

MANDATORY MALPRACTICE INSURANCE TASK FORCE

AGENDA

January 30, 2019

1:00 – 4:00 p.m.

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

AGENDA

1. Preliminary Matters and Approval of November 28, 2018 and December 19, 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 Plan for Final Report
6. Discussion of Possible February Meeting

MEETING MATERIALS

- A. Draft November 28, 2018 minutes (pp. 768 – 771)
- B. Draft December 19, 2018 minutes (pp. 772 – 773)
- C. Revised Draft of Final Report to the Board of Governors (pp. 774 – 898)
- D. Draft of Amended APR 26 (pp. 899 – 902)
- E. Comments Submitted to the Task Force (provided to 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, 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, Gretchen Gale, 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.
Draft December 19, 2018
minutes

MANDATORY MALPRACTICE INSURANCE TASK FORCE

MEETING MINUTES

December 19, 2018

Members present were Chair Hugh Spitzer, John Bachofner (by phone, joined call after adjournment), Christy Carpenter (by phone), PJ Grabicki (by phone), Kara Masters (by phone), Brad Ogura, Suzanne Pierce (by phone), Todd Startzel, Stephanie Wilson (by phone), and Annie Yu (by phone). Members Stan Bastian, Dan Bridges, Gretchen Gale, Lucy Isaki, Mark Johnson, Rob Karl, Evan McCauley, and Brooke Pinkham 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), and Rachel Konkler (Office of Disciplinary Counsel Legal Administrative Assistant).

The meeting was called to order at 1:10 p.m. Because under the WSBA Bylaws there were not enough members in attendance at any given time to establish a quorum, the meeting adjourned shortly after its commencement due to lack of a quorum. The Chair announced that there may need to be an additional meeting called in February if the Task Force is unable to complete its work at the scheduled January meeting.



C.

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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I. 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. The Task Force was asked to provide an interim report in the summer, 2018, which it provided on July 10. The Task Force was charged with finalizing its 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.¹ 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. As of December 1, 2018, the Task Force had received more than 580 written comments, both solicited and unsolicited. The Task Force 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.

Through the autumn of 2018, the Task Force continued to gather information about the impact of uninsured lawyers on clients, the character of the apparent problem, and the best approach to dealing with that issue. The Task Force spent considerable time discussing which categories of lawyers should be excluded from any malpractice insurance requirement. The Task Force members reached consensus on its recommendations, and then worked on drafting and editing a report to the Board of Governors.

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 it received, and reached consensus. Task Force members also concluded that they should move boldly and not shy away from difficult proposals. Task Force participants were consistent in their view, reflected in General Rule (GR) 12.1 that the Washington Supreme Court and the WSBA have a duty to protect the public and maintain the integrity of the profession. 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

¹ The Task Force was unable to conduct its December 19, 2018, meeting due to lack of a quorum.

this Task Force is to recommend effective ways to assure 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 lawyers pose a significant risk to their clients. Further, when lawyers lack insurance that 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 the Task Force has concluded that it is more than 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 malpractice insurance in the private marketplace. For the purposes of this Report, the “private practice of law” means the provision of legal services to clients other than the lawyer’s employing organization and that organization’s representatives and employees.
- The required minimum coverage should be \$250,000 per occurrence/\$500,000 total per year (“\$250K/\$500K”).
- Several categories of lawyers should be exempt because they are not engaged in the private practice of law or are otherwise insured by the organization through which they provide legal services:
 - Government lawyers;
 - Judges;
 - Employees of a corporation or business entity, including nonprofits;
 - Employees of or independent contractors for nonprofit legal aid or public defense offices that provide insurance to their employees or independent contractors;
 - Mediators or arbitrators;
 - Lawyers providing volunteer pro bono services for qualified legal services provider as defined in APR 1(e)(8) that provide insurance to their volunteers;
 - 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 this report.

- Licensed lawyers should 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.
- The WSBA should partner with VLPs in Washington to increase the availability of no- or low-cost malpractice insurance for lawyers whose private practice is limited solely to *pro bono* representations. It is important to make sure that implementation of an insurance mandate does not have a material adverse effect on access to justice.

In shaping its 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 the Task Force's proposals. The Task Force recognizes 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 requiring that lawyers carry insurance. 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, the Task Force believes 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 balance tips in favor of public protection.

Protection of the public is the overriding *public* duty of lawyers, the WSBA, and the Washington Supreme Court. The WSBA's mission statement lists four core missions: to serve the public, to serve the members of the Bar, to ensure the integrity of the legal profession, and to champion justice. Three out of those four goals emphasize the *public* mission of the organized bar. Equally if not more important is the language of the Washington Supreme Court's GR 12. GR 12.1 begins: "Legal services providers must be regulated in the public interest." GR 12.1 then lists ten specific objectives, leading off with "protection of the public" and proceeding to list nine other regulatory objectives, all of which are oriented toward the protection of clients and access to justice. The Task Force emphasizes GR 12 and the WSBA's mission to underscore the point that the Board of Governor's decision whether to recommend action on uninsured lawyers, and the Court's ultimate decision on this matter, must be approached overwhelmingly from the perspective of what is good for the public and what is good for clients—not what might be convenient or desirable for lawyers themselves.

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

II. TASK FORCE REPORT

A. 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 malpractice 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 public 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 and Georgia are considering doing so; in 2018, the State Bar of Nevada proposed a mandatory malpractice insurance rule, which was not adopted by the Supreme Court of Nevada; and, in 2017, New Jersey Supreme Court Ad Hoc Committee on Attorney Malpractice recommended a direct disclosure requirement, which has not been implemented by the Court and was opposed by the New Jersey State Bar Association).
- 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.

The Task Force also received useful technical assistance from ALPS,² 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

² ALPS is the WSBA's endorsed professional liability insurance provider.

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, 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 the Task Force received monthly updates on the concerns voiced by WSBA members. On October 16, 2018, the Task Force held an open forum, during which 18 people testified either 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. All information has been made available to members and the public via the Task Force web page of the WSBA website.

DRAFT

B. KEY FINDINGS

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

1. WSBA Membership Data 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 2017.³ Of those lawyers, 32,189 were actively licensed to practice law.⁴ In 2017, 19,813 of actively licensed lawyers were engaged in the private practice of law.⁵ 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 malpractice insurance.⁶ 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.⁷

As of December 19, 2018, there are 819 actively licensed limited practice officers (LPOs) and 35 actively licensed limited license legal technicians (LLLTs).⁸ 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 financial responsibility ordinarily is established by certification of the existence of professional liability insurance.⁹ Specifically, LPOs may choose to submit an insurance policy in the amount of \$100,000 or an audited financial statement in the amount of \$200,000.¹⁰ LLLTs must submit proof of insurance coverage in the

³ WSBA Staff, *WSBA Membership Demographics*, PowerPoint Presentation, at 2 (Mar. 28, 2018).

⁴ *Id.*

⁵ Based on data compiled by WSBA staff from APR 26 reporting records.

⁶ APR 26 (adopted effective July 1, 2007).

⁷ *State Implementation of ABA Model Court Rule on Insurance Disclosure*, ABA Standing Comm. on Client Protection (A.B.A., Feb. 10, 2016), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/chart_implementation_of_mcrid.authcheckdam.pdf.

⁸ *WSBA Member Licensing Counts*, December 19, 2018 (member licensing counts are published monthly on the WSBA website).

⁹ APR 12(f)(2); APR 28(l)(2)(a).

¹⁰ APR 12(f)(2).

amount of at least \$100,000 per claim and a \$300,000 annual aggregate.¹¹ Failure to comply with this licensing obligation results in administrative suspension.¹²

2. 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.

a) 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.¹³ She found that small firm lawyers are more likely to go uninsured;¹⁴ however, a limited amount is known about these lawyers and why they choose to go uninsured, because these lawyers often fly “under the radar.”¹⁵

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).¹⁶ Her survey concluded that approximately 15% of private practitioners in New Mexico and 19.6% of private practitioners in Arizona go uninsured.¹⁷ 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.¹⁸ 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.¹⁹ Other reasons included philosophical opposition to mandatory insurance, a dislike of insurance companies, and a belief of no risk of liability because of practice area.²⁰ A

¹¹ APR 28(I)(2)(a)

¹² APR 17(a)(2)(D).

¹³ Leslie C. Levin, *Lawyers Going Bare and Clients Going Blind*, 68 Fla. L. Rev. 1281 (2016).

¹⁴ Levin, *supra* note 13, at 1282-83; *see also* Herbert M. Kritzer & Neil Vidmar, *When Lawyers Screw Up: Improving Access to Justice for Legal Malpractice Victims* 40-41 (University Press of Kansas) (2018).

¹⁵ Levin, *supra* note 13, at 1282-83.

¹⁶ Leslie C. Levin, *Lawyers Going Bare*, PowerPoint Presentation, at 3 (Mar. 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, *supra* note 13, at 1286.

¹⁷ Levin, *Lawyers Going Bare*, at 3.

¹⁸ *Id.* at 8.

¹⁹ Levin, *supra* note 13, at 1290.

²⁰ *Id.* at 1293-95.

recent article by Texas A&M University School of Law Professor Susan Saab Fortney adds: “A perplexing explanation for lawyers ‘going bare’ is that many apparently do not believe that they have a professional obligation to maintain insurance or assets to be available in the event of a claim.”²¹

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.²² 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.²³ 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%).²⁴ Survey respondents listed the following as their primary reason for going uninsured: cost, confidence in their practice, and a belief that their practice area did not necessitate coverage.²⁵

b) 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.²⁶ 14% of Washington lawyers in private practice have consistently reported being uninsured.²⁷ Specifically, in 2017, of the 19,813 lawyers in private practice, 2,752 lawyers reported that they were uninsured.²⁸

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,

²¹ Susan Saab Fortney, *A Tort in Search of a Remedy: Prying Open the Courthouse Doors for Legal Malpractice Victims*, 85 Fordham L. Rev. 2033, 2052 (2017).

²² In the Matter of Amendments to Supreme Court Rule 79 Regarding Professional Liability Insurance for Attorneys Engaged in Private Practice, AKDT 534, at 22 (June 29, 2018), <http://caseinfo.nvsupremecourt.us/public/case/Captcha.do?n=%2Fdocument%2Fview.do%3FcsNameID%3D46470%26csIID%3D46470%26deLinkID%3D657034%26sireDocumentNumber%3D18-24812> [hereinafter ADKT 534].

²³ *Id.* at 24.

²⁴ *Id.* at 25 (respondents were permitted to select one or more practice areas in responding to this survey question).

²⁵ *Id.* at 26.

²⁶ Based on data compiled by WSBA staff from APR 26 reporting records.

²⁷ Based on data compiled by WSBA staff from APR 26 reporting records.

²⁸ Based on data compiled by WSBA staff from APR 26 reporting records.

83.5% aged 61-70, and 75.6% aged 71-80 reporting they are insured compared to 90% of lawyers aged 30-40 and 89.4% of lawyers aged 41-50.²⁹

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.³¹

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.³²

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.³³ Of the 101, 55 reported that they did not carry malpractice insurance.³⁴ 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.³⁵ Eighteen of those uninsured actively licensed lawyers reported maintaining a solo private practice.³⁶ (It should be noted that these are simply correlations, and the fact that an individual lawyer does or does not obtain insurance will not necessarily affect the likelihood that the lawyer might violate the Rules of Professional Conduct.)

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

²⁹ WSBA Staff, *WSBA Membership Demographics*, at 8; *Mar. 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).

³¹ WSBA Staff, *WSBA Membership Demographics*, at 12.

³² Based on data compiled by WSBA staff from APR 26 reporting data.

³³ Based on data compiled by WSBA staff from APR 26 reporting data and discipline data.

³⁴ Based on data compiled by WSBA staff from APR 26 reporting data and discipline data.

³⁵ Based on data compiled by WSBA staff from APR 26 reporting data and discipline data.

³⁶ Based on data compiled by WSBA staff from APR 26 reporting data and discipline data.

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.³⁷

3. The Malpractice Insurance Market, Generally

Virtually all malpractice coverage is claims-made coverage, which covers a claim when the claim is filed during the policy period.³⁸ Claims-made coverage will only cover claims after the policy period expires if the insured purchases “tail” coverage.³⁹ Tail coverage protects from claims based on lawyer errors or omissions that occur during the policy period that are not filed until the policy period has expired.⁴⁰

There is significant variation among insurance providers regarding what is and is not covered, and regarding many other policy details. 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
- pre- or post-judgment interest, appeal, bonds, and related costs.⁴¹

³⁷ *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-force26b365f2f6d9654cb471ff1f00003f4f.pdf?sfvrsn=296a00f1_2.

³⁸ Mark Bassingthwaight, *A Young Lawyer’s Guide to Purchasing Lawyer’s 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>; 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 (Apr. 25, 2018); *Apr. 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.

³⁹ Mark Bassingthwaight, *The Ins and Outs of “Tail” Coverage*, ALPS Blog (Mar. 2, 2012), <https://blog.alpsnet.com/the-ins-and-outs-of-tail-coverage>; *Apr. 25, 2018 Task Force Meeting Minutes* at 2.

⁴⁰ Mark Bassingthwaight, *The Ins and Outs of “Tail” Coverage*; *Apr. 25, 2018, Task Force Meeting Minutes*, at 2.

⁴¹ *Understanding Your Insurance Coverage*, ABA Standing Comm. on Law. Prof. Liability, at 2-3 (A.B.A.), https://www.americanbar.org/content/dam/aba/administrative/lawyers_professional_liability/downloads/understandingcoverage.pdf.

Multiple variables apply when underwriting lawyer malpractice insurance. Specifically, some areas of practice present higher risks than others.⁴² 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.⁴³

Typical exclusions to malpractice insurance policies include dishonest, fraudulent, criminal, or malicious acts by the insured.⁴⁴ Additional exclusions include, among others, prior acts (committed before the policy period) when the insured knew of or should have foreseen the claim, discrimination and sexual harassment, vicarious liability, and punitive damages.⁴⁵ Again, the exclusions vary noticeably from carrier to carrier.

Both admitted and non-admitted carriers operate in Washington State.⁴⁶ See Appendix C ABA List of Admitted and Non-admitted Carriers (as of February *, 2019). Admitted carriers are licensed by the Washington State Office of the Insurance Commissioner (OIC) and must abide by specific regulations governing admitted carriers.⁴⁷ The ABA reports that in Washington there are 21 admitted carriers that write lawyer malpractice policies.⁴⁸ 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.⁴⁹ Because they are subject to strict government oversight, admitted carriers have less flexibility in setting rates and deviating from their filings.⁵⁰ When an admitted carrier becomes insolvent, a state fund operates to protect consumers by paying out claims (up to statutory maximums) and refunding premiums.⁵¹

⁴² 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 (Apr. 25, 2018).

⁴³ Graf, *Mandatory Malpractice Insurance – Task Force*, at 10; Weisenberger, *Mandatory Malpractice Insurance Task Force*, at 4.

⁴⁴ *Understanding Your Insurance Coverage*, ABA Standing Comm. on Law. Prof. Liability, at 3.

⁴⁵ *Id.* at 3-4.

⁴⁶ Graf, *Mandatory Malpractice Insurance – Task Force*, at 3.

⁴⁷ Graf, *Mandatory Malpractice Insurance – Task Force*, at 11; Apr. 25, 2018, *Task Force Meeting Minutes*, at 1.

⁴⁸ *LPL Insurance Directory – Washington*, ABA Standing Comm. on Law. Prof. Liability (Am. Bar Ass’n), https://www.americanbar.org/groups/lawyers_professional_liability/resources/lpl-insurance-directory/washington/.

⁴⁹ RCW 48.05.110; RCW 48.05.400; Apr. 25, 2018, *Task Force Meeting Minutes*, at 1.

⁵⁰ Graf, *Mandatory Malpractice Insurance – Task Force*, at 11; Apr. 25, 2018, *Task Force Meeting Minutes*, at 1.

⁵¹ *What’s a Guaranty Association and How Does It Work?*, Wash. St. Office of the Insurance (OIC) Commissioner, <https://www.insurance.wa.gov/whats-guaranty-association-and-how-does-it-work>.

