

MANDATORY MALPRACTICE INSURANCE TASK FORCE

AGENDA

December 19, 2018

1:00 – 4:00 p.m.

[Conference Call: 1-866-577-9294](tel:1-866-577-9294); Code: 52824#

AGENDA

1. Preliminary Matters and Approval of November 28, 2018 minutes
2. Discussion of Revised Draft Final Report
3. Continue Discussion of Draft of Amended APR 26
4. Comments Received by the Task Force
5. Communication to WSBA Membership of Final Report

MEETING MATERIALS

- A. Draft November 28, 2018 minutes (pp. 715 – 718)
- B. Revised Draft of Final Report to the Board of Governors (pp. 719 – 766)
- C. Comments Submitted to the Task Force (provided to the Task Force separately)



A.

Draft November 28, 2018
Minutes

MANDATORY MALPRACTICE INSURANCE TASK FORCE

MEETING MINUTES

November 28, 2018

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

Also present were WSBA Governor Michael Cherry, Doug Ende (WSBA Staff Liaison and Chief Disciplinary Counsel), Thea Jennings (Office of Disciplinary Counsel Disciplinary Program Manager), Rachel Konkler (Office of Disciplinary Counsel Legal Administrative Assistant), Jean McElroy (WSBA Chief Regulatory Counsel), and WSBA member Inez Petersen (by phone).

The meeting was called to order at 1:05 p.m.

A. MINUTES

The minutes of the October 24, 2018 meeting were approved.

B. DISCUSSION OF DRAFT FINAL REPORT

The Task Force discussed and made revisions to its draft final report to the Board of Governors. The final report will be presented to the Board of Governors in March 2019. Among the suggested revisions to the final report included:

- Under the section *The Professional Liability Insurance Market and Malpractice Descriptions*, include data regarding the fact that lawyer malpractice claims peak in a lawyer's eighth to tenth year of practice;
- Under the section *The Professional Liability Insurance Market and Malpractice Descriptions*, include a description of what a typical malpractice insurance policy covers;
- Under the section *The Professional Liability Insurance Market and Malpractice Descriptions*, address concerns that mandatory malpractice insurance may affect insurance rates due to a bigger risk pool;
- Create a new section under *Key Findings* regarding the impact of uninsured lawyers on clients;



- Under the section *Recommendations*, make clear that a lawyer's employer may provide the insurance coverage, and that the firm need not purchase excess coverage for each lawyer;
- Under the section *Recommendations*, include more detailed explanations of the recommended exemptions;
- Under the section *Recommendations*, make clear that public defenders and civil legal aid lawyers will not be required to obtain individual insurance policies if they are covered by a nonprofit entity insurance policy, are government employees, or are subject to government indemnification; and
- Under the section *WSBA Member Concerns and Task Force Responses*, add an additional cost model of an experienced lawyer who leaves a large firm to start a solo practice.
- Add clarification about which research methods the Task Force used, or considered, during the information gathering process

The Task Force further discussed revisiting an exemption for lawyers who only represent family members, which the Task Force previously voted against recommending. Task Force member Rob Karl will review standard policies to determine whether they typically include such an exclusion to assist the Task Force in determining whether such an exemption is necessary.

The Task Force also discussed member concerns that malpractice insurance rates might increase if insurance is mandated. As the Task Force's insurance industry professional, Mr. Karl noted that based on his experience, it is unrealistic that a mandate would materially change the market.

Based on discussion, the Task Force members will revise the report for the next Task Force meeting on December 19, 2018. Prior to submitting the final report to the Board of Governors, the Task Force will share the report with the membership.

C. DISCUSSION OF DRAFT OF AMENDED APR 26

The Task Force discussed and made revisions to the draft of amended APR 26, including clarifying that exempt in-house counsel may be employed by either for-profit or not-for-profit organizations, and that volunteer lawyers who provide legal services for a qualified legal services provider (QLSP), as defined in APR 1(e)(8), are only exempt if the QLSP provides insurance to its volunteer lawyers.

D. NEXT STEPS

The Task Force will continue to receive comments from the membership regarding mandatory malpractice insurance through December 1, 2018. It will review all of the comments received in consideration of its final recommendation and report to the Board of Governors.

E. ADJOURNMENT

The meeting adjourned at 3:47 p.m.

B.

Revised Draft of Final
Report to the Board of
Governors



Mandatory Malpractice Insurance Task Force

Final Report to WSBA Board of Governors

February *, 2019



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www.wsba.org

Mandatory Malpractice Insurance Task Force

Final Report to Board of Governors

February __, 2019

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SUMMARY

On September 28, 2017, the Board of Governors established the Mandatory Malpractice Insurance Task Force and adopted 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 lawyers, 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 17 members including lawyers from a variety of practice areas and law firm sizes, a federal judge, an LLLT, industry professionals, and members of the public. The list of members is ~~attached as~~ **Appendix A**. We were asked to provide an interim report in the summer, 2018, which we provided on July 10. We were charged with finalizing our recommendations by January, 2019. At its November 2018 meeting, the Board of Governors extended the Task Force's reporting deadline to March 2019. Since January 2018, the Task Force has conducted monthly meetings. In addition to gathering information and data from a variety of sources described in this report, the Task Force made a substantial effort to hear from WSBA members. We have received more than 580 written comments, both solicited and unsolicited. We sponsored informational articles and progress reports in *NW Lawyer* and through other forms of direct communication with members. On October 16, 2018, the Task Force held an open forum for lawyers with an interest in the topic, and heard from 18 people, testifying both in person and through telephonic testimony.

Members of the Task Force started with widely divergent ideas about mandating malpractice insurance. But the group deliberated carefully over its potential recommendations, listened thoughtfully to each other and to the comments we received, and reached consensus. ~~Task~~ Task Force members ~~also concluded expressed a belief~~ that we should move boldly and not shy away from difficult proposals. Task Force participants were consistent in their view that the Washington Supreme Court and the WSBA have a duty to protect the public and maintain the integrity of the profession. General Rule (GR) 12.1. Consequently, the Task Force has focused on the risk of injury to the *public* that arises from uninsured lawyers engaged in the private practice of law, a group that constitutes a small percentage of lawyers in Washington State. 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 ~~assure ensure~~ that clients are compensated when lawyers make mistakes. Because 14% of Washington lawyers in private practice do not carry malpractice insurance, the Task Force members determined that ~~those such~~ lawyers pose a significant risk to their clients and to themselves. Further, the lack of lawyer insurance means that from a practical standpoint, their clients do not have access to the legal system to seek compensation because plaintiffs' lawyers are generally unwilling to pursue representations when the defendant is uninsured. This is, fundamentally, an access-to-justice issue, and tThe Task Force has concluded that it is more than~~would be~~ appropriate for lawyers to ensure their own financial accountability.

Specifically, this Report concludes that:

- The Board of Governors should recommend, and the Washington Supreme Court should adopt, a rule mandating continuous, uninterrupted malpractice insurance for actively-licensed lawyers engaged in the private practice of law, with specified exemptions. Lawyers would be required to obtain minimum levels of professional liability insurance in the private marketplace.
- The required minimum coverage should be \$250,000 per occurrence/\$500,000 total per year (“\$250K/\$500K”).
- Several categories of lawyers should be exempt:
 - Government lawyers.
 - In-house private company lawyers.
 - Lawyers who volunteer to provide pro bono services through a qualified legal service provider (QLSP) that provides malpractice coverage.
 - Mediators and arbitrators.
 - Judges, administrative law judges, and hearing officers.
 - Other lawyers either not “actively licensed” or not “engaged in the private practice of law,” including, for example, retired attorneys maintaining their licenses, judicial law clerks, and Rule 9 interns.

The recommended exemptions are described in more detail below.

- Licensed lawyers ~~sh~~ould report their type of practice and malpractice insurance coverage status through the annual licensing process. Failure to comply with the requirement would lead to an administrative suspension of the lawyer’s license.

In shaping our recommendations, the Task Force focused on basic requirements that would be simple and straightforward, avoid multiple requirements, and allow for insurance policy flexibility.

In developing its recommendations, the Task Force listened to the many suggestions from WSBA members, particularly in the area of appropriate exemptions. Those suggestions definitely reshaped our proposals. We recognize that notwithstanding the adjustments the Task Force made to its approach, a number of WSBA members have continued to voice ardent opposition to the concept of mandating insurance for lawyers. However, this is an important issue of fairness and access-to-justice. While it is important to respect the concerns of those who oppose an insurance requirement, we believe that these recommendations meet many of those concerns. Ultimately, the Task Force has concluded that when one weighs the

apprehensions of those who resist malpractice insurance against the large number of clients who are exposed to harm by uninsured lawyers, the proper choice is clear.

The Task Force's detailed meeting minutes and meeting materials are available at <https://www.wsba.org/insurance-task-force>.

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TASK FORCE REPORT

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 lawyers, 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, California is considering doing so, and in 2018, the State Bar of Nevada proposed a mandatory malpractice insurance rule, which was not adopted by the Supreme Court of Nevada).
- 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, including Herbert M. Kritzer's and Neil Vidmar's *When Lawyers Screw Up: Improving Access to Justice for Legal Malpractice Victims*, 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.

We also received useful technical assistance from ALPS¹, ~~the WSBA's endorsed professional liability insurance provider~~, as well as from mandatory program administrators in Oregon and Idaho.

As a volunteer-driven and WSBA-funded project, the Task Force was charged with developing a recommendation and report with limited resources, so it focused much of its research and analysis on available sources and studies, the experience of other jurisdictions, and the perspective of industry professionals. Given the fiscal limitations and its reporting deadline, the Task Force did not perform the types of research and analysis that would have required the services of independent consultants and data analysts. However, through targeted outreach,

¹ ALPS is the WSBA's endorsed professional liability insurance provider.

the Task Force received a great deal of information, including comments from WSBA members, that filled in some of these gaps and informed the Task Force's thinking on many key decision points.

As noted above, the Task Force received more than 580 written comments from lawyers throughout the state of Washington. All of those comments were shared with members of the Task Force, and we received monthly updates on the concerns voiced by WSBA members. On October 16, 2018, the Task Force held an open forum for lawyers with an interest in the topic, and heard from 18 people, testifying both in person and through video and telephonic testimony. Informational articles and progress reports appeared several times over the course of the year in *NWLawyer* and through other forms of direct communication with members. Each of those communications generated additional member comments and suggestions.

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KEY FINDINGS

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

WSBA Membership Data-Generally and Financial Responsibility Requirements

The legal profession in Washington has seen significant and consistent growth over the last decade, with 38,540 licensed lawyers in Washington in 2017.² Of those lawyers, 32,189 were actively licensed to practice law.³ In 2017, 19,813 of actively licensed lawyers were engaged in the private practice of law.⁴ See **Appendix B** for current information on lawyer demographics.

Washington lawyers are not required to establish proof of financial responsibility to maintain their licenses. Washington lawyers are, however, as part of the annual licensing process, required to disclose to the Bar whether they are in private practice and whether they maintain professional liability insurance.⁵ The information is made available to the public through the legal directory on the WSBA website. Washington is one of 25 states that require disclosure of malpractice insurance either to the licensing organization or directly to the client.⁶

As of November 1, 2018, there are 814 actively licensed limited practice officers (LPOs) and 34 actively licensed limited license legal technicians (LLLTs).⁷ Under Admission and Practice Rules (APR) 12(f)(2) and 28(l)(2) respectively, LPOs and LLLTs are required to show proof of financial responsibility on an annual basis to maintain their licenses. ~~That~~Such financial responsibility ordinarily is established by certification of the existence of professional liability insurance.⁸ Specifically, LPOs may choose to submit an insurance policy in the amount of \$100,000 or an audited financial statement in the amount of \$200,000.⁹ LLLTs submit proof of insurance

² WSBA Staff, *WSBA Membership Demographics*, PowerPoint Presentation, at 2 (March 28, 2018).

³ *Id.*

⁴ Based on data compiled by WSBA staff.

⁵ APR 26 (adopted effective July 1, 2007).

⁶ *State Implementation of ABA Model Court Rule on Insurance Disclosure*, ABA Standing Committee on Client Protection, American Bar Association, February 10, 2016, available at https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/chart_implementation_of_mcrid.authcheckdam.pdf.

⁷ *WSBA Member Licensing Counts*, November 1, 2018 (member licensing counts are published monthly on the WSBA website).

⁸ APR 12(f)(2); APR 28(l)(2)(a).

