claims, and the WSBA’s Client Protection Fund is precluded from making payments based on malpractice.

In the Task Force’s view, the WSBA has a duty to protect the public and maintain the integrity of the profession. Lawyers make mistakes. A license to practice law is a privilege, and no lawyer should be immune from those mistakes.

The Task Force considered a number of possible regulatory approaches for possible recommendation to the WSBA Board of Governors. These are listed below, together with a short list of considerations relevant to each approach.

1. Do nothing and maintain the status quo

- No resource cost or fiscal impact on WSBA
- Does not address the identified problems for clients in any way

2. Implement a Proactive Management-Based Regulation model (e.g., Illinois “PMBR” model, which increases training requirements for uninsured lawyers, particularly in practice management and bookkeeping).

- Directly addresses issues of competence/practice management but not financial responsibility for professional errors
- Practical effect of PMBR model in Illinois not yet known
- May reduce attorney errors, but does not provide protection to clients when claims do arise
- May encourage acquisition of insurance, but insufficient evidence at this time

3. Implement more extensive malpractice insurance disclosure requirements (e.g., South Dakota model, which requires large-print notice of lack of malpractice insurance on every uninsured lawyer’s stationery).

- Low cost to administer
- Impact on conduct appears significant in South Dakota, although the potential impact in Washington is unknown
- Appears to encourage acquisition of insurance
- Does not address financial responsibility when professional errors occur

4. Combine PMBR with more extensive disclosure requirements

(Combine 2 and 3 above, *i.e.*, require uninsured lawyers to both take annual courses on risk reduction, practice management and bookkeeping and disclose lack of insurance).

- Double requirement of extra mandatory training courses and vivid disclosure to clients of lack of insurance might cause many uninsured attorneys to purchase coverage
- Does not address financial responsibility when professional errors occur

5. Implement mandatory malpractice insurance through a free market model (e.g., Idaho model).

- Provides diverse coverage options to members
- Free market allocates risks and costs based on practice character, claims history, and other underwriting standards
- Highly competitive market provides reasonable cost and different coverage, exclusions, and deductibles (Idaho reports no lawyers unable to obtain insurance)
- Modest operating costs
- Guarantees available coverage for vast majority of client claims
- Adverse reaction by members who feel "forced" to purchase insurance that they don't want.

6. Implement professional liability fund model (e.g., Oregon model, requiring all private practice lawyers with a primary office in Oregon to participate in the Bar-operated Professional Liability Fund, with coverage of all members).

- Coverage available for all members
- Robust practice management, member support, and claims support systems
- Relatively high annual premium (in current market) and high operating costs
- Large staff required to administer and significant fiscal impact to implement
- Choice restricted to single provider
- Spreads risks across all classes of lawyers, with internal "cross-subsidization"

7. Consider other approaches (e.g., allowing letters of credit or surety bonds for uninsured lawyers)

- Client ability to obtain sufficient recovery on surety bonds is unclear
- Letters of credit are as expensive or more expensive than insurance premiums, and would not typically provide defense costs for covered attorneys

As noted at the beginning of this Interim Report, the Task Force has tentatively concluded that it should recommend the following program to the Board of Governors:

- Malpractice insurance should be mandated for Washington-licensed lawyers, with certain exceptions. All attorneys subject to the requirement would be required to annually certify that they carry, and will continue to carry, professional liability insurance at or above the required minimum level.
- Minimum coverage levels should be mandated, *e.g.*, \$100K/\$300K, \$250K/\$250K, \$250K/\$500K, or \$500K/\$500K;
- Coverage should be “continuing,” meaning continued coverage from the initial coverage date, and policies should not be permitted that exclude attorney acts prior to the current year. However, because of expense constraints, lawyers obtaining malpractice insurance policies for the first time should not be required to obtain insurance that covers their acts prior to the coverage date.
- Attorneys should be required to obtain minimum levels of professional liability insurance in the private marketplace, rather than establishing a “captive” single-carrier system. And the basic requirements should be simple and straightforward, avoiding multiple requirements that would interfere with the insurance market’s ability to offer flexible and affordable policies.
- Several categories of attorneys should be exempt. In Oregon, for example, exempt groups include, among others: government attorneys, in-house private company lawyers, attorneys providing services through nonprofit entities, including pro bono services, retired attorneys, full-time arbitrators, and judges and law clerks.

NEXT STEPS FOR THE MANDATORY MALPRACTICE INSURANCE TASK FORCE

The Task Force consensus described above is tentative, and based on the information we have obtained thus far and the Task Force’s consideration of that information. In the coming months, the Task Force will focus its efforts on:

- Considering feedback from the Board of Governors;
- Ramping up information efforts among WSBA members, and obtaining and considering additional comments received;
- Detailing the recommended malpractice insurance mandate, including the specific required coverage minimums;
- Identifying in detail the recommended exemptions from the professional liability insurance requirement; and
- Drafting a proposed Court Rule for the Board of Governor’s consideration

The Task Force has every expectation that it will be able to provide a final report to the Board of Governors by January 2019, as specified in the Charter. We look forward the Board’s questions and comments regarding this interim report.

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