In contrast, non-admitted carriers are not governed by state insurance departments and are not required to file their rates with the state.⁵² They provide what is known as “surplus line” coverage.⁵³ With less regulation, non-admitted carriers are free to set their own rates and underwrite higher risk insurance packages.⁵⁴ Some areas of practice that are higher risk and receive greater underwriting scrutiny from admitted carriers such as ALPS include entertainment and sports law, patent law, securities law, and mergers and acquisitions work.⁵⁵ Practitioners in these higher risk areas may need to seek insurance from non-admitted carriers rather than through admitted carriers.⁵⁶ Non-admitted carriers can further accommodate certain complex risks for which the traditional insurance marketplace does not provide adequate coverage.⁵⁷ No state fund protects consumers from non-admitted carrier insolvency.⁵⁸ The ABA reports that in Washington there are six non-admitted carriers that write lawyer malpractice policies.⁵⁹

4. 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.⁶⁰ The *Profile* is based on self-reporting by insurers, so it does not present a comprehensive review of the legal malpractice insurance market.⁶¹ 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.⁶² Much, but not all, of the information in this section of the Report is drawn from the results of the *Profile*.

a) Firm Size and Malpractice Claims

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

⁵² *Surplus Line Insurance*, Wash. St. OIC, <https://www.insurance.wa.gov/surplus-line-insurance>; Graf, *Mandatory Malpractice Insurance – Task Force*, at 11; *Apr. 25, 2018, Task Force Meeting Minutes*, at 2.

⁵³ *Surplus Line Insurance*, Wash. St. OIC; *Apr. 25, 2018, Task Force Meeting Minutes*, at 2.

⁵⁴ *Surplus Line Insurance*, Wash. St. OIC; *Apr. 25, 2018, Task Force Meeting Minutes*, at 2.

⁵⁵ Email, Chris Newbold to Task Force Member Todd Startzel, Dec. 14, 2018, on file with WSBA.

⁵⁶ *Id.*

⁵⁷ *Surplus Line Insurance*, Wash. St. OIC; *Apr. 25, 2018, Task Force Meeting Minutes*, at 2.

⁵⁸ *Surplus Line Insurance*, Wash. St. OIC.

⁵⁹ *LPL Insurance Directory – Washington*, ABA Standing Comm. on Law. Prof. Liability.

⁶⁰ ABA Standing Comm. on Law. Prof. Liability, *Profile of Legal Malpractice Claims 2012-2015*, at 7 (A.B.A.) (Sept. 2016).

⁶¹ *Id.* at 2.

⁶² *Id.* at 9.

against firms with two to five attorneys.⁶³ 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).⁶⁴ It is unclear to what the higher 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 14% to 15% of private practitioners.⁶⁵ Further, larger firms may have more robust practice management systems⁶⁶ 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 claims⁶⁷; 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.⁶⁸

b) Percentage of Claims by Practice Area

Nationwide, the 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%.⁶⁹ These statistics tend to mirror those practice areas with the highest reported number of uninsured lawyers in Washington.⁷⁰ 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.⁷¹

⁶³ *Id.* at 14.

⁶⁴ Carol J. Bernick, Oregon Professional Liability Fund Chief Executive Officer, *PLF: History, How It Works, Why It Works*, PowerPoint Presentation, at 17 (Feb. 21, 2018).

⁶⁵ Kritzer & Vidmar, *supra* note 14, at 78.

⁶⁶ *Id.* at 5.

⁶⁷ *Id.* at 79.

⁶⁸ Levin, *Lawyers Going Bare*, at 5.

⁶⁹ *Profile of Legal Malpractice Claims 2012-2015*, at 12.

⁷⁰ WSBA Staff, *WSBA Membership Demographics*, at 12.

⁷¹ *Id.*

c) Years in Practice and Claim Rates

Evidence nationally suggests that lawyers with more than ten years of practice produce a disproportionate share of claims.⁷² 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.⁷³ 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.⁷⁴ 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 72% of claims were against lawyers with more than ten years of experience.⁷⁵ 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.⁷⁶

d) 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).⁷⁷ 95.2% of malpractice claims are resolved for less than \$250,000.⁷⁸ ALPS reports that based on its experience, over the past 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.⁷⁹ According to ALPS, in Washington, for all claims, its average loss payment was \$60,548 and average loss expense to defend those claims was \$20,406.⁸⁰ Where payments were made by ALPS, its average loss payment was \$119,856, and average loss expenses were about \$40,454.⁸¹

⁷² Kritzer & Vidmar, *supra* note 14, at 81-82.

⁷³ *Id.* at 67-68, 81.

⁷⁴ *Id.* at 81-82.

⁷⁵ *Id.* at 82.

⁷⁶ *Id.* at 83.

⁷⁷ *Profile of Legal Malpractice Claims 2012-2015*, at 22.

⁷⁸ *Id.*

⁷⁹ Chris Newbold, Executive Vice President of ALPS, "Open Market" Mandatory Malpractice Model, PowerPoint Presentation, at 11 (June 27, 2018).

⁸⁰ *Id.*

⁸¹ *Id.*

e) Frequency Rate of Claims

National frequency rates of claims, meaning the percentage of lawyers per 100 lawyers against whom claims are filed, appears to be less than six percent annually for all lawyers.⁸² 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.⁸³ Also, in Canada, where lawyers must 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%.⁸⁴ Given that the market is claims made, claim rate percentages include matters lawyers report to their insurers as possible claims.⁸⁵

5. Insurance Options for Lawyers Providing Primarily Pro Bono Services

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 association or other independent pro bono programs,⁸⁶ many of which are likely qualified legal service providers (QLSPs). 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.⁸⁸ Washington has approximately 60 Bar-approved QLSPs.⁸⁹

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 volunteer lawyer programs (VLPs).⁹⁰ VLPs are legal assistance programs that recruit volunteer lawyers to provide free legal aid in civil matters to primarily low-income individuals.⁹¹ Approximately five to eight years ago, LFW launched its own group insurance program for all of its grantees that are

⁸² Levin, *supra* note 13, at 1309-10.

⁸³ Levin, *Lawyers Going Bare*, at 13.

⁸⁴ *Id.* at 14

⁸⁵ Levin, *supra* note 13, at 1310.

⁸⁶ ABA Standing Comm. on Pro Bono and Public Service, *Supporting Justice in Washington: A Report on the Pro Bono Work of Washington's Lawyers*, at 5-6 (A.B.A.) (July 2017).

⁸⁸ *Public Service Opportunities*, WSBA, <https://www.wsba.org/connect-serve/volunteer-opportunities/psp>.

⁸⁹ *Id.*

⁹⁰ WSBA Staff, *Report re Qualified Legal Service Providers and Malpractice Insurance*, at 2 (Oct. 18, 2018).

⁹¹ *Volunteer Lawyers Program*, Spokane County Bar Association, <http://www.spokanebar.org/volunteer-lawyers-program/>; *About Us*, Clark County Volunteer Lawyers Program, <https://ccvlp.org/about/>.

VLPs.⁹² The LFW plan offers coverage up to \$500,000.⁹³ Many grantees choose to buy additional coverage. This includes, for example, the King County Bar Association (KCBA) Pro Bono Services Program and the Eastside Legal Assistance Program (ELAP).⁹⁴

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.⁹⁵ 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.⁹⁶ With respect to tail coverage, the coverage extends past the time of volunteering.⁹⁷ 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.⁹⁸ QLSPs that provide legal services primarily through staff attorneys, such as Columbia Legal Services and Northwest Justice Project, obtain their own insurance plans.⁹⁹ Columbia Legal Services and Northwest Justice Project have pro bono riders for volunteer lawyers that work with them.¹⁰⁰

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.¹⁰¹ It is thus likely that not every lawyer would connect with a VLP to provide pro bono services.¹⁰² 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.

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 professional 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.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.* at 3-4.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.* at 4-5

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 6.

¹⁰² *Id.*

Applications are investigated only when there is a chance the fund could pay the victim, meaning that there is evidence of malfeasance.¹²¹ Applications regarding malpractice cannot be considered and, thus, are not investigated.¹²² Consequently, the CPF has no evidence of whether the applicants' malpractice claims were meritorious.¹²³ 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.¹²⁴ Specifically, from 2013-2017, 598 applications were considered.¹²⁵ 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.¹²⁶

7. 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.¹²⁷ Plaintiffs' lawyers rarely agree to pursue professional negligence cases when the potential

¹²¹ Apr. 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

¹²² *Id.*

¹²³ *Id.*

¹²⁴ WSBA Staff, *Client Protection Fund Statistics*, PowerPoint Presentation, at 3 (Apr. 25, 2018).

¹²⁵ *Id.* at 2.

¹²⁶ *Id.* at 2-3.

¹²⁷ See, e.g., *Cleveland B. Ass'n v. Smith*, 102 Ohio St. 3d 10, 2004–Ohio-1582, 806 N.E.2d 495 (2004) (six-month suspension imposed for an uninsured lawyer, who among other misconduct, failed to file her client's case before the statute of limitations had run and then negotiated a \$50,000 settlement with her client related to the error. After several bounced checks and paying only \$14,000 of the amount owed, the lawyer filed for bankruptcy. Though the bankruptcy did not discharge her debt, the lawyer's debt to her client remained unpaid as of the time of the imposition of discipline); *Parker v. Marcus*, 281 N.J. Super. 589, 685 A.2d 1326 (1995) (motion to reinstate plaintiff's dismissed complaint in a personal injury action granted where dismissal was due to plaintiff's lawyer's failure to appear at an arbitration proceeding. The Court granted the motion despite the option to sue for malpractice given that "any claim against [the plaintiff's] disbarred and uninsured attorney would undoubtedly be futile. Thus, plaintiff ... would be left without any viable remedy"). See also, Andrew Wolfson, *Malpractice Award Still Unpaid 18 Years Later*, *The Courier-Journal*, June 17, 2014, at A7 (judgment of \$390,000 plus interest still unsatisfied for client who, due to his uninsured lawyer's negligence, was convicted of murder and arson and spent two years in prison before he was later acquitted); Jay Stapleton, *Hard-to-Collect Verdict Raises New Questions; Attorneys Mixed on Need to Mandate Legal Malpractice Policies*, 39 Conn. L. Trib. No. 20, 1, May 20, 2013 (judgment in excess of \$530,000 unrecoverable against uninsured and judgment-proof lawyer who failed to name the proper party to a personal injury suit, which led to dismissal of the case).

defendant is an uninsured lawyer,¹²⁸ in part because even a successful lawsuit ultimately may result in the defendant filing for bankruptcy or taking other actions that make recovery difficult or impossible.¹²⁹ Attorney malpractice cases are complicated and difficult to bring and to prove,¹³⁰ and for malpractice plaintiff's lawyers, economic viability must be a significant factor in determining whether to take a case.¹³¹ 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.¹³² Because the bulk of potential malpractice claims are relatively small in size,¹³³ 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.¹³⁴ The problem is heightened by the fact that some lawyers in small firm and solo practices are involved in representations involving smaller amounts of money, but those are the same practitioners who are much more likely to be "going bare" in terms of insurance. As Professors Kritzer and 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.¹³⁵ They further note that clients of lawyers outside the large corporate firm context

face a greater likelihood of a lawyer making a costly error, and they face greater limitations in securing the kind of assistance needed 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.¹³⁶

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 the Task Force reviewed.¹³⁷ In their study, Professors Kritzer and Vidmar found that "[t]he much higher rate of claims per 100

¹²⁸ Kritzer & Vidmar, *supra* note 14, at 92, 148; *See also*, Bob Egelko, *Lawyers Battle Over State Malpractice Proposal*, San Francisco Chronicle, June 18, 2007, at A1; Apr. 25, 2018, Task Force Meeting Minutes, at 3.

¹²⁹ (source ?).

¹³⁰ Susan Saab Fortney, *A Tort in Search of a Remedy: Prying Open the Courthouse Doors for Legal Malpractice Victims*, 85 Fordham L. Rev. 2033, 2034-37 (2017).

¹³¹ Robert B. Gould, *Deciding to Take a Plaintiff Legal Malpractice Case*, Law. Liability Rev., 2 (Apr. 1987).

¹³² *Id.*

¹³³ *Profile of Legal Malpractice Claims 2012-2015*, at 22; Newbold, "Open Market" Mandatory Malpractice Model, at 11.

¹³⁴ Kritzer & Vidmar, *supra* note 14, at 147-48.

¹³⁵ *Id.* at 43.

¹³⁶ *Id.* at 169-70.

¹³⁷ Levin, *Lawyers Going Bare*, at 13; Kritzer & Vidmar, *supra* note 14, at 70.

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.”¹³⁸ The annual frequency of claims rate in Oregon is about 12 per 100 lawyers, higher than in other states, and Canadian provinces with mandatory malpractice insurance report similar rates.¹³⁹ Required malpractice insurance appears to increase the number of claims made and claims paid. While this might be viewed as a disadvantage to lawyers, it should be viewed as promoting the regulatory objective of protecting the public.

8. Other Regulatory Schemes

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

a) *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 \$3,300 per year. The Oregon program was established in 1977 by legislative mandate¹⁴⁰ to create a shared risk pool to ease the difficulty in obtaining insurance, which at the time was scarce and expensive.¹⁴¹

The PLF is an independently managed subdivision of the OSB governed by a Board of Directors, which is appointed by the OSB Board of Governors.¹⁴² 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.¹⁴³ Each participating lawyer pays the same flat-rate annual assessment of \$3,300 for coverage of \$300,000 per claim/\$300,000 aggregate, with optional excess coverage and no deductibles.¹⁴⁴ Coverage also includes \$50,000 of expenses (principally costs of representation).¹⁴⁵ The PLF is a shared risk pool, with no underwriting of the individual participants.¹⁴⁶ The program covers lawyers, and not law firms.¹⁴⁷ The annual assessment is

¹³⁸ Kritzer & Vidmar, *supra* note 14, at 171.

¹³⁹ *Id.* at 171 n.10.

¹⁴⁰ *About the PLF*, OSB PLF, <https://www.osbplf.org/about-plf/overview.html>; Or. Rev. Stat. § 9.080.

¹⁴¹ *Statement of the Board of Governors Professional Liability Fund*, OSB, at 1 (1977).

¹⁴² *Id.* at 3

¹⁴³ *Coverage*, OSB PLF, <https://www.osbplf.org/coverage/overview.html>; *Exemptions*, OSB PLF, <https://www.osbplf.org/assessment-exemptions/exemptions.html>.

¹⁴⁴ *Coverage*, OSB PLF; *Excess Coverage*, OSB PLF, <https://www.osbplf.org/excess-coverage/overview.html>; Bernick, *PLF: History, How It Works, Why It Works*, at 2.

¹⁴⁵ *Coverage*, OSB PLF.

¹⁴⁶ Bernick, *PLF: History, How It Works, Why It Works*, at 2-3.

¹⁴⁷ *Id.* at 2.

reduced for new lawyers in their first three years of practice.¹⁴⁹ A major advantage of Oregon's PLF approach is that all lawyers are covered, so no lawyer is in the position of being unable to obtain insurance.

The PLF has high favorability ratings among the OSB membership and is seen as a resource for lawyers facing problems.¹⁵⁰ 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.¹⁵¹

b) Idaho Model, Free Market Model

Idaho's malpractice insurance mandate began in 2018, based on a free-market model.¹⁵² The malpractice insurance requirement was proposed in Idaho without creation of a formal task force or vetting committee.¹⁵³ 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 2016.¹⁵⁴ The measure won by a slim majority of 51% to 49%.¹⁵⁵ Following membership approval, the Idaho Supreme Court adopted the proposed rule with an effective date of January 1, 2018.¹⁵⁶

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.¹⁵⁷ Idaho lawyers may purchase insurance from any provider they wish on the free market.¹⁵⁸ The rule purposely provides for no hardship or other exemptions.¹⁵⁹

¹⁴⁹ Bernick, *PLF: History, How It Works, Why It Works*, at 8.

¹⁵⁰ *Id.* at 20-21.

¹⁵¹ *About the PLF*, OSB PLF; Bernick, *PLF: History, How It Works, Why It Works*, at 20-21.

¹⁵² Idaho B. Comm'n R. 302(a)(5), https://isb.idaho.gov/wp-content/uploads/ibcr_sec03_licensing.pdf

¹⁵³ *Feb. 21, 2018, Task Force Meeting Minutes*, at 2.

¹⁵⁴ Annette Strauser, *2018 Malpractice Coverage Requirement – General Information*, Idaho St. B. (Aug. 29, 2017), <https://isb.idaho.gov/blog/author/astrouser/>; *Feb. 21, 2018, Task Force Meeting Minutes*, at 2.

¹⁵⁵ Strauser, *2018 Malpractice Coverage Requirement – General Information*.

