

MANDATORY MALPRACTICE INSURANCE TASK FORCE

AGENDA

June 27, 2018

1:00 p.m. to 4:00 p.m.

Conference Call: 1-866-577-9294; Code: 52824#

AGENDA

1. Call to Order and Preliminary Matters
 - a. Approval of May 23, 2018 minutes
2. Discussion with Chris Newbold (Executive Vice President, ALPS) on Potential Free Market Modeling
3. Report on Recent ABA Reports regarding the Pro Bono Work of Lawyers in Washington and Nationwide (Thea Jennings)
4. Report to the Board of Governors on Revised Background Information and “Decision Agenda”

MEETING MATERIALS

- A. Draft May 23, 2018 Meeting Minutes
- B. Draft Memo to Board of Governors with Task Force Interim Report
- C. Revised Background Information and “Decision Agenda”



A.
Draft May 23, 2018 Minutes

MANDATORY MALPRACTICE INSURANCE TASK FORCE

MEETING MINUTES

May 23, 2018

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

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

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

A. MINUTES

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

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

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

1. Key Information Discussion

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



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

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

2. Expressed Concerns from the Membership

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

3. Potential Approaches

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

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

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

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

expressed that malpractice insurance or lack thereof has a significant impact on clients, and that it is appropriate for lawyers to ensure their own financial accountability.

C. PROPOSED MODELING

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

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

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

D. MEMBER FEEDBACK

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

E. NEXT STEPS

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

F. ADJOURNMENT

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

B.

Draft Memo to Board of Governors with
Task Force Interim Report

WASHINGTON STATE
BAR ASSOCIATION
Mandatory Malpractice Insurance Task Force

MEMO

To: WSBA Board of Governors
From: Hugh Spitzer, Chair of Mandatory Malpractice Insurance Task Force
Date: June 22, 2018
Re: Interim Report of the Mandatory Malpractice Insurance Task Force

On September 28, 2017, the Board of Governors established the Mandatory Malpractice Insurance Task Force and issued a Charter to guide the Task Force's work. The Task Force roster (attached as Appendix B) is composed of WSBA members, industry professionals, and members of the public.

The purpose of the Task Force is to focus on the nature and the consequences of uninsured attorneys, to examine current mandatory malpractice insurance systems, and to gather information and comments from WSBA members and other interested parties. The Task Force is using this information to determine whether to recommend mandatory malpractice insurance for all licensed legal professionals. Under the Charter, the Task Force will make its recommendation to the Board of Governors by January, 2019.

The Task Force has spent its initial six months meeting monthly to investigate the topic, consider oral presentations from various individuals with relevant perspectives on the issue, and collect input from the membership. Attached as Appendix C to this Interim Report is a document entitled *Background Information & "Decision Agenda,"* which summarizes (1) the key information acquired by the Task Force thus far, (2) concerns raised by the membership in comments to the Task Force, and (3) possible regulatory approaches that the Task Force might recommend to the Board. The Task Force discussed this document at its May 23, 2018 meeting and then again at its June 27, 2018 meeting.

Following initial discussion of a preliminary version of this *Background Information & "Decision Agenda,"* the Task Force had a general discussion of which approaches it would likely recommend. The consensus was that the Task Force would likely recommend that mandatory malpractice insurance be implemented, with important exemptions, through a free market model.

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

expressed that malpractice insurance or lack thereof has a significant impact on clients, and that it is appropriate for lawyers to ensure their own financial accountability.

With an approach tentatively identified, the next steps for the Task Force include developing the details of a practicable free market approach for Washington State and exploring what potential limits, requirements, and exemptions that model should include—keeping in mind the concerns raised by the membership. The Task Force is working with WSBA’s endorsed professional liability insurance provider, ALPS, on developing a proposed program for mandatory malpractice insurance. This work is ongoing.

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

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

ATTACHMENTS

Appendix A: Task Force Charter

Appendix B: Task Force Roster

Appendix C: Background Information & “Decision Agenda”

C.
Revised Background Information and
“Decision Agenda”

BACKGROUND INFORMATION & “DECISION AGENDA”

A. INTRODUCTION

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: jurisdictions with mandatory malpractice insurance programs in place or under consideration; a jurisdiction that has implemented a proactive management-based regulation (PMBR) model; a law professor regarding her research into lawyers who go uninsured; experienced insurance industry professionals; a legal malpractice plaintiff’s lawyer; WSBA members through comments submitted to the Task Force; and various WSBA staff regarding member demographics, the Client Protection Fund, and the results of the *2015 ABA Profile on Legal Malpractice Claims*.

This document summarizes the key information acquired by the Task Force, and preliminarily identifies possible regulatory approaches.

B. KEY INFORMATION

What follows is a listing of the most significant data acquired by the Task Force regarding the problems associated with lawyers who go uninsured.