⁹ APR 12(f)(2).

coverage in the amount of at least \$100,000 per claim and a \$300,000 annual aggregate.¹⁰ Failure to comply with this licensing obligation results in administrative suspension.¹¹

Who Is Uninsured and What We Know About Them

What follows is a discussion regarding those lawyers who choose to go uninsured and what the research shows about who they are and why they are uninsured.

National Trends Relating to Uninsured Lawyers

On March 28, 2018, Leslie C. Levin, Professor at University of Connecticut School of Law, presented to the Task Force her research on uninsured lawyers, who they are, and why they go uninsured.¹² She found that small firm lawyers are more likely to go uninsured; however, a limited amount is known about these lawyers and why they choose to go uninsured, because these lawyers often fly “under the radar.”¹³

As part of her research, Professor Levin reviewed surveys of more than 200 lawyers in Connecticut (a state with no malpractice insurance disclosure requirements), New Mexico (a state with direct disclosure requirements), and Arizona (a state with indirect disclosure requirements).¹⁴ Her survey concluded that approximately 15% of private practitioners in New Mexico and 19.6% of private practitioners in Arizona go uninsured.¹⁵ She further found that most uninsured lawyers are small firm practitioners or solo attorneys, who are more likely to work at home without any support staff.¹⁶ According to those surveyed, the most common reason for not carrying insurance was cost; in all three surveyed states, insurance premiums averaged \$3,000 per lawyer.¹⁷ Other reasons included philosophical opposition to mandatory

¹⁰ APR 28(I)(2)(a)

¹¹ APR 17(a)(2)(D).

¹² Leslie C Levin, *Lawyers Going Bare and Clients Going Blind*, 68 Fla. L. Rev. 1281 (2016), <http://scholarship.law.ufl.edu/flr/vol68/iss5/2>; see also Herbert M. Kritzer and Neil Vidmar, *When Lawyers Screw Up: Improving Access to Justice for Legal Malpractice Victims* 40-41 (University Press of Kansas) (2018).

¹³ Levin, *Lawyers Going Bare and Clients Going Blind*, 68 Fla. L. Rev. 1281, 1282-83.

¹⁴ Leslie C. Levin, *Lawyers Going Bare*, PowerPoint Presentation, at 3 (March 28, 2018). [“Direct disclosure” requires uninsured lawyers to disclose directly to clients that they do not carry malpractice insurance. “Indirect disclosure” requires uninsured lawyers to disclose whether they carry insurance on annual licensing forms, which is then posted to state bar or judicial websites in ten of the states that require it.](#) Levin, *Lawyers Going Bare and Clients Going Blind*, 68 Fla. L. Rev. 1281, 1286.

¹⁵ *Id.*

¹⁶ *Id.* at 8.

¹⁷ Levin, *Lawyers Going Bare and Clients Going Blind*, 68 Fla. L. Rev. 1281, 1290.

insurance, a dislike of insurance companies, and a belief of no risk of liability because of practice area.¹⁸

Similarly, the State Bar of Nevada, as part of its initiative to investigate whether to require malpractice insurance of its lawyers, conducted a survey of uninsured lawyers in Nevada.¹⁹ The survey revealed that 79.8% of its uninsured lawyers were in private practice, with 73% of the uninsured lawyers indicating they were solos and 15.25% indicating they were in firms of 2-4 attorneys.²⁰ The survey showed the highest concentration of uninsured lawyers in the practice areas of plaintiff's general civil practice (29.15%), criminal defense (25.56%), corporate/business organization and transactions (24.22%), plaintiff's personal injury (22.87%), and family law, (22.87%).²¹ Survey respondents listed the following as their primary reason for going uninsured: cost (39.9%), confidence in their practice (25.8%), and a belief that their practice area did not necessitate coverage (14%).²²

Washington Trends Relating to Uninsured Lawyers

As annually reported by Washington lawyers pursuant to APR 26, from 2015 to 2017, 85% of Washington lawyers in private practice reported carrying insurance.²³ 14% of Washington lawyers in private practice have consistently reported being uninsured.²⁴ Specifically, in 2017, of the 19,813 lawyers in private practice, 2,752 lawyers reported that they were uninsured.²⁵

On average, Washington lawyers are practicing longer, and once lawyers reach the age of 71, the number in private practice who carry malpractice insurance drops. With respect to those lawyers in private practice who reported being uninsured, the data suggest that as lawyers age, they are more likely to report not having malpractice insurance: with 86.6% of those lawyers aged 51-60, 83.5% aged 61-70, and 75.6% aged 71-80 reporting they are insured compared to

¹⁸ *Id.* 1293-95.

¹⁹ In the Matter of Amendments to Supreme Court Rule 79 Regarding Professional Liability Insurance for Attorneys Engaged in the Private Practice of Law, AKDT 534, at 24 (June 29, 2018), <http://caseinfo.nvsupremecourt.us/public/caseCaptcha.do?n=%2Fdocument%2Fview.do%3FcsNameID%3D46470%26csIID%3D46470%26deLinkID%3D657034%26sireDocumentNumber%3D18-24812>.

²⁰ *Id.*

²¹ *Id.* at 25.

²² *Id.* at 26.

²³ Based on data compiled by WSBA staff.

²⁴ Based on data compiled by WSBA staff.

²⁵ Based on data compiled by WSBA staff.

90% of lawyers aged 30-40 and 89.4% of lawyers aged 41-50.²⁶ The same trend holds true for the number of years in practice.²⁷

According to voluntary demographic information collected in 2017, the practice areas where Washington lawyers in private practice were most likely to report being uninsured included business-commercial law, civil litigation, contract law, estate planning and probate, criminal law, family law, general practice, and personal injury.²⁸

In Washington State, lawyers in private practice who practice in solo or small firms are most likely to be uninsured. According to 2017 voluntary demographic information reported by Washington lawyers as part of the annual licensing process, approximately 28% of solo practitioners reported being uninsured.²⁹

While the correlation between public disciplinary information and APR 26 insurance disclosure information might not accurately reflect whether the population of uninsured lawyers is more likely to make errors or become subject to malpractice claims, most attorney misconduct grievances and disciplinary actions also involve solo and small firm practitioners. Of the 211 lawyers disciplined between 2014 and 2017, 101 reported maintaining a solo private practice as of the last time they reported voluntary demographic information to the Bar during the annual licensing process.³⁰ Of the 101, 55 reported that they did not carry malpractice insurance.³¹ As of October 2018, only 62 of the total number of lawyers disciplined during that period had an active license to practice law and were in private practice, and 22 of those individuals reported being uninsured.³² Eighteen of those uninsured actively licensed lawyers reported maintaining a solo private practice.³³

With respect to the reasons why Washington lawyers choose not to carry insurance, written comments to the Task Force suggest that cost is a common reason, along with retirement, a

²⁶ WSBA Staff, *WSBA Membership Demographics*, at 8; *March 28, 2018 Task Force Meeting Minutes* at 5, [https://www.wsba.org/docs/default-source/legal-community/committees/mandatory-malpractice-insurance-task-force/march-28-2018-minutes\(00409376\).pdf?sfvrsn=76ae07f1_4](https://www.wsba.org/docs/default-source/legal-community/committees/mandatory-malpractice-insurance-task-force/march-28-2018-minutes(00409376).pdf?sfvrsn=76ae07f1_4).

²⁷ WSBA Staff, *WSBA Membership Demographics*, at 9; *March 28, 2018 Task Force Meeting Minutes* at 5.

²⁸ WSBA Staff, *WSBA Membership Demographics*, at 12.

²⁹ Based on data compiled by WSBA staff.

³⁰ Based on data compiled by WSBA staff.

³¹ Based on data compiled by WSBA staff.

³² Based on data compiled by WSBA staff.

³³ Based on data compiled by WSBA staff.

limited practice that may include providing legal services only to family members, friends or on a pro bono basis, and perceptions of uninsurability based on practice area.³⁴

The Professional Liability Insurance Market and Malpractice Statistics

What follows is a description of how the professional liability market operates generally and statistics regarding malpractice claims.

The Professional Liability Insurance Market, Generally

Virtually all professional liability coverage is claims-made coverage, which covers a claim when the claim is filed during the policy period.³⁵ Claims-made coverage will only cover claims after the policy period expires if the insured purchases “tail” coverage.³⁶ Tail coverage protects ~~lawyers from claims arising after the policy period has expired, meaning it protects them retroactively~~ from claims based on lawyer errors or omissions that occur during the policy period that are not filed until the policy period has expired.³⁷

Typical malpractice insurance agreements may include coverage for:

- services as an attorney;
- services as a notary public;
- services as a title agent;
- an attorney who causes personal injury;
- services as a trustee or executor; and

³⁴ *Comments Submitted to the Task Force*, https://www.wsba.org/docs/default-source/legal-community/committees/mandatory-malpractice-insurance-task-force/comments-received-by-the-task-force.pdf?sfvrsn=fd8000f1_2.

³⁵ [Mark Bassingthwaight, “A Lawyer’s Guide to Purchasing Professional Liability Insurance,” ALPS Corp, at 4, http://www.cobar.org/Portals/COBAR/Repository/Cbrief/Young%20Lawyers%20Guide%20To%20Purchasing%20Lawyers%20Malpractice%20Insurance.pdf?ver=2017-03-16-075338-557](http://www.cobar.org/Portals/COBAR/Repository/Cbrief/Young%20Lawyers%20Guide%20To%20Purchasing%20Lawyers%20Malpractice%20Insurance.pdf?ver=2017-03-16-075338-557); Judy Graf, Area Vice President and Account Executive at Arthur J. Gallagher Risk Management Services, *Mandatory Malpractice Insurance – Task Force*, PowerPoint Presentation, at 8-9 (April 25, 2018); *April 25, 2018 Task Force Meeting Minutes* at 2, [https://www.wsba.org/docs/default-source/legal-community/committees/mandatory-malpractice-insurance-task-force/april-25-2018-minutes.pdf?sfvrsn=c60507f1_2-\(source-?\)](https://www.wsba.org/docs/default-source/legal-community/committees/mandatory-malpractice-insurance-task-force/april-25-2018-minutes.pdf?sfvrsn=c60507f1_2-(source-?)).

³⁶ [Mark Bassingwaight, *The Ins and Outs of “Tail” Coverage*, ALPS Blog \(March 2, 2012\), https://blog.alpsnet.com/the-ins-and-outs-of-tail-coverage](https://blog.alpsnet.com/the-ins-and-outs-of-tail-coverage); *April 25, 2018 Task Force Meeting Minutes* at 2 [\(source ?\)](#).

³⁷ [Mark Bassingwaight, *The Ins and Outs of “Tail” Coverage; April 25, 2018, Task Force Meeting Minutes*, at 2, \[id.i; \\(source ?\\)\]\(#\).](#)

- [pre- or post-judgment interest, appeal, bonds, and related costs.](#)³⁸

Multiple variables apply when underwriting lawyer malpractice insurance. Specifically, some areas of practice present higher risks than others.³⁹ Insurers also consider the number of attorneys in a firm, the years of coverage, the professional experience of the lawyer, limits of liability and deductibles, any claims or disciplinary history, premium payment history, and other factors.⁴⁰

Typical exclusions to professional liability insurance policies include dishonest, fraudulent, criminal, or malicious acts by the insured.⁴¹ Additional exclusions include, among others, prior acts (acts committed before the policy period) when the insured knew or should have foreseen the claim, discrimination and sexual harassment, vicarious liability, and punitive damages.⁴²

Both admitted and non-admitted carriers operate in Washington State.⁴³ Admitted carriers are licensed by the Washington State Office of the Insurance Commissioner (OIC) and must abide by specific regulations governing admitted carriers.⁴⁴ The ABA reports that in Washington there are 21 admitted carriers that write lawyer professional liability policies.⁴⁵ The OIC issues to each admitted carrier a certificate of authority to do business in the state and requires the carrier to file its rates and coverage forms annually.⁴⁶ Because they are subject to strict government oversight, admitted carriers have less flexibility in setting rates and deviating from

³⁸ [“Understanding Your Insurance Coverage,” ABA Standing Committee on Lawyers’ Professional Liability, American Bar Association, at 2-3,
https://www.americanbar.org/content/dam/aba/administrative/lawyers_professional_liability/downloads/understandingcoverage.pdf.](#)

³⁹ Graf, *Mandatory Malpractice Insurance – Task Force*, at 10; David Weisenberger, Vice President, Healthcare and Professional Liability, James River Insurance Company, *Mandatory Malpractice Insurance Task Force*, PowerPoint Presentation, at 4 (April 25, 2018).

⁴⁰ Graf, *Mandatory Malpractice Insurance – Task Force*, at 10; Weisenberger, *Mandatory Malpractice Insurance Task Force*, at 4.