¹⁵⁶ Strauser, *2018 Malpractice Coverage Requirement – General Information*; Idaho B. Comm'n R. 302(a)(5).

¹⁵⁷ Idaho B. Comm'n R. 302(a)(5).

¹⁵⁸ Strauser, *2018 Malpractice Coverage Requirement – General Information*.

¹⁵⁹ *Feb. 21, 2018, Task Force Meeting Minutes*, at 3.

No Idaho attorneys reported an inability to obtain the required insurance.¹⁶⁰ Further, although some expressed concern about the cost, the average premium ranged between \$2,000 and \$3,000, and no premium quoted exceeded \$3,500.¹⁶¹ However, some lawyers indicated that the requirement would affect their decision to retire from practice.¹⁶²

c) Illinois' Proactive Management-Based Regulation

In 2017, Illinois became the first state to adopt proactive management-based regulation (PMBR).¹⁶³ PMBR is an approach to lawyer regulation that focuses on programs intended to promote the ethical practice of law and hopefully reduce the incidence of grievances and malpractice claims.¹⁶⁴

Prior to adoption of PMBR in Illinois, Illinois studied PMBR models in other jurisdictions including New South Wales, Australia, and Nova Scotia, Canada.¹⁶⁵ 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.¹⁶⁶

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.¹⁶⁷

With the adoption of PMBR, beginning in 2018, every two years, Illinois lawyers in private practice who do not have malpractice insurance must complete a four-hour self-assessment online,

¹⁶⁰ Feb. 21, 2018, *Task Force Meeting Minutes*, at 3; Interview Notes with Diane Minnich, Dec. 11, 2018, on file with WSBA.

¹⁶¹ Feb. 21, 2018, *Task Force Minutes*, at 3; Interview Notes with Diane Minnich, Dec. 11, 2018, on file with WSBA.

¹⁶² Feb. 21, 2018, *Task Force Minutes* at 3.

¹⁶³ Ill. Sup. Ct. R. 756, http://www.illinoiscourts.gov/SupremeCourt/Rules/Art_VII/artVII.htm#Rule756; Press Release, Sup. Ct. of Ill., *Illinois Becomes First State to Adopt Proactive Management Based Regulation* (Jan. 25, 2017), <http://www.illinoiscourts.gov/Media/PressRel/2017/012417.pdf>.

¹⁶⁴ Press Release, Sup. Ct. of Ill., *supra* note 163.

¹⁶⁵ Jerry Larkin, Attorney Register and Disciplinary Commission (ARDC) Administrator, *PMBR – The Illinois Experience*, PowerPoint Presentation, at 10 (Mar. 28, 2018); *Mar. 28, 2018, Task Force Meeting Minutes*, at 3.

¹⁶⁶ Larkin, *PMBR – The Illinois Experience*, at 9.

¹⁶⁷ Larkin, *PMBR – The Illinois Experience*, at 19-20; *Mar. 28, 2018, Task Force Meeting Minutes*, at 3.

evaluating their law firm management and business practices.¹⁶⁸ The self-assessment is administered by the Attorney Registration and Disciplinary Commission (ARDC), the Illinois Supreme Court agency that regulates Illinois lawyers.¹⁶⁹ Uninsured lawyers who fail to complete the self-assessment cannot register in 2019 to renew their license and may be administratively suspended.¹⁷⁰

The self-assessment is confidential, and also provides free CLE credit.¹⁷¹ The self-assessment covers the following topics: technology; conflicts; fees and billing; client relations; trust accounting; wellness; civility and professionalism; and diversity and inclusion.¹⁷² Of those lawyers who have completed the self-assessment, a large majority have responded positively to the program.¹⁷³

d) South Dakota's Direct 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.¹⁷⁴ Among the most stringent of those seven states is South Dakota, which adopted its rule in 1999.¹⁷⁵ 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.¹⁷⁶ The Rule further requires the lawyer to disclose the information in every written communication with the client on firm letterhead and in all advertising.¹⁷⁷ Some anecdotal evidence suggests that the purchase of insurance increased around the time of the implementation of the disclosure rule in

¹⁶⁸ *PMBR Self-Assessment Course FAQs*, ARDC, https://registration.iardc.org/attyreg/Registration/regdept/Rule_756e2_Self-Assessment_FAQ_s.aspx.

¹⁶⁹ Press Release, Sup. Ct. of Ill, *supra* note 163.

¹⁷⁰ *PMBR Self-Assessment Course FAQs*, ARDC.

¹⁷¹ *Id.*

¹⁷² *PMBR Modules*, ARDC, <https://www.iardc.org/pmbr.html>.

¹⁷³ Matthew Hector, *ARDC Reports Positive Early Reaction to Lawyer Self-Assessment*, 106 Ill. Bar J. N. 10 (Apr. 2018).

¹⁷⁴ Levin, *supra* note 13, at 1297-99; *State Implementation of ABA Model Court Rule on Insurance Disclosure*, ABA Standing Comm. on Client Protection.

¹⁷⁵ 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>.

¹⁷⁶ S.D. R. of Prof. Conduct 1.4(c), https://sdlegislature.gov/Statutes/Codified_Laws/DisplayStatute.aspx?Type=Statute&Statute=16-18-A.

¹⁷⁷ S.D. R. of Prof. Conduct 1.4(c), 1.4(d), 7.2(l), https://sdlegislature.gov/Statutes/Codified_Laws/DisplayStatute.aspx?Type=Statute&Statute=16-18-A.

South Dakota.¹⁷⁸ Currently, in South Dakota, approximately 6% of lawyers in private practice are uninsured, with 8.4% of small firm and solo lawyers in private practice uninsured.¹⁷⁹

e) 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.¹⁸⁰ 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.¹⁸¹ 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).¹⁸²

f) Other Recent State Efforts to Explore Mandatory Malpractice Insurance

California

At the direction of the state legislature in 2017, 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.¹⁸³ The Working Group is considering enhanced disclosure requirements, mandating insurance as a condition of licensure, developing a PMBR program, and promoting voluntary insurance.¹⁸⁴ The Working Group is actively seeking public comment from both the public and attorneys who provide reduced cost services.¹⁸⁵ The period

¹⁷⁸ Levin, *Lawyers Going Bare*, at 12.

¹⁷⁹ Kritzer & Vidmar, *supra* note 14, at 41.

¹⁸⁰ *Id.* at 38.

¹⁸¹ *Professional Indemnity Insurance Requirements Around the World*, 9 LAWPRO Magazine “File Retention,” no. 4, (Dec. 2010), <https://www.practicepro.ca/wp-content/uploads/2017/06/2010-12-professional-indemnity-around-world.pdf>.

¹⁸² *Id.*

¹⁸³ *Malpractice Insurance Working Group Charter*, the St. B. of Cal., <http://www.calbar.ca.gov/Portals/0/documents/cc/Malpractice-Insurance-Working-Group-Charter.pdf>.

¹⁸⁴ *The State Bar Seeks Public Comment on Options Under Consideration in Its Statutorily Mandated Malpractice Insurance Study*, the St. B. of Cal., (Nov. 5, 2018), <http://www.calbar.ca.gov/About-Us/Our-Mission/Protecting-the-Public/Public-Comment/Public-Comment-Archives/2018-Public-Comment/Legal-Malpractice-Insurance> [hereinafter *The State Bar Seeks Public Comment*].

¹⁸⁵ *Open Session Agenda: Item 702 September 2018*, Malpractice Insurance Working Group, at 2 (Sept. 14, 2018), <http://www.calbar.ca.gov/Portals/0/documents/702-Malpractice-Insurance-Working-Group.pdf>.

for public comment closed on November 5, 2018.¹⁸⁶ The Working Group must report its findings to the State Supreme Court, Legislature, and Bar's Board of Trustees by March 31, 2019.¹⁸⁷

Georgia

In late 2018, the State Bar of Georgia convened a Professional Liability Insurance Committee to study and make recommendations concerning lawyer's professional liability insurance coverage.¹⁸⁸ The Committee has met twice since December 13, 2018, and is currently drafting a set of two proposed rules for submission to the State Bar of Georgia's Board of Governors at its March 2019 meeting: One of the proposed rules would impose a mandatory malpractice insurance requirement and the other would impose an insurance disclosure requirement to the state bar.¹⁸⁹

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.¹⁹⁰ As in Washington, Nevada lawyers must report their insurance coverage status annually.¹⁹¹ 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.¹⁹² 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.¹⁹³

On June 29, 2018, the State Bar of Nevada submitted a petition to the Supreme Court of Nevada seeking adoption of a free-market malpractice insurance requirement.¹⁹⁴ The proposed rule amendment would have required every lawyer engaged in private practice to attest to having malpractice insurance coverage at a minimum limit of \$250,000 per occurrence/\$250,000 annual

¹⁸⁶ *The State Bar Seeks Public Comment*, the St. B. of Cal.

¹⁸⁷ *Malpractice Insurance Working Group Charter*, the St. B. of Cal.

¹⁸⁸ *Executive Committee Minutes November 7, 2018*, St. B. of Ga.; https://www.gabar.org/committeesprogramssections/executivecommittee/upload/EC_1118a.pdf; *Committees*, State Bar of Georgia, <https://www.gabar.org/committeesprogramssections/committees/>.

¹⁸⁹ Professional Liability Insurance Committee, *Draft January 7, 2019, Minutes*, St. B. of Ga.

¹⁹⁰ Robert Horne & Jennifer Smith, *Join the Discussion: Whether Malpractice Insurance Should Be Mandatory for Nevada Attorneys*, 25 Nev. Law. 28, at 28 (Dec. 2017), https://www.nvbar.org/wp-content/uploads/NevadaLawyer_Dec2017_Malpractice-Insurance-Discussion2.pdf.

¹⁹¹ Nev. Sup. Ct. R. 79, <https://www.leg.state.nv.us/CourtRules/SCR.html>.

¹⁹² Horne & Smith, *Join the Discussion: Whether Malpractice Insurance Should Be Mandatory for Nevada Attorneys*, at 28-29.

¹⁹³ *Mar. 28, 2018, Task Force Meeting Minutes*, at 4.

¹⁹⁴ ADKT 534, *supra* note 22, at 1.

aggregate.¹⁹⁵ 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.¹⁹⁶

New Jersey

In February 2014, the New Jersey Supreme Court formed the Ad Hoc Committee on Attorney Malpractice.¹⁹⁷ The Committee was charged with investigating whether to implement an insurance disclosure rule in accordance with the ABA Model Rule on Insurance Disclosure, as well as whether to implement mandatory malpractice insurance.¹⁹⁸ After three years of study, in June 2017, the Committee issued its report recommending against mandatory malpractice insurance but proposing a court rule requiring lawyers to disclose whether they carry malpractice insurance to the Court and to clients.¹⁹⁹ In a letter dated January 15, 2018, in response to a request for comment on the Committee's Report, the New Jersey State Bar Association agreed with the Committee's recommendation not to impose mandatory malpractice insurance but opposed its recommendation to mandate direct disclosure.²⁰⁰ It is unclear what action, if any, the New Jersey Supreme Court took on the Committee's proposal; however, as of the issuance of this Report, the propose rule had not yet been adopted.²⁰¹

9. 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.²⁰²

¹⁹⁵ *Id.* at 15

¹⁹⁶ Order Denying Petition for Amendment to Supreme Court Rule 79, ADKT 534 (Oct. 11, 2018), https://nvcourts.gov/Supreme/Decisions/Administrative_Orders/.

¹⁹⁷ N.J. Sup. Ct. Ad Hoc Comm. on Malpractice Ins., *Report of the Supreme Court Ad Hoc Committee on Attorney Malpractice Insurance*, June 2017, at 3, <https://www.njcourts.gov/courts/assets/supreme/reports/2017/attmalpracticeinsurance.pdf>.

¹⁹⁸ *Id.* at 5

¹⁹⁹ *Id.* at 7-9.

²⁰⁰ Letter from Robert B. Hille, President of the New Jersey State Bar Association to Hon. Glenn A. Grant, Acting Administrative Director of the New Jersey Court, dated Jan. 15, 2018, <https://tcms.njsba.com/personifyebusiness/Portals/0/NJSBA-PDF/Reports%20&%20Comments/malpractice%20insurance%20--%202018.pdf>.

²⁰¹ *See*, R. 1:21. Practice of Law, the Rules Governing the Courts of the State of New Jersey, <https://njcourts.gov/attorneys/assets/rules/r1-21.pdf>.

²⁰² Graf, *Mandatory Malpractice Insurance – Task Force*, at 10; Weisenberger, *Mandatory Malpractice Insurance Task Force*, at 4.

Average premium numbers can vary broadly based on the firm's principal area(s) of practice.²⁰³ According to the *Profile*, the practice areas of personal injury (plaintiff), real estate, family law, estate planning, collection/bankruptcy, criminal law, and certain business/corporate law practices have the highest incidences of malpractice claims.²⁰⁴ Not surprisingly, insurance premiums tend to be higher in many of those practice areas.²⁰⁵

Basic malpractice policies with modest coverage levels are available to most practitioners at reasonable cost, including those practicing solo or in small firms.²⁰⁶ Based on ALPS-specific data, the average premium of Washington lawyers based on current market trends is \$2,500.²⁰⁷ However, the average premium amount reflects all insured practitioners, some of whom may carry coverage amounts of \$1,000,000 or more.²⁰⁸ According to ALPS, in Idaho, which launched its mandatory malpractice requirement in 2018, the average premium for ALPS' Basic policy issued to solo practitioners (the primary demographic of uninsured lawyers) without prior acts coverage was approximately \$1,200 for the mandated limit of liability of \$100,000 per occurrence/\$300,000 aggregate.²⁰⁹ ALPS' average premium per Idaho solo practitioner was \$2,200, an average that included lawyers who had reached "full maturity" and purchased a variety of different limits of liability.²¹⁰ According to Diane Minnich, Executive Director of the Idaho State Bar, reported insurance premiums averaged between \$2,000 and \$3,000.²¹¹ 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 implementation,²¹² so trends may become more apparent with time. However, consistent with how the market operates, premiums will go up in the next several reporting cycles, especially for first-time insurance purchasers and new lawyers.²¹³

²⁰³ Newbold, "Open Market" Mandatory Malpractice Model, at 9.

²⁰⁴ *Profile of Legal Malpractice Claims 2012-2015*, at 12.

²⁰⁵ See Newbold, "Open Market" Mandatory Malpractice Model, at 9.

²⁰⁶ Newbold, "Open Market" Mandatory Malpractice Model, at 6-7, 9.

²⁰⁷ Newbold, "Open Market" Mandatory Malpractice Model, at 6.

²⁰⁸ *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..)

²⁰⁹ Email, Newbold to Task Force Member Startzel, Dec. 14, 2018, on file with WSBA.

²¹⁰ *Id.*

²¹¹ Interview Notes with Diane Minnich, Dec. 11, 2018, on file with WSBA.

²¹² Interview Notes with Diane Minnich, Dec. 11, 2018, on file with WSBA; [pending approval] Nov. 28, 2018 *Task Force Meeting Minutes*, * [add link].

²¹³ Interview Notes with Diane Minnich, Dec. 11, 2018, on file with WSBA.

New lawyers pay noticeably lower malpractice insurance premiums than more experienced lawyers.²¹⁴ 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.²¹⁵ Insurers set premiums to provide resources to pay claims on incidents that happened in the past.²¹⁶ A first-year lawyer was not practicing in the past, and thus represents a lower risk to insurers.²¹⁷ 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.²¹⁸ 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 provide coverage beginning from the start date of the policy and exclude prior acts.²¹⁹ The start date is the retroactive date for the life of the policy, which means that as with new lawyers, the more years a lawyer maintains a policy, the more the premium will increase until the end of the maturity process.²²⁰

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.²²¹ Tail coverage can be expensive (an unlimited tail can be 300% of the expiring premium) for retiring lawyers who do not qualify for a free extended reporting period endorsement or who do not have a relatively long history with a particular carrier.²²²

²¹⁴ Newbold, “Open Market” Mandatory Malpractice Model at 7-8.

²¹⁵ Keith Fichtner, *Ask an Expert: Why Legal Malpractice Insurance Costs Go Up Every Year*, ALPS Blog (Oct. 24, 2017), <https://blog.alpsnet.com/ask-an-expert-why-legal-malpractice-insurance-rates-go-up-every-year>

²¹⁶ *Id.*

²¹⁷ Newbold, “Open Market” Mandatory Malpractice Model at 7.

²¹⁸ *Id.* at 8.

²¹⁹ Fichtner, *Ask an Expert: Why Legal Malpractice Insurance Costs Go Up Every Year*.

