

MANDATORY MALPRACTICE INSURANCE TASK FORCE

MEETING MINUTES

May 23, 2018

Members present were Chair Hugh Spitzer, John Bachofner (by phone), Stan Bastian (by phone), Dan Bridges, Christy Carpenter, P.J. Grabicki, Lucy Isaki, Mark Johnson (by phone), Kara Masters (by phone), Evan McCauley (by phone), Brad Ogura, Suzanne Pierce, Todd Startzel, and Stephanie Wilson (by phone). Gretchen Gale, Rob Karl, Brooke Pinkham, and Annie Yu were not in attendance.

Also present were Doug Ende (WSBA Staff Liaison), Thea Jennings (Office of Disciplinary Counsel Disciplinary Program Administrator), Rachel Konkler (Office of Disciplinary Counsel Legal Administrative Assistant), Sara Niegowski (WSBA Chief Communications and Outreach Officer), and William D. Pickett (WSBA President).

The meeting was called to order at 1:02 p.m.

A. MINUTES

The minutes of the April 25, 2018 meeting were approved.

B. DISCUSSION OF DRAFT PRELIMINARY BACKGROUND INFORMATION AND PRELIMINARY DECISION AGENDA

The Task Force reviewed the draft *Preliminary Background Information and Preliminary Decision Agenda*, which was provided with the meeting materials, in anticipation of providing an interim report to the WSBA Board of Governors in July 2018. The draft lists the key information that the Task Force has gathered so far regarding the problem of uninsured lawyers, expressed concerns from the membership regarding the concept of mandatory malpractice insurance, and the Task Force's potential approaches to the problem. The members discussed what information, concerns, and approaches they would add to the draft *Preliminary Background Information and Preliminary Decision Agenda*.

1. Key Information Discussion

First, the Task Force discussed the key information demonstrating problems arising from lawyers who go uninsured. Upon reviewing this key information, some Task Force members pointed out that it may be difficult for lawyers with claims history to get insurance, and this must be considered as they evaluate potential mandatory malpractice insurance recommendations. Additionally, some Task Force members addressed another factor in the problem of uninsured lawyers: the current demographics of the bar, which demonstrate that



lawyers are aging and practicing longer. The current demographics are being considered as the Task Force decides how best to protect clients in the event of an error.

In its discussion, the Task Force identified what information it did not investigate, including geographic differences among uninsured private practitioners, whether mandatory malpractice insurance reduces the number of grievances filed, and whether malpractice claims filed have any relationship to the incidence of discipline against a lawyer.

2. Expressed Concerns from the Membership

The Task Force also discussed the concerns expressed by the WSBA membership, via email comments and phone calls, regarding the idea of implementing mandatory malpractice insurance. The members agreed that they will continue to request and gather input from the WSBA membership before they submit an interim report to the Board of Governors.

3. Potential Approaches

The potential regulatory approaches that the Task Force is considering in order to make a recommendation to the WSBA Board of Governors are as follows:

1. Do nothing and maintain the status quo;
2. Implement a Proactive Management-Based Regulation model;
3. Implement more extensive malpractice insurance disclosure requirements;
4. Combine Proactive Management-Based Regulation with more extensive disclosure requirements;
5. Implement mandatory malpractice insurance through a free market model (e.g., Idaho model); and
6. Implement a professional liability fund model (e.g., Oregon model).

Following the discussion of potential approaches to the mandatory malpractice insurance problem, the Task Force had a general discussion of which approaches it would likely recommend. The consensus was that the Task Force would likely recommend mandatory malpractice insurance be implemented, with exemptions, through a free market model. A second option that gained some support was to implement proactive management-based regulation with more extensive disclosure requirements, though a clear majority favored implementation of a free market model.

As the Task Force deliberated over its potential recommendation, it noted that now is the time to move boldly and not to shy away from a difficult recommendation. The Task Force stressed that the WSBA has a duty to protect the public and maintain the integrity of the profession. Consequently, the Task Force must address the risk of injury to the public that arises from uninsured lawyers. It noted that having a license to practice law is a privilege and that no lawyer is immune from mistake. The members emphasized that the goal of this Task Force is to ensure that clients have recompense in the event of such 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.

C. PROPOSED MODELING

The Task Force then had a preliminary discussion regarding the elements of a possible free market model and what potential limits, requirements, and exemptions any model should include. The Chair requested that staff reach out to insurance industry professionals, specifically to ALPS, to develop a proposed model for mandatory malpractice insurance. Generally speaking, the Task Force proposed obtaining additional information from ALPS based on the assumption of a required \$300,000 per claim/\$300,000 aggregate policy. From that base policy, the Task Force expressed an interest in having ALPS provide a range of likely premiums given several variables. The Task Force would further like guidance regarding the feasibility of requiring tails for lawyers who retire and what policy options might be available for semi-retired practitioners.

The Task Force intends to include exemptions if a free market mandatory malpractice insurance model is recommended. Several WSBA members who provided comment to the Task Force suggested ideas for exemptions. The exemptions would likely follow those in the Oregon Professional Liability Fund model.

The Task Force expressed concern regarding how to resolve the issue of uninsured retired/semi-retired lawyers who maintain their licenses for the sole purpose of offering pro bono services. The Task Force noted that those practicing through a qualified legal service provider would be covered by the organization through which they volunteer. However, it is unclear to what extent lawyers in Washington are providing pro bono services through other means, such as personal or client referrals. The Task Force requested additional information about how pro bono services are being delivered throughout the state.

D. MEMBER FEEDBACK

Regarding WSBA member feedback, the Task Force remains committed to ensuring that the membership is informed of the Task Force's ongoing work and that WSBA members continue to have opportunities to voice their opinions and concerns. The Task Force will prepare an article for the September issue of *NWLawyer*. Chief Communications and Outreach Officer Sara Niegowski also discussed approaches for outreach to uninsured lawyers in the state to determine what barriers to obtaining malpractice insurance they face.

E. NEXT STEPS

The Chair and staff will initiate a dialogue with ALPS to develop parameters for a potential free market insurance model. The Pro Bono and Public Service Committee will be contacted to determine how pro bono services are delivered throughout the state. The Task Force will continue to work on its recommendations for an interim report to the Board of Governors, and will continue to reach out to members for further feedback.

F. ADJOURNMENT

There being no further business, the meeting adjourned at 3:10 p.m.