⁴¹ “Understanding Your Insurance Coverage,” ABA Standing Committee on Lawyers’ Professional Liability, at 3.

⁴² *Id.* at 3-4.

⁴³ Graf, *Mandatory Malpractice Insurance – Task Force*, at 2.

⁴⁴ Graf, *Mandatory Malpractice Insurance – Task Force*, at 11; *April 25, 2018, Task Force Meeting Minutes*, at 1

⁴⁵ *LPL Insurance Directory – Washington*, ABA Standing Committee on Lawyers’ Professional Responsibility, American Bar Association, https://www.americanbar.org/groups/lawyers_professional_liability/resources/lpl-insurance-directory/washington/.

⁴⁶ RCW 48.05.110; RCW 48.05.400; *April 25, 2018, Task Force Meeting Minutes*, at 1.

their filings.⁴⁷ When an admitted carrier becomes insolvent, a state fund operates to protect consumers by paying out claims (up to statutory maximums) and refunding premiums.⁴⁸

In contrast, non-admitted carriers are not governed by state insurance departments and are not required to file their rates with the state.⁴⁹ They provide what is known as “surplus line” coverage.⁵⁰ With less regulation, non-admitted carriers are free to set their own rates and underwrite higher risk insurance packages.⁵¹ Non-admitted carriers can further accommodate certain complex risks for which the traditional insurance marketplace does not provide adequate coverage.⁵² No state fund protects consumers from non-admitted carrier insolvency.⁵³ The ABA reports that in Washington there are six non-admitted carriers that write lawyer professional liability policies.⁵⁴

Current Market Statistics

The *ABA Profile of Legal Malpractice Claims (2012-2015)* (“*Profile*”) is issued periodically by the ABA Standing Committee on Lawyers’ Professional Liability and reflects malpractice insurer statistics.⁵⁵ The *Profile* is based on self-reporting by insurers, so it does not present a comprehensive review of the legal malpractice insurance market.⁵⁶ Data collected include claims by area of law, size of firm, disposition, types of alleged errors, expenses paid, indemnity dollars paid, and file processing times.⁵⁷ Much, but not all, of the information in this section of the Report is drawn from the results of the *Profile*.

Firm Size and Malpractice Claims

⁴⁷ Graf, *Mandatory Malpractice Insurance – Task Force*, at 11; *April 25, 2018, Task Force Meeting Minutes*, at 2.

⁴⁸ *What’s a Guaranty Association and how does it work?*, Washington State Office of the Insurance Commissioner, <https://www.insurance.wa.gov/whats-guaranty-association-and-how-does-it-work>.

⁴⁹ [Surplus line insurance, Washington State Office of the Insurance Commissioner, https://www.insurance.wa.gov/surplus-line-insurance](https://www.insurance.wa.gov/surplus-line-insurance); Graf, *Mandatory Malpractice Insurance – Task Force*, at 11; *April 25, 2018, Task Force Meeting Minutes*, at 2.

⁵⁰ *Surplus line insurance*, Washington State Office of the Insurance Commissioner; *April 25, 2018, Task Force Meeting Minutes*, at 2.

⁵¹ [Surplus line insurance, Washington State Office of the Insurance Commissioner](https://www.insurance.wa.gov/surplus-line-insurance); *April 25, 2018, Task Force Meeting Minutes*, at 2 ~~(source ?)~~.

⁵² [April 25, 2018, Task Force Meeting Minutes, at 2](#) ~~id.; (source ?)~~.

⁵³ RCW 48.115.110; *Surplus line insurance*, Washington Office of the Insurance Commissioner.

⁵⁴ *LPL Insurance Directory – Washington*, ABA Standing Committee on Lawyers’ Professional Responsibility, American Bar Association.

⁵⁵ ABA Standing Committee on Lawyers’ Professional Liability, *Profile of Legal Malpractice Claims 2012-2015* 7 (American Bar Association) (September 2016).

⁵⁶ *Id.* at 10.

⁵⁷ *Id.* at 9.

Solo and small firm practitioners represent a disproportionate share of the malpractice claims. During the period of 2012-2015, the firms [nationwide](#) with the highest percentage of claims had between one and five attorneys, with 34% of claims against solo practitioners and 32% of claims against firms with two to five attorneys.⁵⁸ In other words, over 65% of claims arose from firms with five or fewer attorneys. In Oregon, the 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).⁵⁹ It is unclear to what this higher level of incidence of malpractice claims among solo and small firm lawyers is attributable, [but, according to available national statistics, small firm practitioners constitute the majority of private practitioners with solo practitioners constituting between 45% to 49% of private practitioners, and lawyers in firms of two to five lawyers constituting 12% to 15% of private practitioners.](#)⁶⁰ ~~but~~ Further, larger firms may have more robust risk management systems⁶¹ and the clients of such firms may use means other than the filing of malpractice claims to resolve situations involving lawyer error.

Even though solo practitioners represent the greatest number of claims, as a whole the evidence suggests they are underrepresented as a source of malpractice claims⁶²; [in other words, the potential claims against solo practitioners might be even greater than the statistics suggest.](#) The underrepresentation of solo practitioners may be due to the fact that many do not carry insurance and thus would not appear in reports by insurers.⁶³

Percentage of Claims by Practice Area

[Nationwide](#), ~~t~~he areas of practice with the highest incidences of malpractice claims include plaintiff's personal injury at 18.24%; real estate law at 14.89%; family law at 13.51%; estates, trusts, and probate at 12.05%; collection and bankruptcy at 10.59%; and commercial/corporate law at 9.74%.⁶⁴ These statistics tend to mirror those practice areas with the highest reported number of uninsured lawyers in Washington.⁶⁵ Specifically, among the practice areas where Washington lawyers in private practice were most likely to report being uninsured included business-commercial law, estate planning and probate, family law, and personal injury.⁶⁶

⁵⁸ *Id.* at 14.

⁵⁹ Carol J. Bernick, Oregon Professional Liability Fund Chief Executive Officer, *PLF: History, How It Works, Why It Works*, PowerPoint Presentation, at 17 (February 21, 2018).

⁶⁰ [Kritzer and Vidmar, *When Lawyers Screw Up: Improving Access to Justice for Legal Malpractice Victims* 78.](#)

⁶¹ *Id.* at 5.

⁶² *Id.* at 79.

⁶³ Levin, *Lawyers Going Bare*, at 5.

⁶⁴ *Profile of Legal Malpractice Claims 2012-2015*, at 12.

⁶⁵ WSBA Staff, *WSBA Membership Demographics*, at 12.

⁶⁶ *Id.*

Years in Practice and Claim Rates

Evidence nationally suggests that lawyers with more than ten years of practice produce a disproportionate share of claims.⁶⁷ For example, a 2015 report from the Missouri Department of Insurance, Financial Institutions, and Professional Regulation showed that over a ten-year period, 87.5% of claims were against lawyers with ten years or more of practice experience.⁶⁸ Further, the Wisconsin Lawyers Mutual Insurance Company reported that, between 1983 and 2013, 29% of claims filed were against lawyers with eleven to twenty years of practice experience, and 75% were against lawyers with more than ten years of experience.⁶⁹ Further, in 2013, Minnesota Lawyers Mutual Insurance Company reported that 39% of its policyholders who reported claims had eleven to twenty years of experience, and 68% of claims were against lawyers with more than ten years of experience.⁷⁰ Why this group is overrepresented among claims is unclear; however, it may be attributable to the fact that lawyers in that stage of their careers are more likely to experience burnout, which may be reflected in the quality of their work.⁷¹

Percentage of Indemnity Dollars and Expenses Paid

Nationally, 89.1% of malpractice claims are resolved for less than \$100,000 (including claims payments and expenses).⁷² 95.2% of malpractice claims are resolved for less than \$250,000.⁷³ ALPS, ~~WSBA's endorsed carrier~~, reports that based on its experience, over the past ~~10~~ ten years, 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.⁷⁴ According to ALPS, in Washington, for all claims, its average loss payment was \$60,548 and average loss expense to defend those claims was \$20,406.⁷⁵ Where payments were made by ALPS, its average loss payment was \$119,856, and average loss expenses were about \$40,454.⁷⁶

⁶⁷ Kritzer and Vidmar, *When Lawyers Screw Up: Improving Access to Justice for Legal Malpractice Victims* 81-82.

⁶⁸ *Id.* at 67-68, 81.

⁶⁹ *Id.* at 81-82.

⁷⁰ *Id.* at 82.

⁷¹ *Id.* at 83.

⁷² *Profile of Legal Malpractice Claims 2012-2015*, at 22.

⁷³ *Id.* at 22.

⁷⁴ Chris Newbold, Executive Vice President of ALPS, “Open Market” Mandatory Malpractice Model, PowerPoint Presentation, at 11 (June 27, 2018).

⁷⁵ *Id.* at 11.

⁷⁶ *Id.* at 11

Frequency Rate of Claims

National frequency rates of claims filed against lawyers appears to be less than six percent.⁷⁷ Some evidence suggests that where insurance is mandated, claim rates rise. In Oregon, where insurance is mandated, the annual rate is 12.4% per 100 lawyers.⁷⁸ Also, in Canada, which requires lawyers be insured, Ontario has a claims rate of 10.3%; British Columbia has a rate of 12.3%; and Alberta has a rate of 11.8%.⁷⁹ Given that the market is claims made, claim rate percentages include matters lawyers report to their insurers as possible claims.⁸⁰

~~Viability of Malpractice Claims Where Lawyers Uninsured~~

~~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.⁸¹~~

~~Insurance Options for Lawyers Providing Primarily Pro Bono Services and Insurance Options~~

Civil legal aid providers and most organized volunteer lawyer programs (typically provided through nonprofit organizations) provide malpractice insurance for participating lawyers. According to the *ABA Report on the Pro Bono Work of Washington's Lawyers* issued in July 2017, approximately 56% of lawyers in Washington are connected to their pro bono clients through referrals from legal aid providers, non-profit organizations, or bar associations, many of which are likely qualified legal service providers (QLSPs).⁸² QLSPs, as defined in APR 1(e)(8), are nonprofit legal service organizations whose primary purpose is to provide legal services to low income individuals. QLSPs are required either to provide malpractice insurance for their volunteers or have a policy in place to require that all volunteers carry their own malpractice insurance.⁸³ Washington has approximately 60 Bar-approved QLSPs.⁸⁴

The Legal Foundation of Washington (LFW) provides grants to many nonprofit legal aid providers in Washington State, many of which are QLSPs and provide legal services through

⁷⁷ Levin, *Lawyers Going Bare and Clients Going Blind*, 68 Fla. L. Rev. 1284, 1309-1310.

⁷⁸ Levin, *Lawyers Going Bare*, at 13.

⁷⁹ *Id.* at 14

⁸⁰ Levin, *Lawyers Going Bare and Clients Going Blind*, 68 Fla. L. Rev. 1284, 1309-1310.

⁸¹ ~~Kritzer and Vidmar, *When Lawyers Screw Up: Improving Access to Justice for Legal Malpractice Victims*, at 92, 148; Robert B. Gould, *Deciding to Take a Plaintiff Legal Malpractice Case, Lawyers' Liability Review*, 2 (April, 1987).~~

⁸² Standing Committee on Pro Bono and Public Service, *Supporting Justice in Washington: A Report on the Pro Bono Work of Washington's Lawyers* 5-6 (American Bar Association) (July 2017).

⁸³ *Public Service Opportunities*, Washington State Bar Association, <https://www.wsba.org/connect-serve/volunteer-opportunities/psp>.

⁸⁴ *Id.*

volunteer lawyer programs (VLPs).⁸⁵ Approximately five to eight years ago, LFW launched its own group insurance program for all of its grantees that are VLPs.⁸⁶ The LFW plan offers coverage up to \$500,000.⁸⁷ Many grantees choose to buy additional coverage. This includes the King County Bar Association (KCBA) Pro Bono Services Program and the Eastside Legal Assistance Program (ELAP).⁸⁸

Both KCBA and ELAP's plan includes the cost of legal fees for defending a claim, providing total coverage of \$1 million for claims/\$2 million aggregate.⁸⁹ For lawyers to be covered under the plan, the lawyers must be providing services through one of the VLP's pro bono programs for no fee.⁹⁰ With respect to tail coverage, the coverage extends past the time of volunteering.⁹¹ The lawyer would thus be covered if a client files a claim arising from services provided through KCBA or ELAP's pro bono program long after the lawyer has ceased volunteering.⁹² QLSPs that provide legal services primarily through staff attorneys, such as Columbia Legal Services and Northwest Justice Project, obtain their own insurance plans.⁹³ Each has a pro bono rider for volunteer lawyers that work with them.⁹⁴

With respect to the geographic reach of VLPs, there are some gaps in VLPs across the state with only 20 of 39 Washington counties served by VLPs.⁹⁵ It is thus possible that not every lawyer would connect with a VLP to provide pro bono services.⁹⁶ Staff research confirmed that 20 of 39 Washington counties are served by VLPs. Ferry County, for example, has no VLP, so an uninsured lawyer wishing to volunteer to represent a Ferry County resident would have to purchase insurance or arrange to perform the work through an out-of-county low-income legal services provider.