²²⁰ *Id.*

²²¹ Bassingthwaighe, *The Ins and Outs of “Tail” Coverage*; Apr. 25, 2018, *Task Force Meeting Minutes*, at 2.

²²² Bassingthwaighe, *The Ins and Outs of “Tail” Coverage*; Apr. 25, 2018, *Task Force Meeting Minutes*, at 2.

C. WSBA MEMBER CONCERNS AND TASK FORCE RESPONSES

During a comment period ending December 1, 2018, 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.²²³ The Task Force concluded that it would be helpful to address each of those general concerns directly, providing additional background on why it decided to make a particular recommendation or chose not to follow a suggested approach.

1. Cost of Malpractice Insurance

The number one concern expressed in written comments from WSBA members—20% of all comments—listed the cost of malpractice insurance as a reason lawyers should not be required to maintain a malpractice insurance policy.

The Task Force has 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 also received information regarding Idaho's experience with mandatory malpractice coverage. Idaho instituted mandatory coverage of \$100K per occurrence/\$300K aggregate 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 in the future. The average premium for an ALPS Basic policy for \$100K per occurrence/\$300K aggregate issued to a solo practitioner 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 for an ALPS Basic 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 Washington malpractice insurance premiums under the recommended minimum of \$250K per occurrence/\$500K

²²³ The Task Force accepted and compiled member comments from its inception in January 2018 through its publicized comment deadline of December 1, 2018. The work of the Task Force and its solicitation of member comment was publicized throughout 2018 by means of informational articles and progress reports appearing in *NWLawyer*, *Take Note*, and through other forms of direct communication with members, such as email communications.

aggregate as a means of illustrating the likely range of premiums lawyers in this state could expect. The examples are as follows:

Firm A: Solo practitioner located in Seattle. Purchasing a Retroactive Date (Retro Date)²²⁴ Inception policy on the Basic form (no First Dollar Defense (FDD))²²⁵ 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.

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 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 \$250K per occurrence/\$500K aggregate policy is adopted in Washington, the average premiums will be higher than the 2018 experience 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 uninsured lawyers will generally be able to obtain coverage for a reasonable premium on the insurance market in Washington.

²²⁴ A 'retroactive date' is generally the date from which a law firm holds uninterrupted malpractice insurance coverage. The purpose of the retro date is to exclude claims arising from any work undertaken prior to the date shown on the declaration page of the lawyer's insurance policy. Email, Newbold to Task Force Member Startzel, Dec. 14, 2018, on file with WSBA. The retroactive date is thus the inception date of the policy. Email, Newbold to Task Force Staff, Jan. 23, 2019, on file with the WSBA.

²²⁵ "'First Dollar Defense' is a coverage option offered to certain law firms based upon eligibility that states [that] when a firm is faced with a claim, the deductible will apply to damages only[,]" meaning the insurer pays the 'first dollar' to defend the claim. Email, Newbold to Task Force Member Startzel, Dec. 14, 2018, on file with WSBA.

2. Insurance Requirements for Retired and Semi-retired Lawyers

The second largest number of comments received from WSBA members—10% of all comments—were from licensed lawyers who noted they were either retired, semi-retired, or planning to retire, 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 simply need to certify that status, and the insurance requirement would not apply. Apparently, a number of retired lawyers maintain their licenses either because they believe 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.

3. Anticipated Adverse Impact 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 might be cost prohibitive and force some of 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 recommend a requirement that might undermine the aspirational recommendation of RPC 6.1 or materially interfere with a lawyer’s purpose to provide legal services to the underserved.

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. While the overall impact of a malpractice insurance requirement on pro bono service might not be large, the WSBA should take positive action to reduce the possibility of a material effect on the number of lawyers willing to volunteer to perform pro bono services. The primary goal of a mandatory malpractice requirement is to protect the public, and that need for protection applies with equal force to legal services provided to the disadvantaged.

4. 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. Diane Minnich, Executive Director of the Idaho State Bar, 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 no Idaho lawyer, regardless of specialty, has 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 and recognizes that premiums may vary based on a variety of factors. 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. However, if a malpractice event occurs involving a lawyer in a unique field, the potential damage to the client could be substantial. The Task Force therefore believes that there is at least equal responsibility for lawyers that practice in specialized fields to obtain malpractice insurance coverage.

5. "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.²²⁶ 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. The Task Force simply does 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

²²⁶ See, *e.g.*, Shaila Dewan, *Moral Hazard: A Tempest-Tossed Idea*, N.Y. Times, Feb. 25, 2012, at BU1, <https://www.nytimes.com/2012/02/26/business/moral-hazard-as-the-flip-side-of-self-reliance.html>.

with “legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”

6. 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 occur. But that is the point. If more clients who 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.

7. Adverse Impact on Public Attitude towards Lawyers

The Task Force received a small number of comments to the effect that the public might 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.²²⁷ Further, the Task Force believes that to the extent there are existing negative public attitudes about lawyers, these will not be materially affected one way or the other by an insurance mandate.

8. 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.”).

²²⁷ Levin, *supra* note 13, at 1325-1327.

D. 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 lawyers to evaluate and assume personal risks created by lack of malpractice insurance, the Task Force concluded that it is simply not fair 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 Washington Supreme Court'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, Washington would have 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 approaches are summarized below, followed by a more detailed discussion of the approaches considered and the considerations, pro and con, 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 lawyer 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 direct disclosure of a lawyer's lack of malpractice insurance to clients and prospective clients).

- 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
- Noncompliance puts lawyers at risk of permanent record of professional discipline

4. Combine PMBR with more extensive disclosure requirements (Combine 2 and 3 above, *i.e.*, require uninsured lawyers to both undergo self-assessment and education on risk reduction, practice management, and bookkeeping and directly 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 options for 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

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 malpractice insurance. The insurance coverage disclosure requirement notwithstanding, it is not reasonable to assume that most consumers check the WSBA website to ascertain whether their prospective lawyer has a malpractice insurance policy. On the contrary, anecdotal information received by many Task Force members suggests that 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 are 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.

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,”²²⁸ 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 approach 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.

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.” As a rule of professional conduct, the potential consequence of noncompliance is professional discipline. 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, notwithstanding South Dakota’s disclosure requirement, there are still many uninsured lawyers practicing in that state, and when incidences of malpractice occur with damaging consequences, the clients of uninsured lawyers can suffer serious adverse consequences.

²²⁸ Press Release, Sup. Ct of Ill., *supra* note 163.

4. Couple Illinois' PMBR Model with South Dakota's Direct Disclosure Requirement

Washington State could impose a two-pronged approach coupling Illinois' Proactive Management-Based Regulation with South Dakota's direct 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.

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 unreasonably expensive or unavailable to some practitioners.

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.²²⁹ The advantage of this

²²⁹ In the late 1980s, the WSBA previously considered and rejected such a proposal. Specifically, in 1986, the WSBA Board of Governor's considered creating a professional liability fund and system for requiring malpractice insurance, which would have been incorporated into the former Admission to Practice Rules.

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 (\$3,300 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 lawyers, *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 does not provide lawyers with any ability to tailor their policies by adjusting coverage amounts or policy terms.

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 malpractice 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

Status Report on Malpractice Insurance Coverage and Professional Liability Fund Proposal, Wash. St. B. News, October 1986, at 27. In December 1986, by a 7-4 vote, the BOG approved the proposal for submission to the Supreme Court, subject to submission of the issue to a referendum of the membership. Carole Grayson, *Washington State Bar Newslines: The Board's Work*, Wash. St. B. News, January 1987, at 29. The membership defeated the referendum by a vote of 6,971 to 1,693. Carole Grayson, *Washington State Bar Newslines: The Board's Work*, Wash. St. B. News, March 1987, at 16.

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.

DRAFT

E. 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 under "WSBA Member Concerns and Task Force Responses".)

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

Active Washington-licensed attorneys engaged in the private practice of law, with specified exemptions, should be required to be covered by continuous, uninterrupted malpractice insurance. Attorneys should be required to obtain minimum levels of malpractice 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 rule.

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 malpractice 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 Washington Supreme Court's Client Protection Fund cannot make payments based on malpractice. A license to practice law is a privilege, and every lawyer engaged in the business of providing legal services should be financially responsible for 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. Mistakes made by lawyers without malpractice insurance have a disproportionate impact on low and middle income Washingtonians. This is simply unfair, and it is a problem that can be addressed as a regulatory measure.

The Task Force reviewed the range of potential approaches described in the preceding section of this Report. It 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 the 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 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 well, but it is expensive, would have

significant startup costs, 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 a free-market model was analogous to the system 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 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. The Task Force recommends mandatory minimum coverage at \$250K/\$500K. Idaho's minimum of \$100K/\$300K appears too low for Washington State practice because, based on the data 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 Task Force 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. The Task Force further noted 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 D to this Report.**

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 "private practice" character that calls for insurance requirements. In this context, "private practice" means the provision of legal services to clients other than the lawyer's employing organization and that organization's representatives and employees. Specific exemptions should include:

1. **Employment as a government lawyer;**
2. **Employment as a judge;**
3. **Employment by a corporation or business entity, including nonprofits;**
4. **Employee or independent contractor for a nonprofit legal aid or public defense office that provides insurance to its employees or independent contractors;**
5. **Mediation or arbitration;**
6. **Volunteer pro bono service for a qualified legal services provider as defined in APR 1(e)(8) that provides insurance to its volunteers; and**
7. **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 those recommended exemptions discussed in more detail below.

a) Recommended Exemptions

Fundamentally, the recommended “exemptions,” with the exception of the pro bono category, can be thought of as exclusions because these are categories of lawyers who are not in private practice and therefore not serving private clients who need the protection that malpractice insurance affords.

1. **Employment as a government lawyer.** 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. **Employment as a judge.** 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. Adjudicators are neutrals and are not “representing” any clients when they are acting in an adjudicative capacity.
3. **Employment by a corporation or business entity, including nonprofits.** 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. Similar to lawyers employed by government agencies, house counsel’s malpractice is treated as an act of the organization itself, so an insurance requirement is inapposite. At the same time, a lawyer who 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.
4. **Employee or independent contractor for a nonprofit legal aid or public defense office that provides insurance to its employees or independent contractors.** A lawyer employed to provide public defense services or civil legal aid through an organization that insures its employees or independent contractors would be insured for the purposes of the malpractice insurance mandate. This exemption anticipates that there may be some circumstances under which lawyers will not be insured when providing indigent service or civil legal aid representation to clients. This exemption makes clear to those lawyers who are not insured through any organization that they must obtain malpractice insurance. If lawyers who qualify for this exemption choose to engage in private practice apart from their work as public defenders or in civil legal aid, 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).
5. **Mediation and arbitration.** 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 is thought of in the legal representation context.
6. **Volunteer pro bono service for a qualified legal services provider as defined in APR 1(e)(8) that provides insurance to its volunteers.** 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. As discussed in more detail elsewhere in this Report, the Task Force recommends 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.

7. **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, unemployed lawyers, and fully retired lawyers who do not practice law but choose to maintain their active licenses without engaging in the private practice of law.

b) Exemptions Considered But Not Recommended

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 the private practice of law, notwithstanding that their work is before federal rather than state courts or agencies. The Task Force concluded that 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 malpractice 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 family members, many other policies written for Washington lawyers do not have such exclusions, e.g. policies written by the CNA Financial Corporation, Hanover Insurance Group, and Travelers Indemnity Company.²³⁰
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

²³⁰ Email, Insurance Industry Professional and Task Force Member Rob Karl to Task Force Chair Hugh Spitzer, Dec. 20, 2018, on file with WSBA.

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) and the lawyer is providing those services to private clients, then the lawyer would be required to obtain malpractice 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.
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 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 given the lack of known parameters and the wide variability in the subjective concept of affordability. 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.

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 a lawyer has a Washington license, the lawyer 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 in this state. If a lawyer’s entitlement to practice elsewhere is based solely on the possession of a Washington state license, then it is a legitimate regulatory objective to require insurance coverage for the legal services provided to private clients.

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 given existing processes for administering insurance disclosure under APR 26. 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 malpractice 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.

4. Increasing Insurance Availability for Pro Bono Representation

The WSBA should develop and put into effect an improved statewide program to increase access to malpractice insurance for lawyers whose private practices are limited solely to pro bono representations.

Comment: As described earlier in the Report, a majority of lawyers who provide pro bono services already carry malpractice insurance or are able to obtain coverage through VLPs or QLSPs. However, only 20 of Washington’s 39 counties are served by VLPs, and the unserved

counties are typically those with small populations. In order to obtain coverage, otherwise-uninsured lawyers in the unserved counties have to work through a program based elsewhere. This appears to work in many instances, but it is important to make sure that a pro bono client can be matched with an insured lawyer in *any* community in Washington. As noted above, lawyer malpractice insurance is an access-to-justice issue, and pro bono clients should have the same access to an insured lawyer as anyone else.

A more robust pro bono insurance program statewide will require cooperation and effort with the existing VLPs and QLSPs, with the Statewide Pro Bono Council, and with local and specialized bar associations. The Task Force recommends the WSBA should begin work with these groups to develop and implement an improved statewide program to increase the access to malpractice insurance for lawyers whose private practices are limited solely to pro bono representations. Such a program improvement might be workable (and financially achievable) within the existing pro bono framework. Alternatively, it might require the allocation of additional WSBA or other funds. The development of an expanded pro bono insurance coverage program is beyond the scope of the Task Force's work. However, while this issue will require a separate initiative that could take time, it should not delay the fundamental decision to move ahead on mandating malpractice insurance coverage.

III. CONCLUSION

With this Report, the Task Force recommends to the WSBA Board of Governors that 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 D. 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.

APPENDIX A

MANDATORY MALPRACTICE INSURANCE TASK FORCE

NAME	MEMBER
Hugh D. Spitzer University of Washington School of Law	Chair
John Bachofner Jordan Ramis, PC	Member (Oregon Lawyer)
Stan Bastian United States Courthouse	Judge
Dan Bridges McGaughey Bridges Dunlap PLLC	Current/Former BOG Member
Christy Carpenter Myllt.Com, A Legal Technician Firm, PLLC	Member (LPO/LLLT)
Gretchen Gale Attorney at Law	Member
P.J. Grabicki Randall Danskin PS	Member
Lucy Isaki Attorney at Law	Current/Former BOG Member
Mark Johnson Johnson Flora Sprangers PLLC	Current/Former BOG Member
Rob Karl Sprague Israel Giles, Inc.	Insurance Industry Professional
Kara Masters Masters Law Group	Member (Insurance Experience)
Evan McCauley Jeffers, Danielson Sonn & Aylward PS	Member



NAME	MEMBER
Brad Ogura	Public Member
Suzanne Pierce Davis Rothwell Earle & Xochihua	Member
Brooke Pinkham Seattle University School of Law	Member
Todd Startzel Kirkpatrick & Startzel PS	Member
Stephanie Wilson Seattle University School of Law	Public Member
Annie Yu State of Washington Office of the Attorney General	Member

<i>WSBA Staff Liaisons</i>	
Douglas J. Ende Chief Disciplinary Counsel	
Thea Jennings	
Rachel Konkler	

**MANDATORY MALPRACTICE INSURANCE TASK FORCE
MEMBER BIOS**

Hugh Spitzer is a law professor at the University of Washington School of Law, where he teaches Professional Responsibility along with several other courses. From 1982 until his retirement in 2016, he practiced public finance and municipal law with Foster Pepper PLLC and its predecessor firms in Seattle. Hugh continues to practice as a part-time solo practitioner, advising other lawyers. He has a modest professional liability insurance policy through ALPS.

John Bachofner is a shareholder at Jordan Ramis PC. His practice focuses on litigation and jury trials, as well as on insurance coverage, product liability, general business, bankruptcy, and creditors' rights issues. He is the chair of Jordan Ramis PC's Litigation Group as well as chair of the Oregon State Bar's Litigation Section. He has represented individuals and organizations in a variety of state and federal courts, arbitration forums, and agency hearings, as well as in a variety of transactions. Having taken or defended hundreds of depositions, he is frequently involved in binding arbitration of matters. Since 1996, he has first-chaired a number of jury trials to verdict in trials lasting from one day to as long as two weeks.

Stan Bastian is a U.S. District Court Judge in the Eastern District of Washington, with Chambers in Yakima. He was appointed by President Barack Obama in 2014. Prior to that he was in private practice for over 25 years in Wenatchee and he served as the President of the Washington State Bar Association in 2007-08.

