

MANDATORY MALPRACTICE INSURANCE TASK FORCE

MEETING MINUTES

February 21, 2018

Members present were Chair Hugh Spitzer, Stan Bastian (by phone), Christy Carpenter, Gretchen Gale (by phone), P.J. Grabicki (by phone), Mark Johnson (by phone), Rob Karl, Kara Masters (by phone), Evan McCauley (by phone), Brad Ogura, Suzanne Pierce, Brooke Pinkham, Todd Startzel, Stephanie Wilson, and Annie Yu. Members John Bachofner, Dan Bridges, and Lucy Isaki were excused.

Also present were Carol Bernick (Chief Executive Officer of the Oregon State Bar), Doug Ende (WSBA Staff Liaison), Thea Jennings (Office of Disciplinary Counsel Disciplinary Program Administrator), Rachel Konkler (Office of Disciplinary Counsel Legal Administrative Assistant), Diane Minnich (Executive Director of the Idaho State Bar), Chris Newbold (Executive Vice President, ALPS), and Sara Niegowski (WSBA Chief Communications and Outreach Officer).

The meeting was called to order at 1:00 p.m.

A. MINUTES

The minutes of the January 24, 2018 meeting were approved by consensus.

B. PRESENTATION BY CAROL BERNICK, CHIEF EXECUTIVE OFFICER, OREGON PROFESSIONAL LIABILITY FUND

Carol Bernick, Chief Executive Officer of the Oregon State Bar Professional Liability Fund (PLF), presented a history and overview of the PLF. The PLF was created in 1977 for the purposes offering Oregon State Bar (OSB) members low cost insurance and meaningful access to preventive and education services for risk management. The PLF was established through legislative enactment to create a shared risk pool to ease the difficulty in obtaining insurance, which at the time was scarce and expensive. The PLF is an independently managed subdivision of the OSB governed by a Board of Directors appointed by the OSB Board of Governors. 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. 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. Coverage also includes \$50,000 of expenses (principally costs of representation). The PLF is a shared risk pool, with no underwriting of the individual participants. The program covers lawyers, and not law firms. Both lawyers and firms are free to arrange for excess coverage on the open market. The amount of the assessment has remained the same for seven consecutive years, both through management of risk and favorable returns on investments. The annual assessment is reduced



for new lawyers in their first three years of practice. The PLF has high favorability ratings among the OSB membership and is seen as a resource for lawyers facing problems. The PLF emphasizes loss prevention through legal education, publications, and practice aids, as well as funding of the Oregon Attorney Assistance Program and a practice management advisor program. Ms. Bernick noted that the PLF was originally created 30 years ago as a service for lawyers (rather than clients) because of difficulties that attorneys had obtaining malpractice insurance at that time. At the same time, the PLF provides distinct benefits to clients and the public as well. Ms. Bernick also observed that very few claims reach the \$300,000 maximum.

C. DISCUSSION OF COMMENTS SNAPSHOT

Thea Jennings provided a snapshot of the common themes found in comments submitted by WSBA members for the Task Force's consideration. While the substance of many of the comments were subject to some interpretation, the themes presented reflected the main issues that WSBA members raised regarding whether a mandatory malpractice insurance rule should be adopted. The themes presented were as follows:

1. Cost – commentator expressed concern about costs;
2. Idea for exemption – commentator suggested one or more specific exemptions;
3. Needs more information – commentator needed more information;
4. Not engaged in private practice – commentator not engaged in private practice;
5. Public protection – commentator raised issues of public protection;
6. Reputation of the profession – commentator noted possible impact of imposing malpractice insurance on the public's perception of the profession;
7. Retired/semi-retired/retiring – commentator noted possible impact of imposing malpractice insurance on retirees;
8. Uninsurable – commentator indicated he or she is unable to obtain insurance; and
9. Other – comment could not easily be categorized, was an inquiry, or presented multiple issues for consideration.

The Task Force reviewed a summary of the distribution of comments among themes. These themes will be updated as the Task Force receives additional feedback.

D. PRESENTATION BY DIANE MINNICH, EXECUTIVE DIRECTOR, IDAHO STATE BAR

Diane Minnich, Executive Director of the Idaho State Bar, provided a history and overview of the Idaho State Bar's adoption and implementation of its malpractice coverage requirement. Malpractice insurance in Idaho was adopted in Idaho without creation of a formal task force or vetting committee. 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. The measure won by a slim majority of 51% to 49%. Following membership approval, the Idaho Supreme Court adopted the proposed rule with an effective

date of January 1, 2018. 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. Idaho lawyers may purchase insurance from any provider they wish on the free market. The rule purposely provides for no hardship exemptions.

Idaho is currently in the final stages of implementing its first licensing season with mandatory malpractice insurance. Ms. Minnich stated that this new regulatory scheme has required a large time commitment from staff and extensive Bar resources to implement. As of February 1, 2018, less than 10 lawyers had failed to submit their proof of coverage. Ms. Minnich stated that so far no lawyer has been categorically unable obtain insurance. Although some have expressed concern about the cost, no premium quoted has exceeded \$3,500. Some lawyers have indicated that the requirement will affect their decision to retire from practice.

E. COMMUNICATIONS UPDATE

Chief Communications Officer Sara Niegowski presented communication strategies for the Task Force to consider when communicating with members and the public about the topic of mandatory malpractice insurance. WSBA Communications staff has begun efforts to inform the membership of the Board of Governors' discussions about mandatory malpractice insurance and the Task Force's work. Communications efforts by staff have included circulating information via publications, such as *NWLawyer* and *Take Note*, and by distributing a one-page informational sheet on the Task Force's work at WSBA events. Ms. Niegowski emphasized that the next steps of a communications strategy should be to focus on targeted information gathering rather than generalized "What do you think" inquires.

F. NEXT STEPS

Chief Regulatory Counsel Jean McElroy is expected to attend the next Task Force meeting and provide an overview of membership demographics and statistics on lawyers in private practice who carry malpractice insurance in Washington. Task Force members also discussed reaching out to states with more stringent malpractice insurance disclosure requirements.

G. ADJOURNMENT

The meeting adjourned at 4:00 p.m.