⁸⁵ WSBA Staff, *Report re Qualified Legal Service Providers and Malpractice Insurance*, at 2 (October 18, 2018).

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.* at 3-4.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.* at 4-5

⁹⁴ *Id.*

⁹⁵ *Id.* at 6.

⁹⁶ *Id.*

Insurance Costs and Availability

As noted above, malpractice insurance premiums vary significantly based on many factors, including years in practice, area of practice, size and practice mix of a firm, lawyer history with malpractice claims and disciplinary actions, state characteristics, and whether lawyers are practicing full-time or part-time, among other factors.⁹⁷

Average premium numbers can vary broadly based on the firm's principal area(s) of practice.⁹⁸ According to the *Profile*, 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.⁹⁹ Not surprisingly, insurance premiums tend to be higher in many of those practice areas.¹⁰⁰

Basic malpractice policies with modest coverage levels ~~appear to be~~ available to most practitioners at very reasonable cost ~~to most practitioners~~, including those practicing solo or in small firms.¹⁰¹ The average premium of Washington lawyers based on current market trends is \$2,500.¹⁰² However, the average premium amount reflects all insured practitioners, some of whom may carry coverage amounts of \$1,000,000 or more.¹⁰³ According to ALPS Chris Newbold, in Idaho, where mandatory malpractice began in 2018, the average premium for ALPS policies issued to solo practitioners (the primary demographic of uninsured lawyers) without prior acts coverage was approximately \$1,200.¹⁰⁴ According to Diane Minnich, Executive Director of the Idaho State Bar, ~~no premiums quoted had exceeded~~ averaged between \$2,000 and \$3,0500 as of February 21, 2018.¹⁰⁵ From the information available, it does not appear that insurance rates have gone up in Idaho as a result of the malpractice insurance mandate, though Idaho has had only one reporting cycle since the rule's implementation¹⁰⁶ so trends may

⁹⁷ Graf, *Mandatory Malpractice Insurance – Task Force*, at 10; Weisenberger, *Mandatory Malpractice Insurance Task Force*, at 4.

⁹⁸ Newbold, “*Open Market*” *Mandatory Malpractice Model*, at 9.

⁹⁹ *Profile of Legal Malpractice Claims 2012-2015*, at 12.

¹⁰⁰ See, e.g., Newbold, “*Open Market*” *Mandatory Malpractice Model*, at 9 ~~(source ?)~~.

¹⁰¹ Newbold, “*Open Market*” *Mandatory Malpractice Model*, at 6-7, 9.

¹⁰² *June 27, 2018, Task Force Meeting Minutes*, at 2, [https://www.wsba.org/docs/default-source/legal-community/committees/mandatory-malpractice-insurance-task-force/june-27-2018-minutes\(00435102\)7c7a63f2f6d9654cb471ff1f00003f4f.pdf?sfvrsn=7fa306f1_2](https://www.wsba.org/docs/default-source/legal-community/committees/mandatory-malpractice-insurance-task-force/june-27-2018-minutes(00435102)7c7a63f2f6d9654cb471ff1f00003f4f.pdf?sfvrsn=7fa306f1_2).

¹⁰³ Newbold, “*Open Market*” *Mandatory Malpractice Model*, at 6.

¹⁰⁴ (source ?)

¹⁰⁵ February 21, 2018, Task Force Meeting Minutes, at 2, https://www.wsba.org/docs/default-source/legal-community/committees/mandatory-malpractice-insurance-task-force/february-21-2018-minutes.pdf?sfvrsn=9b0407f1_2 Interview Note with Diane Minnich, December 11, 2018, saved to file.

¹⁰⁶ Interview Notes with Diane Minnich, December 11, 2018, saved to file; [pending approval] November 28, 2018 Task Force Meeting Minutes, * [add link]

become more apparent with time. However, consistent with how the market operates, premiums will go up in the next reporting cycle, especially for first time insurance purchasers and new lawyers.¹⁰⁷

New lawyers pay noticeably lower malpractice insurance premiums than more experienced lawyers.¹⁰⁸ 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 lawyer 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.¹⁰⁹ New attorneys can expect their premiums to increase gradually by an average of 15% year-over-year for the first five years after they start practice, and then those premiums level off.¹¹⁰ ~~According to ALPSChris Newbold, a~~ previously uninsured lawyer obtaining insurance for the first time will be in the same premium position as the new lawyer because, on claims made policies, insurers will exclude prior acts when insuring the lawyer provide coverage beginning from the start date of the policy.¹¹¹ The start date is the retroactive date for the life of the policy, which means that like with new lawyers, the more years a lawyer maintains a policy, the more the premium will increase until the end of the maturity process.¹¹²

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.¹¹³ Tail coverage can be expensive (an unlimited tail can be 300% of 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.¹¹⁴

¹⁰⁷ [Phone Note with Diane Minnich, December 11, 2018, saved to file.](#)

¹⁰⁸ Newbold, “Open Market” Mandatory Malpractice Model at 7-8.

¹⁰⁹ *Id.* at 7.

¹¹⁰ *Id.* at 8.

¹¹¹ ~~(source ?)~~ Keith Fichnter, *Ask an Expert: Why Legal Malpractice Insurance Costs Go Up Every Year*, ALPS Blog (October 24, 2017), <https://blog.alpsnet.com/ask-an-expert-why-legal-malpractice-insurance-rates-go-up-every-year>.

¹¹² *Id.*

¹¹³ Mark Bassingwaight, *The Ins and Outs of “Tail” Coverage*, ALPS Blog (March 2, 2012), <https://blog.alpsnet.com/the-ins-and-outs-of-tail-coverage>; *April 25, 2018, Task Force Meeting Minutes*, at 2.

¹¹⁴ Bassingwaight, *The Ins and Outs of “Tail” Coverage*; *April 25, 2018, Task Force Meeting Minutes*, at 2.

The Client Protection Fund and Applications Alleging Malpractice

The Washington Supreme Court's Client Protection Fund (CPF), administered by the Bar, is funded by a mandatory assessment on lawyers and provides gifts to clients who are victims of licensed legal practitioner dishonest conduct or the practitioner's failure to account for money or property entrusted to the practitioner. The CPF receives its mandate from APR 15. Under APR 15(b)(4), the CPF provides gifts to clients only for lawyer theft or dishonest activities—not for negligent mistakes or incidents of malpractice that result in harm.

Applications are investigated only when there is a chance the fund could pay the victim, meaning that there is evidence of malfeasance. Applications regarding malpractice cannot be considered and, thus, are not investigated. Consequently, the CPF has no evidence of whether the applicants' malpractice claims were meritorious.¹¹⁵ Over the last five years, CPF application statistics indicate that 11% of applications were denied because they described instances of malpractice rather than theft or dishonest conduct.¹¹⁶ Specifically, from 2013-2017, 598 applications were considered. Of those considered, 129 (22%) were denied because the application was regarding a fee dispute, 29 (5%) were denied because the application alleged malpractice and/or negligence, and 37 (6%) were denied because the application was regarding both a fee dispute and alleged malpractice.¹¹⁷

Impact of Uninsured Lawyers on Clients

When lawyers without insurance make mistakes that injure their clients, there is a very low likelihood that those clients will be able to file a claim and a smaller likelihood of recovery. Plaintiffs' lawyers rarely agree to pursue professional negligence cases when the potential defendant is an uninsured lawyer,¹¹⁸ in part because even a successful lawsuit may ultimately result in the defendant filing for bankruptcy or taking other actions that make recovery difficult or impossible.¹¹⁹ [For malpractice plaintiff's lawyers, economic viability is a significant factor in determining whether to take a case.](#)¹²⁰ [When limited avenues exist for recovery, malpractice plaintiff's lawyers must determine whether acceptance of the case makes financial sense both for the client and for the firm.](#)¹²¹ Because the bulk of potential professional liability claims are

¹¹⁵ April 25, 2018, Task Force Meeting Minutes, at 4, https://www.wsba.org/docs/default-source/legal-community/committees/mandatory-malpractice-insurance-task-force/april-25-2018-minutes.pdf?sfvrsn=c60507f1_2.

¹¹⁶ WSBA Staff, *Client Protection Fund Statistics*, PowerPoint Presentation, at 3 (April 25, 2018).

¹¹⁷ *Id.* at 2-3.

¹¹⁸ Kritzer and Vidmar, *When Lawyers Screw Up: Improving Access to Justice for Legal Malpractice Victims*, at 92, 148. April 25, 2018, Task Force Meeting Minutes, at 3.

¹¹⁹ (source ?).

¹²⁰ Robert B. Gould, *Deciding to Take a Plaintiff Legal Malpractice Case*, *Lawyers' Liability Review*, 2 (April, 1987).

¹²¹ *Id.*

relatively small in size,¹²² the impact of uninsured lawyers on clients with smaller claims is exacerbated because it is already challenging to find a plaintiffs' lawyer who will agree to handle a case involving less than \$100,000 in damages.¹²³ The problem is heightened by the fact that ~~many~~ some lawyers in small firm and solo practices are involved in representations involving smaller amounts of money, but those are the practitioners who are much more likely to be "going bare" in terms of insurance. As Herbert M. Kritzer and Neil Vidmar point out in their study, they know of no way to estimate how much harm caused by uninsured lawyers goes uncompensated; at the same time, they observe that national statistics on claims paid out for insured solo practitioners suggest that the harm in that context amounts to tens, if not hundreds, of millions of dollars each year.¹²⁴ They further note that clients of lawyers outside the large corporate firm context:

[F]ace a greater likelihood of a lawyer making a costly error, and they face greater limitations in securing the kind of assistance need to prosecute a claim against the negligent lawyer. This is an access-to-justice problem as well as a potential image problem for the legal profession.¹²⁵

Evidence of the effectiveness of required insurance is provided by Oregon's experience. That state reports a higher rate of claims than the other jurisdictions we reviewed.¹²⁶ In their study, Mr. Kritzer and Mr. Vidmar found: "The much higher rate of claims per 100 insured in Oregon compared with what we found for other insurers of small to medium-sized practices clearly indicates that the absence of required insurance discourages claims."¹²⁷ The annual claim rate in Oregon is about ~~11~~ 12 per 100 lawyers, higher than in other states, and Canadian provinces with mandatory malpractice insurance report similar rates.¹²⁸ Required professional liability insurance appears to increase the number of claims made and claims paid. While this might be viewed as a disadvantage to lawyers, it is clearly a positive for clients.

¹²² Malpractice Insurance Task Force Final Report, Washington State Bar Association, 12-13 (February 2019); Profile of Legal Malpractice Claims 2012-2015, at 22; Newbold, "Open Market" Mandatory Malpractice Model, at 11.

¹²³ Kritzer and Vidmar, When Lawyers Screw Up: Improving Access to Justice for Legal Malpractice Victims, at 147-48.

¹²⁴ Id. at 43.

¹²⁵ Id. at 169-70.

¹²⁶ Malpractice Insurance Task Force Final Report, at 13; Levin, Lawyers Going Bare, at 13; Kritzer and Vidmar, When Lawyers Screw Up: Improving Access to Justice for Legal Malpractice Victims, at 70.

¹²⁷ Kritzer and Vidmar, When Lawyers Screw Up: Improving Access to Justice for Legal Malpractice Victims, at 171.

¹²⁸ Id. at 171, note 10.

Other Regulatory Schemes

What follows are descriptions of the regulatory models investigated and considered by the Task Force.