Dan Bridges was elected to the Board of Governors in September 2016, when he replaced Elijah Forde as District-9 governor. Bridges is a partner with McGaughey Bridges Dunlap PLLC. He has tried over 50 jury trials in state and U.S. District Court and argued more than 30 appeals in Washington Supreme Court, all three divisions of the Washington Court of Appeals, and the U.S. Court of Appeals for the Ninth Circuit. And he serves as a superior court arbitrator in four Washington counties. Bridges received his undergraduate degree in political science from the University of Washington and his law degree from the University of Puget Sound (now Seattle University School of Law).

Christy Carpenter is a Limited License Legal Technician with a solo practice in Tacoma. Prior to opening her own firm in 2017, she was a paralegal for over 20 years, mainly in family law. Christy also serves on the WSBA LLLT Board and is an active volunteer with Tacoma Pro Bono.

Gretchen Gale is a graduate of the University of Colorado School of Law. She served in the Prosecuting Attorney's Offices of Pierce and Thurston Counties, the Thurston County Commissioner's Office, the Office of the State Treasurer, the Washington Attorney General's Office in the Labor and Personnel and Education Divisions, and was a partner in the government relations law firm of Cushman Gale LLC. Gretchen is currently retired from law practice but maintains an active license in the Washington State Bar Association and an inactive license in the Colorado Bar. She resides in Olympia, WA.



P.J. Grabicki practices law in Spokane with the Randall Danskin law firm, and is President of the firm. The firm consists of twenty-two attorneys, who engage in a broad range of civil practice. P.J.'s practice centers on estate planning and tax and business planning, including transactional work. P.J. is currently the President of the Legal Foundation of Washington and represents the Fifth Congressional District on the Board of Governors of the Washington State Bar Association. He is a member of the WSBA Taskforce studying mandatory malpractice proposals and a member of the Taskforce studying bar association structure in light of the U.S. Supreme Court's recent Keller decision. His firm is insured with ALPS.

Lucy Isaki is an experienced civil litigator. She practiced law at a large Seattle firm from 1978 until 1999. She then joined the Attorney General's Office where she led the Complex Litigation Team. In 2007, Ms. Isaki joined the Gregoire Administration as a Senior Assistant Director at the Office of Financial Management where she was in charge of the State Risk Management and Contracts Division. She led the Risk Management Division until 2016 when she retired from the Department of Enterprise Services. The Risk Management Division is responsible for the state's extensive commercial insurance program, as well as the state's self-insurance program. Lucy was President of the King County Bar Association and served on the WSBA Board of Governors.

Rob Karl is an Agency Principal and Commercial Lines Property and Casualty Producer with Sprague Israel Giles, Inc. Rob has been with Sprague Israel Giles for 21 years, previously with Sedgewick James of Washington and Safeco Insurance Company. Rob and Sprague Israel Giles are experts, with over 60 years of experience, in malpractice and errors and omissions insurance and a specific focus on Lawyer Professional Liability coverage.

Kara R. Masters is an attorney who practices in the state and federal courts in Washington, Idaho, Oregon and Alaska. Kara is experienced in a number of civil practice areas, but a significant part of her practice focuses on complex insurance coverage and defense matters. In addition, Kara devotes a substantial amount of time working with various local non-profit organizations. Kara is currently "Of Counsel" to two firms, working from Bainbridge Island. She has professional liability insurance coverage through both firms.

Evan McCauley is a partner at Jeffers, Danielson, Sonn & Aylward, P.S., in Wenatchee, Washington, where he is a member of the firm's business transactional group. His practice is focused on all aspects of corporate and business transactional law, tax and estate planning, real estate, and representation in probate and trust matters. Prior to joining JDSA in 2011, Evan practiced as a Certified Public Accountant in Seattle where he worked for an international accounting firm and for a Fortune 500 company. During law school, Evan served as a judicial extern to the Honorable Edward F. Shea in U.S. District Court in the Eastern District of Washington and to the Honorable Christine Quinn-Brintnall at Division II of the Washington State Court of Appeals.

Brad Ogura is a community member of the Mandatory Malpractice Insurance Task Force. He has also served on WSBA's Disciplinary Selection Panel, Disciplinary Board and Client Protection Board. In addition to WSBA service, he is vice-chairman of Invest in Youth, a Seattle nonprofit that provides tutoring to at-risk elementary school students. He also serves on the board of the local chapter of the National Investor Relations Institute.

Suzanne K. Pierce is currently a shareholder with the Seattle office of Davis Rothwell Earle and Xóchihua, PC (32 lawyers) providing insurance defense, including defending professionals (engineers, doctors, psychologists and attorneys). She has previously worked as a Senior Assistant City Attorney for the City of Seattle defending personal injury and property claims made against the City. She has also worked as a federal judicial clerk, a solo practitioner, an associate in a five-person firm and an associate in a very large firm with worldwide offices and hundreds of attorneys. She is licensed in Washington (25 years) and Oregon. She received her B.A. and law degrees from the University of Michigan.

Brooke Pinkham currently directs the Center for Indian Law & Policy at Seattle University School of Law. The Center for Indian Law & Policy provides an emphasis on Indian law, research, programs and projects. Prior to Seattle University, Ms. Pinkham was a Staff Attorney with the Northwest Justice Project (NJP), Washington's only legal aid organization. While at NJP, Ms. Pinkham provided direct representation and advocacy on behalf of tribal members throughout Washington State. Brooke has served on the Boards for the Washington State Bar Association Indian Law Section, the Northwest Indian Bar Association, Powerful Voices, Indigenous Peoples' Institute at Seattle University, and many others. Brooke has particular expertise in Indian estate planning and probate, enforcing application of the Indian Child Welfare Act, protecting the rights to secure housing, tribal and non-tribal public benefits, and the education rights of Native American students. Brooke is a University of Washington School of Law graduate.

Todd Startzel is a principal with Kirkpatrick & Startzel, P.S., a six-person litigation firm based in Spokane, Washington. He has 31 years of litigation experience. His litigation practice focuses primarily on areas of insurance defense, construction defect and complex multi-party litigation. His firm has a professional liability insurance policy with ALPS with limits of \$2 million per claim/\$4 million aggregate.

Stephanie Wilson is the Head of Reference Services at Seattle University School of Law, where she manages a team of law library faculty, teaches legal research courses, and provides legal research instruction and support for faculty, students, alumni, and patrons. Prior to coming to Seattle University, Ms. Wilson was a reference librarian at Willkie Farr and Gallagher in New York City. As a lawyer, she worked for the Legal Aid Society of New York City and in New York City's Legal Counsel Office.

Annie Yu serves as an assistant attorney general in the Corrections Division. She currently represents the Washington Department of Corrections in state post-conviction relief actions as well as federal habeas corpus litigation. She attended Seattle Pacific University and Gonzaga University School of Law.

APPENDIX B

WSBA Member* Licensing Counts 12/19/18 2:41:29 PM GMT-08:00

Member Type	In WA State	All
Attorney - Active	26,313	32,815
Attorney - Emeritus	109	114
Attorney - Honorary	353	398
Attorney - Inactive	2,354	5,417
Judicial	610	636
LLLT - Active	35	35
LLLT - Inactive	4	4
LPO - Active	806	819
LPO - Inactive	143	155
	30,727	40,393

By District		
	All	Active
0	3,029	2,252
1	2,887	2,402
2	1,962	1,586
3	2,040	1,725
4	1,338	1,130
5	3,160	2,573
6	3,209	2,697
7N	5,205	4,474
7S	6,839	5,715
8	2,119	1,816
9	4,794	4,089
10	2,798	2,356
	39,380	32,815

By State and Province	
Alabama	29
Alaska	198
Alberta	8
Arizona	352
Arkansas	15
Armed Forces Americas	4
Armed Forces Europe, Middle East	28
Armed Forces Pacific	19
British Columbia	101
California	1,737
Colorado	238
Connecticut	49
Delaware	5
District of Columbia	343
Florida	239
Georgia	89
Guam	17
Hawaii	144
Idaho	416
Illinois	154
Indiana	37
Iowa	28
Kansas	27
Kentucky	23
Louisiana	54
Maine	13
Maryland	112
Massachusetts	87
Michigan	69
Minnesota	98
Mississippi	4
Missouri	66
Montana	169
Nebraska	16
Nevada	136
New Hampshire	9
New Jersey	66
New Mexico	65
New York	243
North Carolina	73
North Dakota	9
Northern Mariana Islands	6
Nova Scotia	1
Ohio	70
Oklahoma	27
Ontario	15
Oregon	2,661
Pennsylvania	73
Puerto Rico	2
Quebec	1
Rhode Island	16
Saskatchewan	1
South Carolina	28
South Dakota	7
Tennessee	56
Texas	344
Utah	179
Vermont	20
Virginia	271
Virgin Islands	1
Washington	30,727
West Virginia	7
Wisconsin	43
Wyoming	18

By WA County		By Admit Yr	
Adams	15	1940	3
Asotin	26	1941	2
Benton	357	1942	1
Chelan	237	1944	1
Clallam	155	1945	1
Clark	772	1946	2
Columbia	7	1947	6
Cowlitz	133	1948	8
Douglas	28	1949	16
Ferry	14	1950	16
Franklin	50	1951	27
Garfield	2	1952	27
Grant	107	1953	25
Grays Harbor	104	1954	28
Island	137	1955	20
Jefferson	91	1956	40
King	14,881	1957	32
Kitsap	724	1958	39
Kittitas	80	1959	38
Klickitat	23	1960	32
Lewis	95	1961	29
Lincoln	12	1962	35
Mason	94	1963	33
Okanogan	97	1964	41
Pacific	25	1965	56
Pend Oreille	18	1966	62
Pierce	2,099	1967	61
San Juan	70	1968	94
Skagit	270	1969	104
Skamania	19	1970	109
Snohomish	1,477	1971	117
Spokane	1,657	1972	186
Stevens	48	1973	279
Thurston	1,416	1974	274
Wahkiakum	7	1975	335
Walla Walla	106	1976	408
Whatcom	548	1977	402
Whitman	72	1978	457
Yakima	409	1979	496
		1980	511
		1981	546
		1982	523
		1983	559
		1984	641
		1985	453
		1986	700
		1987	612
		1988	586
		1989	619
		1990	758
		1991	750
		1992	744
		1993	784
		1994	809
		1995	818
		1996	764
		1997	854
		1998	807
		1999	845
		2000	859
		2001	923
		2002	1,001
		2003	1,025
		2004	1,043
		2005	1,069
		2006	1,098
		2007	1,174
		2008	1,092
		2009	997
		2010	1,086
		2011	1,058
		2012	1,102
		2013	1,237
		2014	1,361
		2015	1,625
		2016	1,315
		2017	1,395
		2018	1,293

Misc Counts	
All License Types **	40,701
All WSBA Members	40,393
Members in Washington	30,727
Members in western Washington	23,117
Members in King County	14,881
Members in eastern Washington	3,365
Active Attorneys in western Washington	19,674
Active Attorneys in King County	13,063
Active Attorneys in eastern Washington	2,769
New/Young Lawyers	7,360
MCLE Reporting Group 1	10,516
MCLE Reporting Group 2	11,029
MCLE Reporting Group 3	11,679
Foreign Law Consultant	19
House Counsel	279
Indigent Representative	10

By Section ***	All	Previous Year
Administrative Law Section	285	278
Alternative Dispute Resolution Section	364	383
Animal Law Section	110	118
Antitrust, Consumer Protection and Unfair Business Practice	228	212
Business Law Section	1,295	1,383
Cannabis Law Section	73	
Civil Rights Law Section	177	202
Construction Law Section	524	526
Corporate Counsel Section	1,116	1,163
Creditor Debtor Rights Section	516	548
Criminal Law Section	450	534
Elder Law Section	664	706
Environmental and Land Use Law Section	807	836
Family Law Section	1,158	1,286
Health Law Section	396	415
Indian Law Section	325	337
Intellectual Property Section	908	989
International Practice Section	251	278
Juvenile Law Section	211	218
Labor and Employment Law Section	1,011	1,047
Legal Assistance to Military Personnel Section	100	100
Lesbian, Gay, Bisexual, Transgender (LGBT) Law Section	118	136
Litigation Section	1,069	1,185
Low Bono Section	109	132
Real Property Probate and Trust Section	2,373	2,387
Senior Lawyers Section	268	296
Solo and Small Practice Section	992	1,035
Taxation Section	667	665
World Peace Through Law Section	106	115

* Per WSBA Bylaws 'Members' include active attorney, emeritus pro-bono, honorary, inactive attorney, judicial, limited license legal technician (LLLT), and limited practice officer (LPO) license types.

** All license types include active attorney, emeritus pro-bono, foreign law consultant, honorary, house counsel, inactive attorney, indigent representative, judicial, LPO, and LLLT.

*** The values in the All column are reset to zero at the beginning of the WSBA fiscal year (Oct 1). The Previous Year column is the total from the last day of the fiscal year (Sep 30). WSBA staff with complimentary membership are not included in the counts.

By Years Licensed	
Under 6	8,472
6 to 10	5,417
11 to 15	5,648
16 to 20	4,580
21 to 25	4,136
26 to 30	3,581
31 to 35	3,041
36 to 40	2,533
41 and Over	2,985
Total:	40,393

By Age	All	Active
21 to 30	2,006	1,943
31 to 40	9,148	8,236
41 to 50	9,740	8,063
51 to 60	8,722	6,907
61 to 70	7,809	5,924
71 to 80	2,397	1,614
Over 80	571	128
Total:	40,393	32,815

By Practice Area	
Administrative-regulator	1,957
Agricultural	198
Animal Law	89
Antitrust	247
Appellate	1,347
Aviation	137
Banking	379
Bankruptcy	901
Business-commercial	4,309
Cannabis	9
Civil Litigation	4,450
Civil Rights	889
Collections	505
Communications	200
Constitutional	521
Construction	1,115
Consumer	660
Contracts	3,531
Corporate	2,906
Criminal	3,250
Debtor-creditor	845
Disability	599
Dispute Resolution	1,200
Education	426
Elder	837
Employment	2,405
Entertainment	263
Environmental	1,108
Estate Planning-probate	3,029
Family	2,560
Foreclosure	472
Forfeiture	82
General	2,613
Government	2,453
Guardianships	812
Health	810
Housing	279
Human Rights	274
Immigration-naturaliza	847
Indian	514
Insurance	1,448
Intellectual Property	1,781
International	761
Judicial Officer	374
Juvenile	810
Labor	977
Landlord-tenant	1,134
Land Use	700
Legal Ethics	261
Legal Research-writing	600
Legislation	351
Lgbtq	12
Litigation	3,810
Lobbying	157
Malpractice	685
Maritime	253
Military	310
Municipal	811
Non-profit-tax Exempt	513
Not Actively Practicing	1,689
Oil-gas-energy	176
Patent-trademark-copyr	1,014
Personal Injury	2,861
Privacy And Data Securit	38
Real Property	2,099
Real Property-land Use	2,014
Securities	637
Sports	134
Subrogation	81
Tax	1,055
Torts	1,784
Traffic Offenses	587
Workers Compensation	641

By Languages Spoken	
Afrikaans	6
Akan /twi	4
Albanian	2
American Sign Language	14
Amharic	16
Arabic	53
Armenian	6
Bengali	11
Bosnian	10
Bulgarian	13
Burmese	2
Cambodian	6
Cantonese	94
Cebuano	3
Chamorro	5
Chaozhou/chiu Chow	1
Chin	3
Croatian	21
Czech	6
Danish	18
Dari	4
Dutch	24
Egyptian	2
Farsi/persian	60
Fijian	1
Finnish	7
French	700
French Creole	3
Fukienese	5
Ga/kwa	2
German	433
Greek	28
Gujarati	15
Haitian Creole	2
Hebrew	38
Hindi	90
Hmong	1
Hungarian	14
Ibo	4
Icelandic	2
Ilocano	9
Indonesian	11
Italian	151
Japanese	211
Javanese	1
Kannada/canares	4
Khmer	1
Kongo/kikongo	1
Korean	234
Lao	6
Latvian	6
Lithuanian	4
Malay	3
Malayalam	9
Mandarin	343
Marathi	5
Mongolian	2
Navajo	1
Nepali	4
Norwegian	37
Not_listed	32
Oromo	3
Other	23
Pashto	1
Persian	22
Polish	33
Portuguese	121
Portuguese Creole	1
Punjabi	58
Romanian	20
Russian	232
Samoan	9
Serbian	19
Serbo-croatian	10
Sign Language	22
Singhalese	2
Slovak	2
Somali	1
Spanish	1,796
Spanish Creole	8
Swahili	4
Swedish	53
Tagalog	68
Taishanese	2
Taiwanese	21
Tamil	10
Telugu	3
Thai	15
Tigrinya	3
Tongan	1
Turkish	12
Ukrainian	40
Urdu	39
Vietnamese	86
Yoruba	9
Yugoslavian	2

By Gender	
Female	12,176
Male	17,194
Selected Mult Gend	1
Respondents	29,371
No Response	11,022
All Member Types	40,393

By Disability	
Yes	989
No	19,394
Respondents	20,383
No Response	11,022
All Member Types	40,393

By Sexual Orientation	
Asexual	6
Gay, Lesbian, Bisexual, Pansexual, or Queer	60
Heterosexual	684
Not Listed	11
Selected multiple orientations	6
Two-spirit	1
Respondents	768
No Response	39,625
All Member Types	40,393

By Ethnicity	
American Indian / Native America	250
Asian-Central Asian	6
Asian-East Asian	41
Asian-South Asian	9
Asian-Southeast Asian	8
Asian—unspecified	1,369
Black / African American / African	638
Hispanic / Latinx	688
Middle Eastern Descent	6
Multi Racial / Bi Racial	826
Not Listed	178
Pacific Islander / Native Hawaiian	58
White / European Descent	23,934
Respondents	28,011
No Response	12,382
All Member Types	40,393

Members in Firm Type	
Bank	1
Escrow Company	3
Government/ Public Secto	4,358
House Counsel	2,491
Non-profit	32
Title Company	3
Solo	5,168
Solo In Shared Office Or	1,543
2-5 Lawyers In Firm	4,140
6-10 Lawyers In Firm	1,767
11-20 Lawyers In Firm	1,262
21-35 Lawyers In Firm	785
36-50 Lawyers In Firm	576
51-100 Lawyers In Firm	581
100+ Lawyers In Firm	1,820
Not Actively Practicing	151
Respondents	24,681
No Response	15,712
All Member Types	40,393

* Includes active attorneys, emeritus pro-bono, honorary, inactive attorneys, judicial, limited license legal technician (LLLT), and limited practice officer (LPO).