1. Approximately 32,000 lawyers are actively licensed to practice law in Washington.
2. Over the last three reporting years, 14% of Washington lawyers in private practice have consistently reported being uninsured.
3. Lawyers who practice in solo or small firms are most likely to be uninsured. According to 2017 voluntary demographic information reported by Washington lawyers as part of the annual licensing process, approximately 28% of solo practitioners reported being uninsured.
4. Solo and small firm practitioners represent a disproportionate share of the malpractice claims. According to the *2015 ABA Profile on Legal Malpractice Claims (2015 ABA Profile)*, claims against lawyers in firms of five or fewer lawyers represented over 65% of claims during the period of 2012-2015.
5. According to the *2015 ABA Profile*, the practice areas of personal injury, real estate, family law, estates and trust, and collection and bankruptcy have the highest incidences of malpractice claims.
6. Most grievances and disciplinary actions also involve solo and small firm practitioners.



7. Malpractice plaintiffs' lawyers report numerous instances of worthy claims that they must reject for representation because the defendant lawyer is uninsured, making a recovery much less likely.
8. Over the last five years, Client Protection Fund application statistics indicate that 11% of applications were denied because they describe instances of malpractice rather than theft or dishonest conduct.
9. The value of most malpractice claims is less than \$100,000.
10. There is a disparity in Washington's regulatory/financial responsibility requirements for different legal license types (LLLTs/LPOs/lawyers). LLLTs and LPOs must show financial responsibility, but lawyers do not have a similar requirement.
11. On average, lawyers are practicing longer, and once lawyers reach the age of 71, the number in private practice who carry malpractice insurance drops precipitously.
12. Tail coverage purchased for a specified period protects against claims made after practitioners retire. Tail coverage can be expensive for retiring lawyers who have not previously carried malpractice insurance.
13. Discipline and claims history affect the cost of obtaining insurance.
14. The vast majority of common law countries (as well as civil law countries) require some form of malpractice insurance for lawyers in private practice.

C. EXPRESSED CONCERNS FROM MEMBERSHIP

A number of concerns have been expressed by some WSBA members regarding the concept of requiring attorney malpractice insurance.

1. A perception of prohibitive costs for insurance;
2. Concerns that retired/semi-retired/retiring attorneys will no longer be able to practice;
3. The desire to make malpractice insurance requirements inapplicable to lawyers not engaged in private practice (*e.g.*, government lawyers, in-house counsel, non-profit legal assistance or defense counsel);
4. Possible unfairness of requiring malpractice insurance for lawyers (often retired/semi-retired/retiring lawyers) who provide mainly pro bono services; and
5. The perception of uninsurability (at reasonable cost) of attorneys in certain specialties, or attorneys who practice solely before specialized non-Washington State courts.

D. POTENTIAL APPROACHES: "DECISION AGENDA"

What follows is a list of possible regulatory approaches the Task Force has identified for possible recommendation to the WSBA Board of Governors. Following each approach is a short list of relevant considerations.

1. **Do nothing and maintain the status quo.**
 - a. No resource cost or fiscal impact on WSBA
 - b. Does not address the identified problems 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).
 - a. Directly addresses issues of competence/practice management but not financial responsibility for professional errors
 - b. Practical effect of PMBR model in Illinois not yet known
 - c. 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 stationary).
 - a. Low cost to administer
 - b. Impact on conduct appears significant
 - c. Appears to encourage acquisition of insurance
 - d. Does not address financial responsibility for professional errors
4. **Combine PMBR with more extensive disclosure requirements** (i.e., combine 2 and 3 above).
5. **Implement mandatory malpractice insurance through a free market model** (e.g., Idaho model).
 - a. Provides coverage options to members
 - b. Free market allocates risks and costs based on practice character, claims history, and other underwriting standards
 - c. Highly competitive market provides reasonable cost and different coverage, exclusions, and deductibles (Idaho reports no lawyers unable to obtain insurance)
 - d. Modest operating costs
 - e. Key issues to consider:
 - i. What level to require?
 - ii. Which types of lawyers should be excluded from the requirement?
 - iii. Should the State mandate any policy terms?
 - iv. Other?

6. **Implement professional liability fund model** (e.g., Oregon model, which requires all private practice lawyers with a primary office in Oregon to participate in the Bar-operated Professional Liability Fund, with coverage of all members).
 - a. Coverage available for all members
 - b. Robust practice management, member support, and claims support systems
 - c. Relatively high annual premium (in current market) and high operating costs
 - d. Large staff required to administer and significant fiscal impact to implement
 - e. Choice restricted to single provider
 - f. Spreads risks across all classes of lawyers
7. **Consider other approaches:**
 - a. Captive insurer(s)
 - b. Multiple “approved” insurers
 - c. Letters of credit or surety bonds for uninsured lawyers