Oregon Model, Professional Liability Fund

In Oregon, licensed lawyers with offices in that state must belong to the Oregon State Bar's (OSB) Professional Liability Fund (PLF), paying a flat assessment (premium) of \$3,500 per year. The Oregon program was established in 1977 by legislative mandate¹²⁹ to create a shared risk pool to ease the difficulty in obtaining insurance, which at the time was scarce and expensive.¹³⁰

The PLF is an independently managed subdivision of the OSB governed by a Board of Directors appointed by the OSB Board of Governors.¹³¹ Under the PLF program, all licensed Oregon lawyers engaged in private practice with a principal office in Oregon who are not otherwise exempt must participate.¹³² Each participating lawyer pays the same flat-rate annual assessment of \$3,500 for coverage of \$300,000 per claim/\$300,000 aggregate, with optional excess coverage and no deductibles.¹³³ Coverage also includes \$50,000 of expenses (principally costs of representation).¹³⁴ The PLF is a shared risk pool, with no underwriting of the individual participants.¹³⁵ The program covers lawyers, and not law firms.¹³⁶ The amount of the assessment has remained the same for seven consecutive years.¹³⁷ The annual assessment is reduced for new lawyers in their first three years of practice.¹³⁸

The PLF has high favorability ratings among the OSB membership and is seen as a resource for lawyers facing problems.¹³⁹ The PLF emphasizes loss prevention through legal education,

¹²⁹ *About the PLF*, Oregon State Bar Professional Liability Fund website, <https://www.osbplf.org/about-plf/overview.html>; OSB 9.080.

¹³⁰ *Statement of the Board of Governors Professional Liability Fund*, Oregon State Bar, at 1 (1977).

¹³¹ *Id.* at 3.

¹³² *Coverage*, Oregon State Bar Professional Liability Fund, <https://www.osbplf.org/coverage/overview.html>; *Exemptions*, Oregon State Bar Professional Liability Fund, <https://www.osbplf.org/assessment-exemptions/exemptions.html>.

¹³³ *Coverage*, Oregon State Bar Professional Liability Fund; *Excess Coverage*, Oregon State Bar Professional Liability Fund, <https://www.osbplf.org/excess-coverage/overview.html>; Bernick, *PLF: History, How It Works, Why It Works*, at 3.

¹³⁴ *Coverage*, Oregon State Bar Professional Liability Fund.

¹³⁵ Bernick, *PLF: History, How It Works, Why It Works*, at 2-3.

¹³⁶ *Id.* at 2.

¹³⁷ *About the PLF*, Oregon State Bar Professional Liability Fund.

¹³⁸ Bernick, *PLF: History, How It Works, Why It Works*, at 8.

¹³⁹ *Id.* at 20-21.

publications, and practice aids, as well as funding of the Oregon Attorney Assistance Program and a practice management advisor program.¹⁴⁰

Idaho Model, Free Market Model

Idaho's malpractice insurance mandate began in 2018, based on a free-market model.¹⁴¹ The malpractice insurance requirement was proposed in Idaho without creation of a formal task force or vetting committee.¹⁴² Rather, the Idaho State Bar's then-president proposed a rule change to implement mandatory malpractice insurance, which was submitted to the Idaho State Bar's membership for a vote in 2016.¹⁴³ The measure won by a slim majority of 51% to 49%.¹⁴⁴ Following membership approval, the Idaho Supreme Court adopted the proposed rule with an effective date of January 1, 2018.¹⁴⁵

Under the new requirements, actively licensed lawyers who represent private clients must report coverage annually and provide proof of minimum coverage of \$100,000 per claim/\$300,000 aggregate.¹⁴⁶ Idaho lawyers may purchase insurance from any provider they wish on the free market.¹⁴⁷ The rule purposely provides for no hardship exemptions.¹⁴⁸

~~As of February 21, 2018, n~~No Idaho attorneys ~~had~~ reported an inability obtain the required insurance.¹⁴⁹ Further, although some expressed concern about the cost, no premium quoted exceeded \$3,500.¹⁵⁰ However, some lawyers indicated that the requirement would affect their decision to retire from practice.¹⁵¹

¹⁴⁰ *About the PLF*, Oregon State Bar Professional Liability Fund; Bernick, *PLF: History, How It Works, Why It Works*, at 20-21.

¹⁴¹ *Id.* Bar Comm'n Rule 302(a)(5), https://isb.idaho.gov/wp-content/uploads/ibcr_sec03_licensing.pdf

¹⁴² *February 21, 2018, Task Force Meeting Minutes*, at 2.

¹⁴³ Annette Strauser, *2018 Malpractice Coverage Requirement – General Information* (August 29, 2017), <https://isb.idaho.gov/blog/author/astrouser/>; *February 21, 2018, Task Force Meeting Minutes*, at 2.

¹⁴⁴ *Strauser, 2018 Malpractice Coverage Requirement – General Information.*

¹⁴⁵ *Strauser, 2018 Malpractice Coverage Requirement – General Information*; *Id.* Bar Comm'n Rule 302(a)(5).

¹⁴⁶ *Id.* Bar Comm'n Rule 302(a)(5).

¹⁴⁷ *Strauser, 2018 Malpractice Coverage Requirement – General Information.*

¹⁴⁸ *February 21, 2018, Task Force Meeting Minutes*, at 3.

¹⁴⁹ *Id.*; [Interview Notes with Diane Minnich, December 11, 2018, saved to file.](#)

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

Illinois, Proactive Management-Based Regulation

In 2017, Illinois became the first state to adopt proactive management-based regulation (PMBR).¹⁵² PMBR is an alternative approach to lawyer regulation, focusing on programs are instituted to promote the ethical practice of law and, ~~as a consequence,~~ hopefully reduce the incidence of grievances and malpractice claims.¹⁵³

Prior to adoption of PMBR in Illinois, Illinois studied PMBR models in other jurisdictions including New South Wales, Australia, and Nova Scotia, Canada.¹⁵⁴ PMBR models typically include the following features:

1. Measures to complement traditional reactive disciplinary processes, usually through the use of self-assessment tools;
2. Education of lawyer/firm management to develop and employ an ethical infrastructure to prevent misconduct and unsatisfactory performance; and
3. Information sharing and collaboration among the lawyer regulator and lawyer/firm.¹⁵⁵

Prior to adoption, Illinois investigated whether there was a need to implement PMBR in the state. The research revealed that 41% of solo practitioners in Illinois were uninsured and another 77% had no succession plan, statistics that alarmed regulators and practitioners alike.¹⁵⁶

With the adoption of PMBR, beginning in 2018, Illinois lawyers in private practice who do not have malpractice insurance must complete a four-hour self-assessment online, evaluating their law firm management and business practices.¹⁵⁷ The self-assessment is administered by the Attorney Registration and Disciplinary Commission (ARDC), the Illinois Supreme Court agency

¹⁵² Ill. Supreme Court Rule 756, http://www.illinoiscourts.gov/SupremeCourt/Rules/Art_VII/artVII.htm#Rule756; *Illinois Becomes First State to Adopt Proactive Management Based Regulation*, Supreme Court of Illinois Press Release (January 25, 2017), <http://www.illinoiscourts.gov/Media/PressRel/2017/012417.pdf>.

¹⁵³ *Illinois Becomes First State to Adopt Proactive Management Based Regulation*, Supreme Court of Illinois Press Release.

¹⁵⁴ Jerry Larkin, Attorney Register and Disciplinary Commission (ARDC) Administrator, *PMBR – The Illinois Experience*, PowerPoint Presentation, at 10 (March 28, 2018).

¹⁵⁵ *Id.* at 9.

¹⁵⁶ *Id.* at 19-20.

¹⁵⁷ *PMBR Self-Assessment FAQs*, ARDC, https://registration.iardc.org/attyreg/Registration/regdept/Rule_756e2_Self-Assessment_FAQ_s.aspx.

that regulates Illinois lawyers.¹⁵⁸ Uninsured lawyers who fail to complete the self-assessment cannot register in 2019 to renew their license and may be administratively suspended.¹⁵⁹

The self-assessment is confidential, and also provides free CLE credit.¹⁶⁰ The self-assessment covers the following topics: technology; conflicts; fees and billing; client relations; trust accounting; wellness; civility and professionalism; and diversity and inclusion.¹⁶¹ Of those lawyers who have completed the self-assessment, a large majority have responded positively to the program.¹⁶²

South Dakota's Disclosure Model

Of the 25 states that require lawyers to make disclosures regarding whether they carry malpractice insurance, at least seven require the disclosure be made directly to clients.¹⁶³ Among the most stringent of those seven states is South Dakota, which adopted its rule in 1999.¹⁶⁴ For lawyers who do not carry a minimum of \$100,000 in insurance, South Dakota requires the lawyers to disclose the lack of insurance at the formation of the attorney-client relationship.¹⁶⁵ The Rule further requires the lawyer to disclose the information in every written communication with the client on firm letterhead and in all advertising.¹⁶⁶ Some anecdotal evidence exists that the purchase of insurance increased around the time of the implementation of the disclosure rule in South Dakota.¹⁶⁷ Currently, in South Dakota,

¹⁵⁸ *Illinois Becomes First State to Adopt Proactive Management Based Regulation*, Supreme Court of Illinois Press Release.

¹⁵⁹ *PMBR Self-Assessment FAQs*, ARDC, https://registration.iardc.org/attyreg/Registration/regdept/Rule_756e2_Self-Assessment_FAQ_s.aspx.

¹⁶⁰ *Id.*

¹⁶¹ *PMBR Modules*, ARDC, <https://www.iardc.org/pmbr.html>.

¹⁶² Matthew Hector, *ARDC Reports Positive Early Reaction to Lawyer Self-Assessment*, Illinois Bar Journal, Vol. 106 #4 (April 2018), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/isba_pmbr.pdf.

¹⁶³ Levin, *Lawyers Going Bare and Clients Going Blind*, 68 Fla. L. Rev. 1284, 1297-99; [State Implementation of ABA Model Court Rule on Insurance Disclosure, ABA Standing Committee on Client Protection](#).

¹⁶⁴ Susan Saab Fortney, *Law as a Profession: Examining the Role of Accountability*, 40 Fordham Urb. L.J. 177, 194 (2012), <https://ir.lawnet.fordham.edu/ulj/vol40/iss1/4>.

¹⁶⁵ S.D. Rule Of Prof'l Conduct 1.4(c), https://sdlegislature.gov/Statutes/Codified_Laws/DisplayStatute.aspx?Type=Statute&Statute=16-18-A.

¹⁶⁶ S.D. Rule Of Prof'l Conduct 1.4(c), 1.4(d), 7.2(l), https://sdlegislature.gov/Statutes/Codified_Laws/DisplayStatute.aspx?Type=Statute&Statute=16-18-A.

¹⁶⁷ Levin, *Lawyers Going Bare*, at 12.

approximately six percent of lawyers in private practice are uninsured, with 8.4% of small firm and solo lawyers in private practice -uninsured.¹⁶⁸

International Regulatory Schemes

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.¹⁶⁹ All Australian states, all Canadian provinces and territories, the great majority of countries in the European Union, and several Asian countries require insurance of their practitioners.¹⁷⁰ 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).¹⁷¹

Other State Efforts to Explore Mandatory Malpractice Insurance **California**

At the direction of the state legislature, the State Bar of California has appointed a Malpractice Insurance Working Group to conduct a review and study of errors and omissions insurance for lawyers licensed in California.¹⁷² The Working Group is considering enhanced disclosure requirements, mandating insurance as a condition of licensure, developing a PMBR program, and promoting voluntary insurance.¹⁷³ The Working Group is actively seeking public comment from both the public and attorneys providing reduced cost services.¹⁷⁴ The period for public comment closed on November 5, 2018.¹⁷⁵ The Working Group must report its findings to the State Supreme Court, Legislature, and Bar's Board of Trustees by March 31, 2019.¹⁷⁶

¹⁶⁸ Kritzer and Vidmar, *When Lawyers Screw Up: Improving Access to Justice for Legal Malpractice Victims* 41.

¹⁶⁹ *Id.* at 38.

¹⁷⁰ *Professional Indemnity Insurance Requirements Around the World*, LAWPRO Magazine "File Retention," December 2010 (Vol. 9 no. 4), <https://www.practicepro.ca/wp-content/uploads/2017/06/2010-12-professional-indemnity-around-world.pdf>.

¹⁷¹ *Id.*

¹⁷² *Malpractice Insurance Working Group Charter*, the State Bar of California, <http://www.calbar.ca.gov/Portals/0/documents/cc/Malpractice-Insurance-Working-Group-Charter.pdf>.

¹⁷³ *Legal Malpractice Insurance*, the State Bar of California, <http://www.calbar.ca.gov/About-Us/Our-Mission/Protecting-the-Public/Public-Comment/Public-Comment-Archives/2018-Public-Comment/Legal-Malpractice-Insurance>.

¹⁷⁴ *Item 702 September 2018*, Malpractice Insurance Working Group, at 2 (September 14, 2018), <http://www.calbar.ca.gov/Portals/0/documents/702-Malpractice-Insurance-Working-Group.pdf>.

¹⁷⁵ *Legal Malpractice Insurance*, the State Bar of California.

¹⁷⁶ *Malpractice Insurance Working Group Charter*, the State Bar of California.