APPENDIX C

ABA List of Admitted and Non-Admitted Carriers, as of January 25, 2019

Understanding Your Insurance Coverage, ABA Standing Comm. on Law.
Prof. Liability, at 2-3 (A.B.A.),

https://www.americanbar.org/content/dam/aba/administrative/lawyers_professional_liability/downloads/understandingcoverage.pdf.

Washington

Lawyers' professional liability insurance carriers in Washington

Solo and Small Firms

Carriers that write for firms with 1 to 30 attorneys



Large Firms

Carriers that write for firms with 30 attorneys or more



Admitted Carriers

The company had met the minimum requirements established by statute and is authorized by that state to write lawyers' professional liability business. The importance of being admitted includes not only the protection to the insured of having the backing of the state's regulatory authorities to assist if a problem arises, but also the fact that the guaranty fund laws generally apply only to licensed insurers.



[Allianz](#)

[Allied World Assurance Company](#)

[Aon Attorneys Advantage](#)

[Chartis Lawyers Professional Liability Program](#)

Chubb - Executive Risk

CNA

Hanover Professionals

Hartford Specialty

Lawyer's Protector Plan[®]

Navigators Insurance Company

Noetic Specialty Insurance Co.

Old Republic Insurance Company (Chicago Underwriting Group)

ProAssurance

Protexure Lawyers

RPS Plus Companies, Markel Insurance

[State National Insurance Company](#)

[Swiss Re Corporate Solutions \(Underwritten by Westport Insurance Corp. and First Specialty Insurance Corporation\)](#)

[Travelers](#)

[Wesco Insurance Company \(Synergy Professional Associates, Inc.\)](#)

[XL Catlin Insurance](#)

[Zurich](#)

Non-Admitted Carriers



The company is a surplus line (non-admitted) carrier, which is a company that generally underwrites risks or part of risks for which insurance is not available through an admitted company. This business is, therefore, placed with a non-admitted insurer (a company not licensed in the state) in accordance with state surplus lines insurance laws.

[Admiral Insurance Company](#)

[Arch Insurance Group](#)

[Liberty Surplus Insurance Corporation](#)

[Lloyd's of London - Attorney Select](#)

[Medmarc Casualty Insurance Co. \(LawyerCare\)](#)

[Underwriters at Lloyds \(Synergy Professional Associates, Inc.\)](#)

Risk Retention Group Carriers



A special purpose liability insurance company formed under the Liability Risk Retention Act of 1986 that is wholly owned by its policyholders. After meeting the regulatory requirements of the state in which it is chartered, an RRG can provide insurance to members in other states without first having to meet their individual licensing requirements.

APPENDIX D

See Meeting Material Item D – Draft of Amended APR 26



Mandatory Malpractice Insurance Task Force

Final Report to WSBA Board of Governors

February *, 2019



1325 4th Avenue | Suite 600 | Seattle, WA 98101-2539
www.wsba.org

**Mandatory Malpractice Insurance Task Force
 Final Report to Board of Governors
 February __, 2019**

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I. 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~~The Task Force was asked to provide an interim report in the summer, 2018, which ~~we-it~~ provided on July 10. ~~We were~~The Task Force was charged with finalizing ~~our-its~~ 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.¹ 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. ~~As of December 1, 2018, the Task Force had~~~~We~~ ~~have~~ received more than 580 written comments, both solicited and unsolicited. ~~We-The Task Force~~ 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.

Through the autumn of 2018, the Task Force continued to gather information about the impact of uninsured lawyers on clients, the character of the apparent problem, and the best approach to dealing with that issue. The Task Force spent considerable time discussing which categories of lawyers should be excluded from any malpractice insurance requirement. The Task Force members reached consensus on its recommendations, and then worked on drafting and editing a report to the Board of Governors.

Members of the Task Force started with widely divergent ideas about mandating malpractice insurance—~~B,~~ but the group deliberated carefully over its potential recommendations, listened thoughtfully to each other and to the comments ~~we-it~~ received, and reached consensus. Task Force members also concluded that ~~we-they~~ should move boldly and not shy away from difficult proposals. Task Force participants were consistent in their view, reflected in General Rule (GR) 12.1 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

¹ The Task Force was unable to conduct its December 19, 2018, meeting due to lack of a quorum.

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-Task Force~~ is to recommend effective ways to assure 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 lawyers pose a significant risk to their clients. Further, ~~the-when lawyers~~ ~~of lawyer~~ ~~insurance~~ ~~that~~ 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 the Task Force has concluded that it is more than 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~~ ~~malpractice~~ insurance in the private marketplace. For the purposes of this Report, the "private practice of law" means the provision of legal services to clients other than the lawyer's employing organization and that organization's representatives and employees.
- The required minimum coverage should be \$250,000 per occurrence/\$500,000 total per year ("\$250K/\$500K").
- Several categories of lawyers should be exempt because they are not engaged in the private practice of law or are otherwise insured by the organization through which they provide legal services:
 - Government lawyers;
 - Judges;
 - Employees of a corporation or business entity, including nonprofits;
 - Employees of or independent contractors for nonprofit legal aid or public defense offices that provide insurance to their employees or independent contractors;
 - Mediators or arbitrators;
 - ~~Lawyers providing volunteer pro bono services for qualified legal services provider as defined in APR 1(e)(8) that provide insurance to their volunteers; Government lawyers.~~
 - ~~In-house private company lawyers.~~
 - ~~Lawyers who volunteer to provide pro bono services through qualified legal service providers (QLSPs) that provide 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~~this report.

- Licensed lawyers should 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.
- ~~Before a malpractice insurance requirement goes into effect, t~~The WSBA should develop and put into effect an improved statewide program~~partner with VLPs in Washington to increase the access to professional liability~~availability of no- or low-cost malpractice insurance for lawyers whose private practice is limited solely to *pro bono* representations. It is important to make sure that implementation of an insurance mandate does not have a material adverse effect on access to justice.

In shaping ~~our~~its 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~~the Task Force’s proposals. ~~We~~The Task Force recognizes 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 requiring that lawyers carry insurance. 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~~the Task Force believes 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~~balance tips in favor of public protection.

It is also important to emphasizeProtection of the public is the overriding public duties of lawyers, ~~and~~the WSBA, and the Washington Supreme Court. The WSBA’s mission statement lists four core missions: to serve the public, to serve the members of the Bar, to ensure the integrity of the legal profession, and to champion justice. Three out of those four goals emphasize the public mission of the organized bar. Equally if not more important is the language of the Washington State Supreme Court’s General RuleGR 12. GR 12.1 begins with: “Legal services providers must be regulated in the public interest.” That court ruleGR 12.1 then lists ten specific objectives, leading off with “protection of the public” and proceeding to list nine other regulatory

objectives, all of which are oriented toward the protection of clients, and access to justice, and the protection of clients. WeThe Task Force emphasizes GR 12 and the WSBA's mission to underscore the point that the Board of Governor's decision whether to recommend action on uninsured lawyers, and the Court's ultimate decision on this matter, must be approached overwhelmingly from the perspective of what is good for the public and what is good for clients—not what might be convenient or desirable for the lawyers themselves.

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

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II. TASK FORCE REPORT

III.A. TASK FORCE APPROACH TO INFORMATION-GATHERING

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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~~malpractice 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 public 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 and Georgia are 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; and, in 2017, New Jersey Supreme Court Ad Hoc Committee on Attorney Malpractice recommended a direct disclosure requirement, which has not been implemented by the Court and was opposed by the New Jersey State Bar Association).
- 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~~The Task Force also received useful technical assistance from ALPS,² 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

² ALPS is the WSBA's endorsed professional liability insurance provider.

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, 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 the Task Force~~ received monthly updates on the concerns voiced by WSBA members. On October 16, 2018, the Task Force held an open forum, ~~during which for lawyers with an interest in the topic, and heard from~~ 18 people, ~~testifying testified both either~~ 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. All information has been made available to members and the public via the Task Force web page of the WSBA website.

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A.B. KEY FINDINGS

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

1. WSBA Membership Data 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 2017.³ Of those lawyers, 32,189 were actively licensed to practice law.⁴ In 2017, 19,813 of actively licensed lawyers were engaged in the private practice of law.⁵ 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 malpractice insurance.⁶ 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.⁷

As of ~~November 1, 2018~~ December 19, 2018, there are ~~814-819~~ actively licensed limited practice officers (LPOs) and ~~34-35~~ actively licensed limited license legal technicians (LLLTs).⁸ 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 financial responsibility ordinarily is established by certification of the existence of professional liability insurance.⁹ Specifically, LPOs may choose to submit an insurance policy in the amount of \$100,000 or an audited financial statement in the amount of \$200,000.¹⁰ LLLTs must submit proof of insurance coverage in the amount of at least \$100,000 per claim and a \$300,000 annual

³ WSBA Staff, *WSBA Membership Demographics*, PowerPoint Presentation, at 2 (~~March-Mar.~~ 28, 2018).

⁴ *Id.*

⁵ Based on data compiled by WSBA staff from APR 26 reporting records.

⁶ APR 26 (adopted effective July 1, 2007).

⁷ *State Implementation of ABA Model Court Rule on Insurance Disclosure*, ABA Standing Committee Comm. on Client Protection, ~~(American A.B.A. Bar Association, February-Feb. 10, 2016)~~, available at https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/chart_implementation_of_mcrd.authcheckdam.pdf.

⁸ *WSBA Member Licensing Counts*, ~~November-December 19, 2018-2018~~ (member licensing counts are published monthly on the WSBA website).

⁹ APR 12(f)(2); APR 28(l)(2)(a).

¹⁰ APR 12(f)(2).

aggregate.¹¹ Failure to comply with this licensing obligation results in administrative suspension.¹²

2. 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.

a) 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.¹³ She found that small firm lawyers are more likely to go uninsured;¹⁴ however, a limited amount is known about these lawyers and why they choose to go uninsured, because these lawyers often fly “under the radar.”¹⁵

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).¹⁶ Her survey concluded that approximately 15% of private practitioners in New Mexico and 19.6% of private practitioners in Arizona go uninsured.¹⁷ 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.¹⁸ 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.¹⁹ Other reasons included philosophical opposition to mandatory insurance,

¹¹ APR 28(l)(2)(a)

¹² APR 17(a)(2)(D).

¹³ 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).

¹⁴ Levin, *supra* note 13, at 1282-83; see also Herbert M. Kritzer & Neil Vidmar, *When Lawyers Screw Up: Improving Access to Justice for Legal Malpractice Victims 40-41* (University Press of Kansas) (2018).

¹⁵ Levin, *Lawyers Going Bare and Clients Going Blind*, 68 Fla. L. Rev. 1281 *supra* note 13, at 1282-83.

¹⁶ Leslie C. Levin, *Lawyers Going Bare*, PowerPoint Presentation, at 3 (March-Mar. 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 *supra* note 13, at 1286.

¹⁷ Levin, *Lawyers Going Bare*, at 3*id.*

¹⁸ *Id.* at 8.

¹⁹ Levin, *Lawyers Going Bare and Clients Going Blind*, 68 Fla. L. Rev. 1281 *supra* note 13, at 1290.

a dislike of insurance companies, and a belief of no risk of liability because of practice area.²⁰ A recent article by Texas A-&M University School of Law School Professor Susan Saab Fortney adds: "A perplexing explanation for lawyers 'going bare' is that many apparently do not believe that they have a professional obligation to maintain insurance or assets to be available in the event of a claim."²¹

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.²² 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.²³ 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%).²⁴ 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%~~).²⁵

b) 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.²⁶ 14% of Washington lawyers in private practice have consistently reported being uninsured.²⁷ Specifically, in 2017, of the 19,813 lawyers in private practice, 2,752 lawyers reported that they were uninsured.²⁸

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

²⁰ *Id.* at 1293-95.

²¹ Susan Saab Fortney, *A Tort in Search of a Remedy: Prying Open the Courthouse Doors for Legal Malpractice Victims*, 85 Fordham L. Rev. 2033, 2052 (2017).

²² 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 24-22 (June 29, 2018), <http://caseinfo.nvsupremecourt.us/public/caseCaptcha.do?n=%2Fdocument%2Fview.do%3FcsNameID%3D46470%26csiID%3D46470%26deLinkID%3D657034%26sireDocumentNumber%3D18-24812> [hereinafter ADKT 534].

²³ *Id.* at 24.

²⁴ *Id.* at 25 (respondents were permitted to select one or more practice areas in responding to this survey question).

²⁵ *Id.* at 26.

²⁶ Based on data compiled by WSBA staff from APR 26 reporting records.

²⁷ Based on data compiled by WSBA staff from APR 26 reporting records.

²⁸ Based on data compiled by WSBA staff from APR 26 reporting records.

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 90% of lawyers aged 30-40 and 89.4% of lawyers aged 41-50.²⁹ ~~The same trend holds true for the number of years in practice.~~³⁰

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.³¹

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.³²

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.³³ Of the 101, 55 reported that they did not carry malpractice insurance.³⁴ 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.³⁵ Eighteen of those uninsured actively licensed lawyers reported maintaining a solo private practice.³⁶ (It should be noted that these are simply correlations, and that the fact that an individual lawyer does or does not obtains insurance will not necessarily affect the likelihood that the lawyer might violate the Rules of Professional Conduct.)

²⁹ WSBA Staff, *WSBA Membership Demographics*, at 8; ~~March-Mar. 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).

~~³⁰ WSBA Staff, *WSBA Membership Demographics*, at 9; ~~March 28, 2018 Task Force Meeting Minutes~~ at 5.~~

³¹ WSBA Staff, *WSBA Membership Demographics*, at 12.

³² Based on data compiled by WSBA staff [from APR 26 reporting data](#).

³³ Based on data compiled by WSBA staff [from APR 26 reporting data and discipline data](#).

³⁴ Based on data compiled by WSBA staff [from APR 26 reporting data and discipline data](#).

³⁵ Based on data compiled by WSBA staff [from APR 26 reporting data and discipline data](#).

³⁶ Based on data compiled by WSBA staff [from APR 26 reporting data and discipline data](#).

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 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.³⁷

3. The Professional Liability/Malpractice Insurance Market, Generally

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/malpractice~~ coverage is claims-made coverage, which covers a claim when the claim is filed during the policy period.³⁸ Claims-made coverage will only cover claims after the policy period expires if the insured purchases “tail” coverage.³⁹ Tail coverage protects from claims based on lawyer errors or omissions that occur during the policy period that are not filed until the policy period has expired.⁴⁰

There is significant variation among insurance providers regarding what is and isn't covered, and regarding many other policy details. Typical malpractice insurance agreements may include coverage for:

- services as an attorney:

³⁷ *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-force26b365f2f6d9654cb471ff1f00003f4f.pdf?sfvrsn=296a00f1_2 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.

³⁸ Mark Bassingthwaighte, “A *Young Lawyer’s Guide to Purchasing Lawyer’s 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>; 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-Apr. 25, 2018*); *April-Apr. 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.

³⁹ Mark Bassingthwaighte, *The Ins and Outs of “Tail” Coverage*, ALPS Blog (*March-Mar. 2, 2012*), <https://blog.alpsnet.com/the-ins-and-outs-of-tail-coverage>; *April-Apr. 25, 2018 Task Force Meeting Minutes* at 2.

⁴⁰ Mark Bassingthwaighte, *The Ins and Outs of “Tail” Coverage*; *April-Apr. 25, 2018, Task Force Meeting Minutes*, at 2.

- services as a notary public,
- services as a title agent;
- an attorney who causes personal injury;
- services as a trustee or executor; and
- pre- or post-judgment interest, appeal, bonds, and related costs.⁴¹

Multiple variables apply when underwriting lawyer malpractice insurance. Specifically, some areas of practice present higher risks than others.⁴² 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.⁴³

Typical exclusions to professional liability malpractice insurance policies include dishonest, fraudulent, criminal, or malicious acts by the insured.⁴⁴ Additional exclusions include, among others, prior acts (acts committed before the policy period) when the insured knew of or should have foreseen the claim, discrimination and sexual harassment, vicarious liability, and punitive damages.⁴⁵ Again, the exclusions vary noticeably from carrier to carrier.

Both admitted and non-admitted carriers operate in Washington State.⁴⁶ See Appendix C ABA List of Admitted and Non-admitted Carriers (as of February *, 2019). Admitted carriers are licensed by the Washington State Office of the Insurance Commissioner (OIC) and must abide by specific regulations governing admitted carriers.⁴⁷ The ABA reports that in Washington there are 21 admitted carriers that write lawyer professional liability malpractice policies.⁴⁸ The OIC issues

⁴¹ "Understanding Your Insurance Coverage," ABA Standing Committee Comm. on Lawyers' Law. Professional-Prof. Liability, at 2-3 (American A.B.A. Bar Association), at 2-3, https://www.americanbar.org/content/dam/aba/administrative/lawyers_professional_liability/downloads/understandingcoverage.pdf.

⁴² 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 (Apr. 25, 2018).

⁴³ Graf, *Mandatory Malpractice Insurance – Task Force*, at 10; Weisenberger, *Mandatory Malpractice Insurance Task Force*, at 4.

⁴⁴ "Understanding Your Insurance Coverage," ABA Standing Committee Comm. on Lawyers' Law. Professional-Prof. Liability, at 3.

⁴⁵ *Id.* at 3-4.

⁴⁶ Graf, *Mandatory Malpractice Insurance – Task Force*, at 23.

⁴⁷ Graf, *Mandatory Malpractice Insurance – Task Force*, at 11; Apr. Apr. 25, 2018, Task Force Meeting Minutes, at 1

⁴⁸ LPL Insurance Directory – Washington, ABA Standing Committee Comm. on Lawyers' Law. Professional Prof. ResponsLiability; (American Am. Bar Association Ass'n),

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.⁴⁹ Because they are subject to strict government oversight, admitted carriers have less flexibility in setting rates and deviating from their filings.⁵⁰ When an admitted carrier becomes insolvent, a state fund operates to protect consumers by paying out claims (up to statutory maximums) and refunding premiums.⁵¹

In contrast, non-admitted carriers are not governed by state insurance departments and are not required to file their rates with the state.⁵² They provide what is known as “surplus line” coverage.⁵³ With less regulation, non-admitted carriers are free to set their own rates and underwrite higher risk insurance packages.⁵⁴ Some areas of practice that are higher risk and receive greater underwriting scrutiny from admitted carriers such as ALPS include entertainment and sports law, patent law, securities law, and mergers and acquisitions work.⁵⁵ Practitioners in these higher risk areas may need to seek insurance from non-admitted carriers rather than through admitted carriers.⁵⁶ Non-admitted carriers can further accommodate certain complex risks for which the traditional insurance marketplace does not provide adequate coverage.⁵⁷ No state fund protects consumers from non-admitted carrier insolvency.⁵⁸ The ABA reports that in

https://www.americanbar.org/groups/lawyers_professional_liability/resources/lpl-insurance-directory/washington/.

⁴⁹ RCW 48.05.110; RCW 48.05.400; April-Apr. 25, 2018, Task Force Meeting Minutes, at 1.

⁵⁰ Graf, Mandatory Malpractice Insurance – Task Force, at 11; April-Apr. 25, 2018, Task Force Meeting Minutes, at 21.

⁵¹ What’s a Guaranty Association and how-How does Does it-It workWork?, Washington-Wash. State-St. Office-Office of the Insurance (OIC) CommissionerCommissioner, <https://www.insurance.wa.gov/whats-guaranty-association-and-how-does-it-work>.

⁵² Surplus line-Line insuranceInsurance, Washington-Wash. State-St. Office-OICof the Insurance Commissioner, <https://www.insurance.wa.gov/surplus-line-insurance>; Graf, Mandatory Malpractice Insurance – Task Force, at 11; April-Apr. 25, 2018, Task Force Meeting Minutes, at 2.

⁵³ Surplus line-Line insuranceInsurance, Washington-Wash. State-St. Office-OICof the Insurance Commissioner; April-Apr. 25, 2018, Task Force Meeting Minutes, at 2.

⁵⁴ Surplus line-Line insuranceInsurance, Washington-Wash. State-St. Office-OICof the Insurance Commissioner; April-Apr. 25, 2018, Task Force Meeting Minutes, at 2.

⁵⁵ Email, Chris Newbold to Task Force Member Todd Startzel, Dec. 14, 2018, on file with WSBA.

⁵⁶ Id.

⁵⁷ Surplus Line Insurance, Wash. St. OIC; April-Apr. 25, 2018, Task Force Meeting Minutes, at 2.

⁵⁸ RCW 48.115.110; Surplus Line Insurance, Washington-Wash. Office-St. OICof the Insurance Commissioner.

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Washington there are six non-admitted carriers that write lawyer ~~professional liability~~~~malpractice~~ policies.⁵⁹

~~4~~ **Current Market Statistics**

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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.⁶⁰ The *Profile* is based on self-reporting by insurers, so it does not present a comprehensive review of the legal malpractice insurance market.⁶¹ 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.⁶² Much, but not all, of the information in this section of the Report is drawn from the results of the *Profile*.

a) Firm Size and Malpractice Claims

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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.⁶³ 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).⁶⁴ It is unclear to what ~~this the~~ 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 14% to 15% of private practitioners.⁶⁵ Further, larger firms may have more robust ~~risk-practice~~ management systems⁶⁶ and the clients of such firms may use means other than the filing of malpractice claims to resolve situations involving lawyer error.

⁵⁹ *LPL Insurance Directory – Washington*, ABA Standing ~~Committee Comm.~~ on ~~Lawyers’ Law. Professional Prof. Responsibility~~Liability, American Bar Association.

⁶⁰ ABA Standing ~~Committee Comm.~~ on ~~Lawyers’ Law. Professional Prof.~~ Liability, *Profile of Legal Malpractice Claims 2012-2015*, at 7 (~~American A.B.A. Bar Association~~) (~~September Sept.~~ 2016).

⁶¹ *Id.* at ~~102~~.

⁶² *Id.* at 9.

⁶³ *Id.* at 14.

⁶⁴ Carol J. Bernick, Oregon Professional Liability Fund Chief Executive Officer, *PLF: History, How It Works, Why It Works*, PowerPoint Presentation, at 17 (~~February Feb.~~ 21, 2018).

⁶⁵ Kritzer ~~and &~~ Vidmar, *When Lawyers Screw Up: Improving Access to Justice for Legal Malpractice Victims* ~~supra~~ note 14, at 78.

⁶⁶ *Id.* at 5.

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Even though solo practitioners represent the greatest number of claims, as a whole the evidence suggests they are underrepresented as a source of malpractice claims⁶⁷; 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.⁶⁸

b) Percentage of Claims by Practice Area

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Nationwide, the 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%.⁶⁹ These statistics tend to mirror those practice areas with the highest reported number of uninsured lawyers in Washington.⁷⁰ 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.⁷¹

c) Years in Practice and Claim Rates

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Evidence nationally suggests that lawyers with more than ten years of practice produce a disproportionate share of claims.⁷² 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.⁷³ 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.⁷⁴ 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 72% of claims were against lawyers with more than ten years of experience.⁷⁵ Why this group is overrepresented among claims is unclear; however, it may be attributable to the fact that lawyers in that stage of their

⁶⁷ *Id.* at 79.

⁶⁸ Levin, *Lawyers Going Bare*, at 5.

⁶⁹ *Profile of Legal Malpractice Claims 2012-2015*, at 12.

⁷⁰ WSBA Staff, *WSBA Membership Demographics*, at 12.

⁷¹ *Id.*

⁷² Kritzer and Vidmar, *When Lawyers Screw Up: Improving Access to Justice for Legal Malpractice Victims* *supra* note 14, at 81-82.

⁷³ *Id.* at 67-68, 81.

⁷⁴ *Id.* at 81-82.

⁷⁵ *Id.* at 82.

careers are more likely to experience burnout, which may be reflected in the quality of their work.⁷⁶

d) Percentage of Indemnity Dollars and Expenses Paid

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Nationally, 89.1% of malpractice claims are resolved for less than \$100,000 (including claims payments and expenses).⁷⁷ 95.2% of malpractice claims are resolved for less than \$250,000.⁷⁸ ALPS reports that based on its experience, over the past 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.⁷⁹ According to ALPS, in Washington, for all claims, its average loss payment was \$60,548 and average loss expense to defend those claims was \$20,406.⁸⁰ Where payments were made by ALPS, its average loss payment was \$119,856, and average loss expenses were about \$40,454.⁸¹

e) Frequency Rate of Claims

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National frequency rates of claims, ~~meaning the percentage of lawyers per 100 lawyers against whom claims are filed, filed against lawyers~~ appears to be less than six percent ~~annually for all lawyers~~.⁸² 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.⁸³ Also, in Canada, ~~which where requires~~ lawyers must 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%.⁸⁴ Given that the market is claims made, claim rate percentages include matters lawyers report to their insurers as possible claims.⁸⁵

4)5. Insurance Options for Lawyers Providing Primarily Pro Bono Services

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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,

⁷⁶ *Id.* at 83.

⁷⁷ *Profile of Legal Malpractice Claims 2012-2015*, at 22.

⁷⁸ *Id.*

⁷⁹ Chris Newbold, Executive Vice President of ALPS, "Open Market" Mandatory Malpractice Model, PowerPoint Presentation, at 11 (June 27, 2018).

⁸⁰ *Id.* at 11.

⁸¹ *Id.*

⁸² Levin, *Lawyers Going Bare and Clients Going Blind*, 68 Fla. L. Rev. 1284 *supra* note 13, at 1309-1310.

⁸³ Levin, *Lawyers Going Bare*, at 13.

⁸⁴ *Id.* at 14

⁸⁵ Levin, *Lawyers Going Bare and Clients Going Blind*, 68 Fla. L. Rev. 1284 *supra* note 13, 1309 *at* 1310.

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~~association or other independent pro bono programs,⁸⁶ many of which are likely qualified legal service providers (QLSPs).⁸⁷ 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.⁸⁸ Washington has approximately 60 Bar-approved QLSPs.⁸⁹

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 volunteer lawyer programs (VLPs).⁹⁰ VLPs are legal assistance programs that recruit volunteer lawyers to provide free legal aid in civil matters to primarily low-income individuals.⁹¹ Approximately five to eight years ago, LFW launched its own group insurance program for all of its grantees that are VLPs.⁹² The LFW plan offers coverage up to \$500,000.⁹³ Many grantees choose to buy additional coverage. This includes, for example, the King County Bar Association (KCBA) Pro Bono Services Program and the Eastside Legal Assistance Program (ELAP).⁹⁴

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.⁹⁵ 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.⁹⁶ With respect to tail coverage, the coverage extends past the time of volunteering.⁹⁷ The

⁸⁶ ABA Standing Comm. on Pro Bono and Public Service, *Supporting Justice in Washington: A Report on the Pro Bono Work of Washington's Lawyers*, at 5-6 (A.B.A.) (July 2017).

⁸⁷ ABA Standing Committee Comm. on Pro Bono and Public Service, *Supporting Justice in Washington: A Report on the Pro Bono Work of Washington's Lawyers*, at 5-6 (American Am. Bar Association Ass'n) (July 2017).

⁸⁸ Public Service Opportunities, ~~Washington State Bar Association~~ WSBA, <https://www.wsba.org/connect-serve/volunteer-opportunities/psp>.

⁸⁹ *Id.*

⁹⁰ WSBA Staff, *Report re Qualified Legal Service Providers and Malpractice Insurance*, at 2 (~~October-Oct.~~ 18, 2018).

⁹¹ *Volunteer Lawyers Program*, Spokane County Bar Association, <http://www.spokanebar.org/volunteer-lawyers-program/>; *About Us*, Clark County Volunteer Lawyers Program, <https://ccvlp.org/about/>.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.* at 3-4.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

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.⁹⁸ QLSPs that provide legal services primarily through staff attorneys, such as Columbia Legal Services and Northwest Justice Project, obtain their own insurance plans.⁹⁹ ~~Each has Columbia Legal Services and Northwest Justice Project have a~~ pro bono riders for volunteer lawyers that work with them.¹⁰⁰

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.¹⁰¹ It is thus ~~likely possible~~ that not every lawyer would connect with a VLP to provide pro bono services.¹⁰² ~~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.

~~3. 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.¹⁰³~~

~~Average premium numbers can vary broadly based on the firm's principal area(s) of practice.¹⁰⁴ 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.¹⁰⁵ Not surprisingly, insurance premiums tend to be higher in many of those practice areas.¹⁰⁶~~

~~Basic malpractice policies with modest coverage levels are available to most practitioners at very reasonable cost, including those practicing solo or in small firms.¹⁰⁷ The average premium of~~

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⁹⁸ *Id.*

⁹⁹ *Id.* at 4-5

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 6.

¹⁰² *Id.*

¹⁰³ ~~Graf, *Mandatory Malpractice Insurance—Task Force*, at 10; Weisenberger, *Mandatory Malpractice Insurance Task Force*, at 4.~~

¹⁰⁴ ~~Newbold, "Open Market" Mandatory Malpractice Model, at 9.~~

¹⁰⁵ ~~Profile of Legal Malpractice Claims 2012-2015, at 12.~~

¹⁰⁶ ~~See, e.g., Newbold, "Open Market" Mandatory Malpractice Model, at 9.~~

¹⁰⁷ ~~Newbold, "Open Market" Mandatory Malpractice Model, at 6-7, 9.~~

Washington lawyers based on current market trends is \$2,500.¹⁰⁸ However, the average premium amount reflects all insured practitioners, some of whom may carry coverage amounts of \$1,000,000 or more.¹⁰⁹ According to ALPS, 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 \$1,200.¹¹⁰ According to Diane Minnich, Executive Director of the Idaho State Bar, premiums averaged between \$2,000 and \$3,000.¹¹¹ 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 implementation,¹¹² so trends may 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.¹¹³

New lawyers pay noticeably lower malpractice insurance premiums than more experienced lawyers.¹¹⁴ 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.¹¹⁵ 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.¹¹⁶ 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 provide coverage beginning from the start date of the

¹⁰⁸ Newbold, "Open Market" Mandatory Malpractice Model, at 6 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-)

¹⁰⁹ 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-). Newbold, "Open Market" Mandatory Malpractice Model, at 6.

¹¹⁰ [source ?] Email, Newbold to Task Force Member Startzel, Dec. 18, 2018, on file with WSBA.

¹¹¹ Interview Notes with Diane Minnich, December Dec. 11, 2018, on file with WSBA saved to file.

¹¹² Interview Notes with Diane Minnich, December Dec. 11, 2018, on file with WSBA saved to file; [pending approval] November Nov. 28, 2018 Task Force Meeting Minutes, * [add link].