Nevada

During 2017 to 2018, a Task Force of the State Bar of Nevada investigated whether to institute a mandatory malpractice insurance program in Nevada.¹⁷⁷ Like in Washington, Nevada lawyers must report their insurance coverage status annually.¹⁷⁸ As part of its process, Nevada investigated both the Idaho and Oregon models, reviewed the Illinois PBMR model, and looked at forming its own captive insurance company.¹⁷⁹ It further conducted a public focus group, which revealed that the public is generally uninformed about malpractice insurance requirements, or the lack thereof, among lawyers.¹⁸⁰

On June 29, 2018, the State Bar of Nevada submitted a petition to the Supreme Court of Nevada for approval.¹⁸¹ The proposed rule amendment would have required every lawyer who was engaged in private practice and representing clients to attest to having professional liability insurance coverage at a minimum limit of \$250,000 per occurrence/\$250,000 annual aggregate.¹⁸² On October 11, 2018, the Nevada Supreme Court declined to adopt the proposal on grounds that the State Bar's petition had provided inadequate detail and support.¹⁸³

¹⁷⁷ Robert Horne, *Join the Discussion: Whether Malpractice Insurance Should Be Mandatory for Nevada Attorneys*, Nevada Lawyer, at 28 (December 2017), https://www.nvbar.org/wp-content/uploads/NevadaLawyer_Dec2017_Malpractice-Insurance-Discussion2.pdf.

¹⁷⁸ Nevada Supreme Court Rule 79, <https://www.leg.state.nv.us/CourtRules/SCR.html>.

¹⁷⁹ Horne, *Join the Discussion: Whether Malpractice Insurance Should Be Mandatory for Nevada Attorneys*, at 28-29.

¹⁸⁰ *March 28, 2018, Task Force Meeting Minutes*, at 4.

¹⁸¹ In the Matter of Amendments to Supreme Court Rule 79 Regarding Professional Liability Insurance for Attorneys Engaged in the Private Practice of Law, ADKT 534, at 1.

¹⁸² *Id.* at 15

¹⁸³ Order Denying Petition for Amendment to Supreme Court Rule 79, ADKT 534 (October 11, 2018), https://nvcourts.gov/Supreme/Decisions/Administrative_Orders/.

WSBA MEMBER CONCERNS AND TASK FORCE RESPONSES

The Task Force received over [580](#) written comments from WSBA members raising a variety of different concerns and/or criticisms of a mandatory malpractice insurance requirement. The Task Force concluded that it would be helpful to address each of those general concerns directly, providing additional background on why we decided to make a particular recommendation or chose not to follow a suggested approach.

Cost of Malpractice Insurance

The number one concern expressed in written comments from WSBA members—**19%** of all comments—listed the cost of malpractice insurance as a reason lawyers should not be required to maintain a professional liability insurance policy. The Task Force received input from a variety of industry professionals as to the reasons for a wide range in the cost of malpractice insurance. Premiums are based on a variety of factors, including but not limited to: the nature of the lawyer’s practice; whether the lawyer is working full-time or part-time; years in practice; the practice mix of the firm; an individual lawyer’s history with malpractice claims; and disciplinary history. The Task Force, as a group, is sensitive to the economic impact the cost of malpractice insurance may have on an individual lawyer’s business. The Task Force nevertheless concludes that the professional obligation to protect client interests supersedes the potential financial impact on an individual lawyer’s business. That is, the Task Force members uniformly agreed that, from a client protection standpoint, the client’s interests are paramount.

The Task Force received information regarding Idaho’s experience with mandatory malpractice coverage. Idaho instituted mandatory coverage of \$100k/\$300k beginning in 2018. [From the information available, insurance rates in Idaho do not appear to have risen for the lawyer population as a whole as a result of the mandate; however, given the program’s infancy, more information may be available with time.](#) The average premium for an ALPS policy issued to a solo practitioner (the primary demographic of uninsured lawyers) without prior acts coverage was approximately \$1,200. That amount is expected to increase annually by about 15% as the lawyer’s length of exposure grows, until the lawyer’s premium level matures after six years. All things remaining equal, it is likely that the \$1,200 average policy in Idaho will grow after six years to close to \$2,400 per year.

The Task Force requested that ALPS provide hypothetical examples of malpractice insurance premiums under the recommended minimum of 250K/500K as a means of illustrating the likely range of premiums lawyers in Washington could expect. The examples are as follows:

Firm A: Solo practitioner located in Seattle. Purchasing a Retro Date Inception policy on the Basic form (no FDD)¹⁸⁴ with a \$5,000 deductible. All work focused in corporate and business transactions. No claims, bar complaints, or disciplinary history. Firm established date is 1/28/10, operating uninsured.

¹⁸⁴ [Check with ALPS re definition of FDD and retro date inception policy.](#)

Premium: \$1,018
Fully matured: \$2,418

Firm B: Solo practitioner located in Kennewick. Purchasing a Retro Date Inception policy on the Basic form (no FDD) with a \$10,000 deductible. Majority government work with small estates exposure. No claims, bar complaints, or disciplinary history. Firm established date is 5/1/09, operating uninsured.

Premium: \$1,082
Fully matured: \$1,250

Firm C: ~~Two-attorney~~two-attorney firm located in Spokane. Purchasing a Retro Date Inception policy on the Basic form (no FDD) with a \$5,000 deductible. Generalist firm with areas of practice including defense, personal injury, corporate, estate, and real estate work. No claims, bar complaints, or disciplinary history. Firm established date is 1/1/1961, operating uninsured.

Premium: \$3,117 (or \$1,500 per lawyer)
Fully matured: \$6,235

If the Task Force recommendation for a minimum \$250/\$500k is adopted in Washington, the average premiums will be higher than in Idaho, as the above illustrations demonstrate. The Task Force cannot guarantee specific premium levels, and there will be variations based upon different factors. The Task Force nevertheless concludes that the benefits of client protection by means of a mandatory malpractice insurance justifies imposing additional yet reasonable costs of doing business on an individual lawyer.

Insurance Requirements for Retired and Semi-retired Lawyers

The second largest number of comments received from WSBA members—11% of all comments—were from licensed lawyers who noted they were either retired or semi-retired, and as such should not be required to maintain malpractice insurance. Fully retired lawyers are not “engaged in the practice of law,” and therefore, by operation of the proposed rule, would not be required to obtain a malpractice insurance policy. Fully retired lawyers would only need to certify that status and the insurance requirement would not apply. Apparently, a number of retired lawyers maintain their licenses either because they think that they might want to re-enter practice, or because they intend to continue to be licensed until they have reached the fifty-year mark. On the other hand, lawyers who are “retired” but who still practice on a part-time basis are as capable of making mistakes as any other experienced lawyers. The Task Force concludes that in the interest of client protection, those lawyers should carry a minimum level of insurance so long as they are engaged in private practice. It should be noted that malpractice policy premiums for part-time lawyers will be lower than for full-time practitioners because the lower levels of work translate into lower risks of error.

Negative Impacts on Pro Bono Services

The Task Force received a number of comments from members who are retired and/or semi-retired, but continue to provide legal work only on a pro bono basis and/or a low-cost basis. Members were concerned that a mandatory insurance requirement would be cost prohibitive and force those members to discontinue providing pro bono and/or low-cost services. The Task Force is extremely sensitive to this concern. Washington does not have a mandatory pro bono requirement, but the Task Force recognizes that RPC 6.1 strongly encourages lawyers to provide “legal services to those unable to pay.” The Task Force does not want to impose a requirement that undermines the aspirational recommendation of RPC 6.1 and materially interfere with lawyers providing legal services to underserved communities.

The Task Force has determined that many lawyers who desire to provide pro bono services (and are not otherwise engaged in private practice) can become affiliated with Bar-approved QLSPs or VLPs and thereby be covered by a malpractice insurance policy. Emeritus pro bono status is available for licensed legal professionals who are otherwise retired from the practice of law but wish to provide volunteer legal services through a QLSP. See APR 3(g). Further, some pro bono practitioners may choose to carry their own insurance. The Task Force recognizes there could be gaps in pro bono services provided in certain Washington State communities, but it appears unlikely that a malpractice-insurance requirement will substantially alter the availability of such services. The primary goal of a mandatory malpractice requirement is to protect the public, and it applies with equal force to legal services provided to the disadvantaged.

Concerns about Uninsurability Due to Legal Specialty

Several members raised a concern that they had been historically unable to obtain malpractice insurance coverage due to the unique nature of their practice, such as transactional securities. The Task Force has not been provided with documentary evidence supporting the assertion that any Washington State lawyer has been unable to obtain malpractice insurance due to a unique specialty.

Indeed, the Task Force has been provided information to the contrary. The Idaho State Bar instituted a mandatory malpractice insurance requirement of coverages at a minimum of \$100,000 per occurrence with a \$300,000 annual aggregate, effective January 2018. Ms. Diane Minnich, Executive Director of the Idaho State Bar (“ISB”), gave a presentation to the Task Force regarding Idaho’s experience with instituting mandatory malpractice insurance coverage. Ms. Minnich was the contact point for all Idaho lawyers that had concerns or questions about the requirement and the availability of insurance. Ms. Minnich confirmed that every no Idaho lawyer, regardless of specialty, has been able reported being unable to obtain malpractice insurance coverage based upon the new requirement. Further, in Washington, limited license legal technicians have not reported problems obtaining insurance.

The Task Force received presentations, as noted above, from insurance industry professionals. The Task Force understands that lawyers practicing in unique specialties, such as entertainment law, patent law, or transactional law, may be required to obtain coverage through a secondary

market. The premium costs in the secondary market may be higher because these insurers view the unique practices as posing a higher risk. The Task Force believes, however, that lawyers engaged in unique fields, if a malpractice event occurs, the potential damage to the client would be substantial. The Task Force therefore believes that there may be even a greater responsibility for lawyers that practice in unique fields to obtain malpractice insurance coverage.

“Moral Hazard”

A few WSBA members raised a concern that mandatory malpractice insurance will give rise to a “moral hazard” situation. Economists have developed the “moral hazard” theory, which suggests that an individual will be more likely to engage in risky behavior if that person knows that he or she is protected against adverse consequences because another party (e.g., an insurer) will incur the costs. Applying the moral hazard analysis to legal malpractice, the argument is that some lawyers will provide either risky or incompetent legal services because they know that any adverse consequences will be covered by a malpractice policy. The Task Force rejects this argument. We simply do not believe that lawyers will abdicate professional responsibilities owed to clients because there is a safety net of malpractice coverage. Insurance is unlikely to encourage attorneys to shirk their obligations under RPC 1.1 to represent the client with “legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”

Insurance and Increasing Claims against Lawyers

Several comments from WSBA members argued that a drawback of mandatory insurance is that if all lawyers were covered by malpractice insurance, the number of malpractice claims and associated lawsuits against lawyers would increase. The Task Force agrees that this will likely happen. That is the point. If more clients who think they have been injured have potential access to the courts and to a remedy, then the insurance mandate is doing precisely what it is supposed to do: provide access to justice.

Adverse Impact on Public Attitude ~~Towards~~ towards Lawyers

The Task Force received a small number of comments to the effect that the public will think less highly of lawyers if it is known that lawyers need insurance because they make mistakes. But the Task Force received information that suggests the contrary. In fact, members of the public widely believe that *all* lawyers already carry insurance and are surprised when they learn that malpractice insurance is not already mandatory. Further, the Task Force believes that existing negative public attitudes about lawyers will not be materially affected by an insurance mandate.

Mandatory Insurance not in Lawyers' Best Interests

Several impassioned comments were received from lawyers who stated that as an association of lawyers, the WSBA should focus on what is in the best interests of lawyers rather than the

interests of the public at large. The Task Force does not agree with this viewpoint. See, e.g., GR 12.1 (“Legal services must be regulated in the public interest.”).

DRAFT

POTENTIAL APPROACHES CONSIDERED BY THE TASK FORCE

After compiling a considerable amount of data and other information summarized above, and after hearing from researchers, Bar staff, regulators from other states, insurance industry professionals, and Washington lawyers, the Task Force has concluded that the existing disclosure requirement is insufficient to adequately protect most consumers of legal services. **Uninsured lawyers pose, and continue to pose, a distinct risk to their clients.**

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~~to the clients. Clients of uninsured lawyers often have a difficult time obtaining compensation from those lawyers after a malpractice event. Clients of uninsured lawyers have an especially difficult time finding legal representation for legitimate claims against uninsured lawyers because malpractice plaintiffs' lawyers routinely decline to handle those claims. The WSBA's Client Protection Fund cannot and does not make payments based on malpractice; if it did, and if it were fully funded through license fees or assessments, we would have in Washington the equivalent of Oregon's Professional Liability Fund.

In the Task Force's view, there is a distinct problem that directly affects the public interest, and a solution is needed. The Washington Supreme Court as the supervisory authority over the practice of law in this state, regulates the profession to protect the public and maintain the integrity of the legal profession, and it does so by adopting rules for the regulation of the practice of law. GR 12. **Lawyers make mistakes. A license to practice law is a privilege, and no lawyer should be immune from his or her responsibility to clients injured because of those mistakes.**

The Task Force considered a number of possible approaches to more effectively address the risk to clients posed by uninsured Washington lawyers. These are summarized below, followed by a more detailed discussion of the approaches considered and the considerations, pros and cons relevant to each potential solution for dealing with the problem identified. The report concludes by recommending consideration of a rule to implement a system of malpractice insurance for lawyers as a condition of licensing.

SUMMARY CHART OF POSSIBLE SOLUTIONS

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

Potential Solution 1: Do nothing and maintain the status quo

This "no action" approach would leave things as they are today, with roughly 14% of Washington lawyers in private practice declining to carry professional liability insurance. The insurance coverage disclosure requirement is insufficient, and it is not reasonable to assume that most consumers check the WSBA website to ascertain whether their prospective lawyer has a professional liability insurance policy. On the contrary, anecdotal information received by many Task Force members suggests that the most of the general public (and indeed, many lawyers) assume that all lawyers carry malpractice insurance. The Task Force has concluded that the status quo would not address the problem identified: uninsured lawyers would, like other practicing lawyers, continue to commit errors, clients would be harmed, and those clients would continue to have a very difficult time engaging plaintiffs' lawyers to represent them in pursuing their claims. Where clients were able to seek compensation, they would continue to encounter problems collecting judgments because of defendant lawyers who shield assets or declare bankruptcy. In other words, this "solution" is no solution at all.

Potential Solution 2: Implement a Proactive Management-Based Regulation (“PMBR”) model

The Proactive Management-Based Regulation approach, described above, requires that uninsured lawyers must, every two years, complete a four-hour interactive, online self-assessment regarding the operation of their law firms. They are then provided with a list of resources to help improve their law practices. The educational programs and resources are “aimed at helping lawyers avoid disciplinary problems before they occur,”¹⁸⁵ providing uninsured lawyers with information and tools that also might help prevent actions or inaction leading to incidences of malpractice. One highlight of the Illinois approach is its assessment in practice management and bookkeeping. One way of looking at the PMBR program is that it provides lawyers with some of the questions and potential training that insurance companies regularly provide to the lawyers they insure. The Task Force believes that Illinois PMBR might result in some improved practices among uninsured lawyers in that state, and might reduce incidences of malpractice as well as disciplinary rule violations (PMBR’s primary purpose). In any event, because the program is new, no empirical data is available. The program might also induce some lawyers to obtain insurance in order to avoid spending four hours completing the assessment. (Note, however, that Illinois’ program satisfies four hours of a lawyer’s MCLE obligation.) But the most significant problem with the PMBR model is that training in practice management and record-keeping does not necessarily prevent lawyer errors. After all, lawyers in firms with excellent record-keeping and careful deadline-tracking systems still make mistakes. PMBR does not address the impact on *clients* when uninsured lawyers commit errors that have severe financial consequences.

Potential Solution 3: Impose More Extensive Insurance Disclosure Requirements

This approach would be based on South Dakota’s RPC 1.4(c) requirement that every lawyer without at least \$100,000 in malpractice insurance disclose, on the lawyer’s letterhead and in every written communication to a client, that “This [lawyer][firm] is not covered by professional liability insurance.” South Dakota’s disclosure approach is low-cost from an administrative standpoint and it appears to have reduced the number of uninsured lawyers. At the same time, South Dakota, with a much smaller population and less diverse economy, has a much smaller number of lawyers than Washington. It is difficult to assess whether this type of disclosure approach would be as effective here. Many nonlawyers do not know how to find and engage a lawyer, and nonlawyers are often unskilled at reading engagement letters and even less able to evaluate the risks involved in hiring an uninsured lawyer. Finally, ~~More importantly,~~ notwithstanding South Dakota’s disclosure requirement, there are still many uninsured lawyers practicing in that state~~South Dakota~~, and when incidences of malpractice occur with damaging consequences, the clients of uninsured lawyers can suffer serious adverse consequences.

¹⁸⁵ *Illinois Becomes First State to Adopt Proactive Management Based Regulation* (Jan. 25, 2017 Press Release, Supreme Court of Illinois, statement of Chief Justice Lloyd A. Karmeier).

Potential Solution 4: Couple Illinois' PMBR model with South Dakota's Extensive Insurance Disclosure Requirements

Washington State could impose a two-pronged approach coupling Illinois' intensive Proactive Management-Based Regulation with South Dakota's disclosure model. Conceivably, the PMBR portion of the requirement could be strengthened so that the four-hour assessment would be *in addition to* other MCLE requirements, and uninsured lawyers could also be *required* to take a special multi-hour course in practice management, record-keeping and other skills. These additional hours of requirements might encourage some lawyers simply to purchase insurance. A Washington rule might also provide that the PMBR assessment and training be undertaken at the cost of the uninsured lawyer. Obviously, the effectiveness of this approach in encouraging the purchase of malpractice insurance cannot be ascertained in advance. However, like the two possible solutions described immediately above, this approach would never address the impact on those *clients* whose lawyers remain uninsured and commit errors that have severe financial consequences.

Potential Solution 5: Implement Mandatory Malpractice Insurance through a Free Market Model

This approach is based on Idaho's recent mandate that all lawyers in private practice obtain malpractice insurance at minimum specified coverage levels (\$100,000/\$300,000), and that those lawyers obtain their professional policies on the open market. In Idaho, there is no evidence that any lawyers have been unable to obtain insurance policies. The highly competitive character of the existing malpractice insurance market appears to have kept annual premiums at reasonable levels for Idaho lawyers. Although there has been some adverse reaction from Idaho lawyers who would prefer to be without insurance, this approach guarantees that lawyers for most clients will have sufficient coverage in the event of a malpractice incident leading to financial loss to a client. This model could be implemented in Washington with modest administrative costs by enforcing the mandate through lawyer certification made in connection with the annual licensing process. One advantage of the free market approach to most lawyers is that insurance underwriters will set premiums to reflect the expected risks associated with various law practices and the history of individual attorneys. That means that most lawyers will pay relatively low premiums, but some will pay more for insurance. The actual mandated level can be set at a level high enough to cover the vast majority of potential claims, while not at such a high coverage amount as to make insurance inordinately expensive or unavailable to some practitioners.

Potential Solution 6: Implement Mandatory Malpractice Insurance through a Centralized Professional Liability Fund ("PLF") Model

Oregon's Professional Liability Fund is the model for this approach. Washington could similarly require that all lawyers in private practice participate in a single insurance pool administered by WSBA and funded through an assessment on the participating lawyers. The advantage of this mechanism is its ability to provide universal lawyer access to insurance. In addition, Oregon's robust practice management and claims management systems successfully reduce incidences

of malpractice while causing prompt notification of potential claims and enabling the PLF to respond swiftly to and manage potential claims. The Oregon coverage levels (\$300,000/\$300,000) are sufficient to handle most claims, thus protecting almost all clients in that state. Indeed, Oregon's PLF staff have been quite effective at promptly addressing and resolving small claims. One disadvantage of the Oregon approach is that it is relatively expensive (\$3,500 per year per lawyer) given the modest coverage levels (\$300,000/\$300,000). This is because of the costs of operating a system that provides robust staff and programmatic support to lawyers, and because the flat universal fee means that costs are spread among all attorneys, *i.e.*, lawyers who represent a low risk profile are essentially subsidizing those whose practices or personal histories might generate higher risk (and higher premiums) on the open market. Setting up and operating a new PLF in Washington State would entail substantial staff time and a significant commitment of financial resources. In addition, the Oregon system also does not provide lawyers with any ability to tailor their policies by adjusting coverage amounts, deductibles, or policy terms.

Potential Solution 7: Use the Free Market Model but Permit Lawyers to Substitute Alternate Financial Guarantee Instruments

This system would be based on the Idaho “free market” insurance model but would permit lawyers to provide an alternate financial instrument in lieu of a professional liability insurance policy. In order to assure prompt access to amounts necessary to pay a judgment, a bank letter of credit or a performance bond equaling the maximum coverage amount would be provided to a central administrator (presumably at the WSBA). A letter of credit would provide, for example, that the administrator could file a certificate with the provider bank that the lawyer’s former client obtained a final judgment in a malpractice case in a specific amount (up to the required maximum), and then the bank would immediately pay that amount to the administrator. The administrator would remit the amount to the claimant. A performance bond might work similarly. There are several potential concerns with this approach. First, in contrast with malpractice insurance policies, letters of credit and performance bonds would not cover defense costs for the lawyer against whom a claim is made. More importantly, banks providing letters of credit charge annual fees that typically equal or exceed the cost of normal malpractice insurance premiums. In addition, letter of credit banks require the “account party” for whom the bank issues a letter of credit to post collateral equaling the amount of the highest possible draw. For example, a lawyer providing a letter of credit as a substitute for a \$300,000 insurance requirement would have to post \$300,000 in collateral and pay a letter of credit fee in the range of several thousand dollars. Alternatively, those who work with performance bonds often find that the companies providing those bonds do not make prompt payments, or dispute the amount to be paid (often paying just half of the bond amount). To address that, it might be prudent to require a performance bond equaling twice the minimum insurance amount. The bottom line is that alternate financial instruments present significant complications and cost concerns.

RECOMMENDATIONS

After considering the information and findings described above, listening to the concerns and suggestions of hundreds of WSBA members, and debating a variety of alternate approaches, the WSBA's Mandatory Malpractice Insurance Task Force makes the recommendations outlined below. It should be emphasized that the Task Force listened very carefully to the diverse concerns voiced by commenting lawyers, and adjusted a number of recommendations based on those comments. (The Task Force's analysis and response to the main categories of comments are provided below under "Member Concerns and Task Force Responses".)

Recommendation 1: Mandate a Basic Level of Malpractice Insurance for All Lawyers in Private Practice

~~All active~~ Washington-licensed attorneys engaged in the private practice of law, with specified exemptions, ~~—should be required to be covered by~~ maintain continuous, uninterrupted malpractice insurance, ~~with specified exemptions~~. Attorneys should be required to obtain minimum levels of professional liability insurance in the private marketplace. The required minimum coverage should be \$250,000 per occurrence/\$500,000 total per year (“\$250K/\$500K”). This requirement should be implemented through court rules.

Comment: The absence of malpractice insurance coverage for 14% of Washington lawyers in private practice poses a distinct risk to clients and to the lawyers themselves. It may be appropriate for lawyers to evaluate and assume personal risks created by lack of professional liability insurance. However, that is not fair to clients. As noted above, clients of uninsured lawyers face significant difficulties recovering from those lawyers after a malpractice event, and the WSBA's Client Protection Fund cannot make payments based on malpractice. A license to practice law is a privilege, and no lawyer should be immune from the effects of his or her own mistakes. Lack of malpractice insurance is fundamentally an access-to-justice problem. Individual clients with everyday legal needs are more likely to seek representation from uninsured lawyers than will wealthy people or institutions. When lawyers without professional liability insurance make mistakes, it has a disproportionate impact on low and middle income Washingtonians. This is simply unfair, and it is a problem that can be fixed.

The Task Force reviewed the range of potential approaches described in the preceding section of this Report. We determined that the Illinois-style PMBR approach might lead to an improvement in practice-management skills but would not provide protection to clients when legitimate malpractice claims arise, as they inevitably do. Further, Illinois' PMBR approach provides no incentives for lawyers to purchase insurance because the required four-hour on-line assessment is free, is a substitute for regular CLE hours, and lawyers are not required to enroll in subsequent skills programs if the assessment suggests that might be useful. The South Dakota approach of “super-disclosure” is attractive because it is low-cost and has been relatively successful in reducing the percentage of lawyers without insurance in that state. However, disclosure simply is not the equivalent of coverage, and it does not protect clients who believe they have a legitimate basis to pursue a malpractice claim. Oregon's mandatory

Professional Liability Fund has proved quite successful [and handles small claims quite well](#), but it is expensive and would require the development of substantial staff capacity. Further, comments received by the Task Force suggest that Oregon's one-size-fits-all approach might not be viewed as compatible with the free market attitude of many Washington lawyers.

After substantial discussion, the Task Force has decided to recommend the free-market model that was recently implemented in Idaho. Task Force members concluded that this will provide the least expensive and most flexible approach. Further, the WSBA already has designated an endorsed provider (ALPS) through a competitive process, and in Idaho, that same provider has been quite successful in helping to ensure that every lawyer has access to an affordable insurance policy.

The Task Force considered possible coverage level requirements of \$100K/\$300K, \$250K/\$250K, and \$250K/\$500K. We recommend mandatory minimum coverage at \$250K/\$500K. Idaho's minimum of \$100K/\$300K appears too low for Washington State practice because, based on the data we reviewed, in many instances \$100,000 would not cover the cost of payment to a successful claimant and the costs of representing the lawyer. Upon consideration, the premium cost difference between a \$250K/\$250K and \$250K/\$500K policy would not be substantial, with an estimated one to two hundred dollar difference annually. Because most claims are for less than \$250,000, **the Task Force determined that a policy coverage minimum of \$250,000/\$500,000 will likely be sufficient to cover the large majority of claims.** [The insurance requirement can be fulfilled by the lawyer himself/herself, or by his or her law firm.](#)

The Task Force also discussed tail coverage, deductibles, defense costs, and prior acts (retroactive) coverage. It determined that tail coverage issues will likely be addressed in some individual insurance policies, but that obligatory tail coverage posed significant regulatory impediments. The committee has decided not to recommend a deductible size limitation requirement because deductible levels will not affect coverage and because such matters are most effectively decided by the insurer and the insured. We further note the impracticality of mandating prior acts coverage, because this can be very expensive to purchase on the open market. However, the Task Force emphasizes the importance of maintaining **continuous, uninterrupted coverage** in order to ensure legitimate claims are covered.

The malpractice insurance requirement should be implemented by an amendment to the Admission and Practice Rules promulgated by the Washington Supreme Court. **The Task Force's draft proposed rule appears as Appendix C to this report.**

Recommendation 2: Exemptions from the Malpractice Insurance Requirement

Only active lawyers engaged in the *private* practice of law should be subject to the mandatory malpractice insurance requirement. Significant exemptions should be provided for the substantial number of lawyers whose practices are not of a character that call for insurance requirements. Specific exemptions should include:

1. **Government lawyers.** ~~Government-IA~~ lawyers employed by government whose work as a government lawyer constitutes all of ~~the~~ that lawyer's practice.;
2. **House counsel.** ~~An in-house~~ for-profit or nonprofit organization~~company~~ lawyers whose work in that role constitutes the lawyer's entire practice.;
3. **Lawyers whose sole practice consists of volunteer pro bono services through or with the assistance of a qualified legal service provider that provides malpractice coverage.**;
4. **Mediators and arbitrators.** Mediators and arbitrators, if the lawyer's practice is limited to serving as a mediator or arbitrator.;
5. **Judges or administrative law judges.** Judges and ALJs, if the lawyer's practice is serving exclusively as a judge or administrative law judge.;
and6. **Other lawyers either not "actively licensed" or not "engaged in the private practice of law," including, for example, retired lawyers maintaining their licenses, judicial law clerks, and Rule 9 interns.**

Comment: The Task Force has considered a large number of proposed exemptions suggested by WSBA members. These have included existing exemptions from the insurance disclosure requirements of APR 26 (e.g., full-time government lawyers) and others that were suggested. Based on the primary goal of protecting clients, the Task Force recommends that *all* actively licensed lawyers engaged in the private practice of law be required to comply with the malpractice insurance requirement, except the following:

1. **Government Lawyers.** This category would include lawyers who are employed by:
 - The U.S. Government;
 - State of Washington;
 - A federally-recognized American-Indian Tribal government; or
 - A county, regional, or city government or any other government body, board or commission.

Governments, as well as private organizations, are often self-insured. In any event, actions by their own employees that might constitute malpractice are treated as acts of the organizations themselves. Therefore, a requirement for outside malpractice insurance is illogical for these lawyers. At the same time, if full-time government lawyers choose to engage in private practice apart from their regular work, they would be required to obtain malpractice insurance (unless they fall within one of the other exemptions, such as performing pro bono work through a QLSP).

2. **House Counsel.** A lawyer who provides legal services, solely as an employee, of a private for-profit or non-profit corporation or business entity would not be "engaged in the private practice of law." In-house lawyers are typically covered by an employer's errors and omissions policy or through the employer's self-insurance. A lawyer that provides legal services to a private company as an independent contractor (rather than

as an employee) would not be entitled to this exemption because the lawyer would be deemed to be engaged in the private practice of law.

3. **Lawyers whose sole practice consists of volunteer pro bono services through or with the assistance of a qualified legal service provider that provides malpractice coverage.** Task Force research has confirmed that the various QLSP and/or pro bono clinics across the state provide malpractice insurance coverage for their volunteers. Established low-income legal services organizations such as KCBA's Pro Bono Services Program, Eastside Legal Assistance Program, and Northwest Justice Project, for example, all provide coverage. If the sponsoring non-profit entity does not provide malpractice coverage itself, or through another QLSP, then this exemption would not apply. Further, the exemption would apply only if and to the extent the lawyer is practicing exclusively with one or more insured QLSPs or covered pro bono clinics, and is not representing private clients or engaging in other activities constituting the private practice of law. The Task Force notes that some small-population counties in the state do not have QLSPs operating in them or providing the opportunity for lawyers to provide pro bono services through them. We recommend that the WSBA focus on this issue and work to encourage or enable lawyers in every county to do pro bono work that is automatically covered by a QLSP's insurance policy.
4. **Mediators and Arbitrators.** A lawyer can qualify for this exemption if the lawyer's practice is limited exclusively to mediation and arbitration services and therefore, by operation of the rule, the lawyer would not be engaged in the private practice of law. Indeed, mediators, arbitrators, and other adjudicators are not "practicing law" and do not have "clients" as we think of it in the legal representation context.
5. **Judges, Administrative Law Judges, and Hearing Officers.** Judges, administrative law judges, and hearing officers will qualify for an exemption if the lawyer certifies that he or she is not actively engaged in the private practice of law.
6. **Catchall Category.** Any other lawyer who is either not "actively licensed" or not "engaged in the private practice of law" will be exempt from the malpractice insurance mandate. Individuals who may fit within this category include, among others, judicial law clerks, Rule 9 interns, inactive members, and fully retired lawyers who do not practice law but choose to maintain their active licenses without engaging in the private practice of law.

The Task Force examined several other potential exemptions but concluded that they would not be appropriate. These included:

1. **Lawyers practicing solely before federal tribunals.** These lawyers are engaged in private practice of law, notwithstanding that their work is before federal rather than state courts or agencies. The Task Force concluded their clients deserve the same protections afforded to clients who happen to be in state adjudicatory or administrative systems, and therefore an insurance mandate is appropriate.

2. **Family member exemption.** The Task Force received a number of comments from members suggesting a “family member” exemption. The members noted that they provide only limited legal services to “close family” members and this family “benefit” would be eliminated if the members were required to obtain professional liability insurance. The Task Force deliberated about the possible exemption, but the majority voted against creating an exemption for lawyers that assist or advise family members. The primary reasons were that family members are not immune from lawyer malpractice, and further, the Task Force concluded that it was extremely difficult to precisely define those individuals who constitute a “close” family member. Furthermore, while ALPS’ current policies exclude coverage for legal work for [close?] family members, many other policies written for Washington lawyers do not have such exclusions.

3. **Lobbying and/or Legislative Advocacy Exemption.** The Task Force evaluated an exemption for lawyers who exclusively participate in lobbying and/or legislative advocacy work. The Task Force recognized that GR 24 defines activities that constitute the private practice of law. GR 24(a). The GR also discusses other conduct that is deemed permissible activity of a lawyer, such as “acting as a legislative lobbyist,” but does not define whether that conduct constitutes the practice of law. GR 24(b)(7). The Task Force concluded that an exemption for lobbying and/or legislative advocacy work was inappropriate because each individual lawyer was in the best position to assess whether the lawyer’s work fell within the definition of the practice of law set forth in GR 24(a) as well as RPC 5.7. If the lawyer’s work satisfies the definition of “practicing law” under GR 24(a), then the lawyer would be required to obtain professional liability insurance.

4. **Pro bono services provided to a nonprofit organization.** The Task Force also considered an exemption for lawyers who exclusively provide pro bono services to a nonprofit organizations (other than as house counsel), as opposed to providing pro bono services to individuals. The Task Force is sensitive to member concerns that malpractice insurance expenses could potentially limit or impact a member’s ability to provide pro bono services to a nonprofit organization. The Task Force nevertheless concluded there is no difference between the actual harm of legal malpractice to an organization, as opposed to an individual pro bono client. That is, a nonprofit organization is just as susceptible to legal malpractice and negative consequences flowing therefrom as any other member of the public.

5. **Lawyers providing pro bono legal services where the services are not provided through a civil legal aid provider that maintains malpractice insurance for its volunteers.** Because the lawyer would not have coverage, clients would be unprotected. Lawyers may if they choose, transfer their licenses to emeritus status and work through qualified legal service providers to serve pro bono clients.

5-6. Unaffordable insurance. The Task Force received comments from a number of members regarding concerns that malpractice insurance premiums would be prohibitively expensive and force the lawyer to resign from the Bar and stop the practicing law. The Task Force therefore considered a potential financial hardship exemption. The Task Force was not supplied any specific evidence that malpractice premiums would be prohibitively expensive for any individual lawyer, and, consequently, the lawyer could not afford to purchase a policy. The Task Force understands this same argument was raised in Idaho. The Task Force was provided information, however, that all lawyers in Idaho were able to obtain insurance at a rate the lawyers deemed acceptable. The Task Force received presentations from insurance professionals, including insurance brokers and underwriters, and appreciates that the premium for each individual lawyer may vary based upon a variety of factors, including, but not limited to, the nature of practice; years of practice; claims history; and/or disciplinary history. The Task Force concluded that an affordability exemption could not be drafted with sufficient precision and accuracy. The Task Force further noted that evaluation of an affordability exemption would require substantial WSBA administrative resources to review and resolve an individual lawyer's entitlement to such an exemption.

6-7. Washington-licensed lawyers practicing solely out-of-state or out-of-country. Because it is difficult to define precisely where the "practice of law" occurs and difficult to determine if a lawyer claiming to be "out-of-state" is in fact providing legal services in Washington, the Task Force concluded that if an attorney has a Washington license, he or she should carry insurance so that clients are protected. If a lawyer in private practice is certain that he/she will not practice law in Washington, then that lawyer may wish to reconsider whether it makes sense to maintain an active license.

~~7-1. Lawyers providing pro bono legal services where the services are not provided through a civil legal aid provider that maintains malpractice insurance for its volunteers. Because the lawyer would not have coverage, clients would be unprotected. Lawyers may if they choose, transfer their licenses to emeritus status and work through qualified legal service providers to serve pro bono clients.~~

Recommendation 3: Annual Certification and Enforcement

Licensed lawyers should report whether they are engaged in the private practice of law, and their malpractice insurance coverage status, through the annual licensing process. Failure to comply with the insurance requirement would lead to administrative suspension of the lawyer's license pursuant to APR 17.

Comment: The Task Force recommends that the malpractice insurance coverage requirement be managed through the existing annual licensing process. This would involve only a minimal allocation of WSBA staff resources. Every lawyer would be required to certify annually that he or she is covered by a malpractice insurance policy consistent with the minimum limits described above. Alternatively, the lawyer could certify that he or she qualifies for a recognized

exemption. Lawyers who are required to maintain insurance would be required to provide to the WSBA, upon request, specific information such as the name of the insurance carrier, policy number, coverage limits in the specific policy, and dates of coverage. This information provided upon request would not be public. Lawyers would also be obligated to notify the WSBA if at any time they do not renew insurance coverage or if their insurance lapses.

The Task Force recommends that a lawyer's failure to obtain professional liability coverage by the annual licensing deadline would constitute noncompliance with the licensing requirements in the APR. The Task Force understands that the WSBA Regulatory Services Department would engage in enforcement efforts consistent with the applicable APR for failure to comply with licensing requirements.

CONCLUSION

With this Report, the Task Force recommends to the WSBA Board of Governors all actively licensed lawyers in private practice be required to maintain malpractice insurance as a condition of licensure. Consistent with the directive in its Charter, the Task Force has drafted a rule designed to implement its recommendation. See draft revised APR 26 as **Appendix C**. The Rule incorporates the Task Force's recommended mandatory minimums and exemptions. The Task Force submits this draft Rule for the Board's consideration and any further action the Board deems appropriate.