¹¹³ Interview Notes with Diane Minnich, December Dec. 11, 2018, on file with WSBA saved to file.

¹¹⁴ Newbold, "Open Market" Mandatory Malpractice Model at 7-8.

¹¹⁵ Newbold, "Open Market" Mandatory Malpractice Model Id. at 7.

¹¹⁶ Id. at 8.

policy.¹¹⁷ 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.¹¹⁸

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.¹¹⁹ 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.¹²⁰

4.6. 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~~ professional 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.¹²¹ Applications regarding malpractice cannot be considered and, thus, are not investigated.¹²² Consequently, the CPF has no evidence of whether the applicants’ malpractice claims were meritorious.¹²³ Over the last five years, CPF application statistics indicate that 11% of applications were denied because they described instances of

¹¹⁷ Keith Fichter, *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>.

¹¹⁸ *Id.*

¹¹⁹ Mark Bassingthwaight, *The Ins and Outs of “Tail” Coverage*, ALPS Blog (March 2, 2012), <https://blog.alpsnet.com/the-ins-and-outs-of-tail-coverage>; *April Apr. 25, 2018, Task Force Meeting Minutes*, at 2.

¹²⁰ Bassingthwaight, *The Ins and Outs of “Tail” Coverage*; *April Apr. 25, 2018, Task Force Meeting Minutes*, at 2.

¹²¹ *Apr. 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

¹²² *Id.*

¹²³ *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/d.

malpractice rather than theft or dishonest conduct.¹²⁴ Specifically, from 2013-2017, 598 applications were considered.¹²⁵ 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.¹²⁶

5-7. 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.¹²⁷ Plaintiffs' lawyers rarely agree to pursue professional negligence cases when the potential defendant is an uninsured lawyer,¹²⁸ 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.¹²⁹ Attorney malpractice cases are complicated and difficult to bring and to prove,¹³⁰ and for malpractice plaintiff's lawyers, economic viability must be a significant

¹²⁴ WSBA Staff, *Client Protection Fund Statistics*, PowerPoint Presentation, at 3 (April-Apr. 25, 2018).

¹²⁵ *Id.* at 2.

¹²⁶ *Id.* at 2-3.

¹²⁷ See, e.g., *Cleveland B. Ass'n v. Smith*, 102 Ohio St. 3d 10, 2004-Ohio-1582, 806 N.E.2d 495 (2004) (six-month suspension imposed for an uninsured lawyer, who among other misconduct, failed to file her client's case before the statute of limitations had run and then negotiated a \$50,000 settlement with her client related to the error. After several bounced checks and paying only \$14,000 of the amount owed, the lawyer filed for bankruptcy. Though the bankruptcy did not discharge her debt, the lawyer's debt to her client remained unpaid as of the time of the imposition of discipline); *Parker v. Marcus*, 281 N.J. Super. 589, 685 A.2d 1326 (1995) (motion to reinstate plaintiff's dismissed complaint in a personal injury action granted where dismissal was due to plaintiff's lawyer's failure to appear at an arbitration proceeding. The Court granted the motion despite the option to sue for malpractice given that "any claim against [the plaintiff's] disbarred and uninsured attorney would undoubtedly be futile. Thus, plaintiff ... would be left without any viable remedy"). See also, Andrew Wolfson, *Malpractice Award Still Unpaid 18 Years Later*, *The Courier-Journal*, June 17, 2014, at A7 (judgment of \$390,000 plus interest still unsatisfied for client who, due to his uninsured lawyer's negligence, was convicted of murder and arson and spent two years in prison before he was later acquitted); Jay Stapleton, *Hard-to-Collect Verdict Raises New Questions; Attorneys Mixed on Need to Mandate Legal Malpractice Policies*, 39 Conn. L. Trib. No. 20, 1, May 20, 2013 (judgment in excess of \$530,000 unrecoverable against uninsured and judgment-proof lawyer who failed to name the proper party to a personal injury suit, which led to dismissal of the case).

¹²⁸ Kritzer and Vidmar, *When Lawyers Screw Up: Improving Access to Justice for Legal Malpractice Victims* *supra* note 14, at 92, 148-; See also, Bob Egelko, *Lawyers Battle Over State Malpractice Proposal*, *San Francisco Chronicle*, June 18, 2007, at A1; April-Apr. 25, 2018, Task Force Meeting Minutes, at 3.

¹²⁹ [source ?].

¹³⁰ Susan Saab Fortney, *A Tort in Search of a Remedy: Prying Open the Courthouse Doors for Legal Malpractice Victims*, 85 *Fordham L. Rev.* 2033, 2034-37 (2017).

factor in determining whether to take a case.¹³¹ 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.¹³² Because the bulk of potential ~~professional liability~~ malpractice claims are relatively small in size,¹³³ the impact of uninsured lawyers on clients with smaller claims is exacerbated because it is already challenging to find a plaintiff's lawyer who will agree to handle a case involving less than \$100,000 in damages.¹³⁴ The problem is heightened by the fact that some lawyers in small firm and solo practices are involved in representations involving smaller amounts of money, but those are the same practitioners who are much more likely to be "going bare" in terms of insurance. As ~~Mr. Professors~~ Kritzer and ~~Mr.~~ 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.¹³⁵ They further note that clients of lawyers outside the large corporate firm context:

~~They~~ face a greater likelihood of a lawyer making a costly error, and they face greater limitations in securing the kind of assistance needed 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.¹³⁶

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 the Task Force~~ reviewed.¹³⁷ In their study, ~~Mr. Professors~~ Kritzer and ~~Mr.~~ Vidmar found: ~~that~~ "[t]he 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."¹³⁸ The annual frequency of claims rate in Oregon is about 12 per 100 lawyers, higher

¹³¹ Robert B. Gould, *Deciding to Take a Plaintiff Legal Malpractice Case*, Lawyers' Law Liability Review, 2 (April/Apr. 1987).

¹³² *Id.*

¹³³ *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.

¹³⁴ Kritzer ~~and~~ & Vidmar, *When Lawyers Screw Up: Improving Access to Justice for Legal Malpractice Victims* supra note 14, at 147-48.

¹³⁵ *Id.* at 43.

¹³⁶ *Id.* at 169-70.

¹³⁷ *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* supra note 14, at 70.

¹³⁸ Kritzer ~~and~~ & Vidmar, *When Lawyers Screw Up: Improving Access to Justice for Legal Malpractice Victims* supra note 14, at 171.

than in other states, and Canadian provinces with mandatory malpractice insurance report similar rates.¹³⁹ Required ~~professional liability~~malpractice 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~~should be viewed as promoting the regulatory objective of protecting the public.

~~6.8.~~ Other Regulatory Schemes

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

a) 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, ~~500-300~~ per year. The Oregon program was established in 1977 by legislative mandate¹⁴⁰ to create a shared risk pool to ease the difficulty in obtaining insurance, which at the time was scarce and expensive.¹⁴¹

The PLF is an independently managed subdivision of the OSB governed by a Board of Directors, which is appointed by the OSB Board of Governors.¹⁴² 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.¹⁴³ Each participating lawyer pays the same flat-rate annual assessment of \$3, ~~500-300~~ for coverage of \$300,000 per claim/\$300,000 aggregate, with optional excess coverage and no deductibles.¹⁴⁴ Coverage also includes \$50,000 of expenses (principally costs of representation).¹⁴⁵ The PLF is a shared risk pool, with no underwriting of the individual participants.¹⁴⁶ The program covers lawyers, and not law firms.¹⁴⁷ ~~The amount of the~~

¹³⁹ *Id.* at 171, n. ~~ete~~-10.

¹⁴⁰ *About the PLF, Oregon OSB State Bar Professional Liability Fund PLF website*, <https://www.osbplf.org/about-plf/overview.html>; *Or. Rev. Stat. § 9.080*.

¹⁴¹ *Statement of the Board of Governors Professional Liability Fund, Oregon OSB State Bar*, at 1 (1977).

¹⁴² *Id.* at 3.

¹⁴³ *Coverage, Oregon OSB State Bar Professional Liability Fund PLF*, <https://www.osbplf.org/coverage/overview.html>; *Exemptions, Oregon State Bar OSB Professional Liability Fund PLF*, <https://www.osbplf.org/assessment-exemptions/exemptions.html>.

¹⁴⁴ *Coverage, Oregon OSB State Bar Professional Liability Fund PLF; Excess Coverage, Oregon OSB State Bar Professional Liability Fund PLF*, <https://www.osbplf.org/excess-coverage/overview.html>; Bernick, *PLF: History, How It Works, Why It Works*, at 32.

¹⁴⁵ *Coverage, Oregon OSB State Bar Professional Liability Fund PLF*.

¹⁴⁶ Bernick, *PLF: History, How It Works, Why It Works*, at 2-3.

¹⁴⁷ *Id.* at 2.

~~assessment has remained the same for seven consecutive years.~~¹⁴⁸—The annual assessment is reduced for new lawyers in their first three years of practice.¹⁴⁹ A major advantage of Oregon’s PLF approach is that all lawyers are covered, so no lawyer is in the position of being unable to obtain insurance.

The PLF has high favorability ratings among the OSB membership and is seen as a resource for lawyers facing problems.¹⁵⁰ 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.¹⁵¹

b) Idaho Model, Free Market Model

Idaho’s malpractice insurance mandate began in 2018, based on a free-market model.¹⁵² The malpractice insurance requirement was proposed in Idaho without creation of a formal task force or vetting committee.¹⁵³ 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 2016.¹⁵⁴ The measure won by a slim majority of 51% to 49%.¹⁵⁵ Following membership approval, the Idaho Supreme Court adopted the proposed rule with an effective date of January 1, 2018.¹⁵⁶

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

¹⁴⁸ ~~About the PLF, Oregon State Bar Professional Liability Fund.~~

¹⁴⁹ Bernick, *PLF: History, How It Works, Why It Works*, at 8.

¹⁵⁰ *Id.* at 20-21.

¹⁵¹ ~~About the PLF, Oregon State Bar Professional Liability Fund~~ OSB PLF; Bernick, *PLF: History, How It Works, Why It Works*, at 20-21.

¹⁵² ~~Id.~~ aho Bar B. Comm’n Rule R. 302(a)(5), https://isb.idaho.gov/wp-content/uploads/ibcr_sec03_licensing.pdf

¹⁵³ ~~February-Feb. 21, 2018, Task Force Meeting Minutes~~, at 2.

¹⁵⁴ Annette Strauser, *2018 Malpractice Coverage Requirement – General Information*, Idaho St. B. (August-Aug. 29, 2017), <https://isb.idaho.gov/blog/author/astrouser/>; ~~February-Feb. 21, 2018, Task Force Meeting Minutes~~, at 2.

¹⁵⁵ Strauser, *2018 Malpractice Coverage Requirement – General Information*.

¹⁵⁶ Strauser, *2018 Malpractice Coverage Requirement – General Information*; ~~Id.~~ aho Bar B. Comm’n Rule R. 302(a)(5).

aggregate.¹⁵⁷ Idaho lawyers may purchase insurance from any provider they wish on the free market.¹⁵⁸ The rule purposely provides for no hardship or other exemptions.¹⁵⁹

No Idaho attorneys reported an inability to obtain the required insurance.¹⁶⁰ Further, although some expressed concern about the cost, the average premium ranged between \$2,000 and \$3,000, and no premium quoted exceeded \$3,500.¹⁶¹ However, some lawyers indicated that the requirement would affect their decision to retire from practice.¹⁶²

c) Illinois' Proactive Management-Based Regulation

In 2017, Illinois became the first state to adopt proactive management-based regulation (PMBR).¹⁶³ PMBR is an alternative approach to lawyer regulation, that focusing-focuses on programs are instituted-intended to promote the ethical practice of law and hopefully reduce the incidence of grievances and malpractice claims.¹⁶⁴

Prior to adoption of PMBR in Illinois, Illinois studied PMBR models in other jurisdictions including New South Wales, Australia, and Nova Scotia, Canada.¹⁶⁵ 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

¹⁵⁷ ~~Id.~~ aho Bar B, Comm'n Rule-R, 302(a)(5).

¹⁵⁸ Strauser, *2018 Malpractice Coverage Requirement – General Information*.

¹⁵⁹ ~~February-Feb~~, 21, 2018, *Task Force Meeting Minutes*, at 3.

¹⁶⁰ ~~Feb. 21, 2018, Task Force Meeting Minutes, at 3~~; Interview Notes with Diane Minnich, ~~December Dec.~~ 11, 2018, on file with WSBA saved to file.

¹⁶¹ ~~Feb. 21, 2018, Task Force Minutes, at 3; Interview Notes with Diane Minnich, Dec. 11, 2018, on file with WSBA.~~

¹⁶² ~~Feb. 21, 2018, Task Force Minutes at 3.~~

¹⁶³ Ill. ~~Supreme-Sup. Court~~, Rule-R, 756, http://www.illinoiscourts.gov/SupremeCourt/Rules/Art_VII/artVII.htm#Rule756; Press Release, Sup. Ct. of Ill., Illinois Becomes First State to Adopt Proactive Management Based Regulation, Supreme Court of Illinois Press Release (January-Jan. 25, 2017), <http://www.illinoiscourts.gov/Media/PressRel/2017/012417.pdf>.

¹⁶⁴ ~~Illinois Becomes First State to Adopt Proactive Management Based Regulation, Supreme Court of Illinois~~ Press Release, Sup. Ct. of Ill., supra note 163.

¹⁶⁵ Jerry Larkin, Attorney Register and Disciplinary Commission (ARDC) Administrator, *PMBR – The Illinois Experience*, PowerPoint Presentation, at 10 (~~March-Mar~~, 28, 2018); Mar. 28, 2018, Task Force Meeting Minutes, at 3.

3. Information sharing and collaboration among the lawyer regulator and lawyer/firm.¹⁶⁶

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.¹⁶⁷

With the adoption of PMBR, beginning in 2018, every two years, 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.¹⁶⁸ The self-assessment is administered by the Attorney Registration and Disciplinary Commission (ARDC), the Illinois Supreme Court agency that regulates Illinois lawyers.¹⁶⁹ Uninsured lawyers who fail to complete the self-assessment cannot register in 2019 to renew their license and may be administratively suspended.¹⁷⁰

The self-assessment is confidential, and also provides free CLE credit.¹⁷¹ The self-assessment covers the following topics: technology; conflicts; fees and billing; client relations; trust accounting; wellness; civility and professionalism; and diversity and inclusion.¹⁷² Of those lawyers who have completed the self-assessment, a large majority have responded positively to the program.¹⁷³

d) South Dakota's Direct 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.¹⁷⁴ Among

¹⁶⁶ ~~Id.~~ Larkin, *PMBR – The Illinois Experience*, at 9.

¹⁶⁷ Larkin, *PMBR – The Illinois Experience*, ~~id.~~ at 19-20; *Mar. 28, 2018, Task Force Meeting Minutes*, at 3.

¹⁶⁸ *PMBR Self-Assessment Course FAQs*, ARDC, https://registration.iardc.org/attvreg/Registration/regdept/Rule_756e2_Self-Assessment_FAQ_s.aspx.

¹⁶⁹ *Press Release, Sup. Ct. of Illinois Becomes First State to Adopt Proactive Management Based Regulation, Supreme Court of Illinois Press Release*, *supra* note 163.

¹⁷⁰ *PMBR Self-Assessment Course FAQs*, ARDC, https://registration.iardc.org/attvreg/Registration/regdept/Rule_756e2_Self-Assessment_FAQ_s.aspx.

¹⁷¹ *Id.*

¹⁷² *PMBR Modules*, ARDC, <https://www.iardc.org/pmbr.html>.

¹⁷³ Matthew Hector, *ARDC Reports Positive Early Reaction to Lawyer Self-Assessment*, *Illinois 106 Ill. Bar Journal*, N., Vol. 106 #4 10 (April Apr. 2018), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/isba_pmbra.pdf.

¹⁷⁴ Levin, *Lawyers Going Bare and Clients Going Blind*, 68 *Fla. L. Rev.* 1284 *supra* note 13, at 1297-99; *State Implementation of ABA Model Court Rule on Insurance Disclosure*, ABA Standing Comm. on Client Protection.

the most stringent of those seven states is South Dakota, which adopted its rule in 1999.¹⁷⁵ 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.¹⁷⁶ The Rule further requires the lawyer to disclose the information in every written communication with the client on firm letterhead and in all advertising.¹⁷⁷ Some anecdotal evidence ~~exists~~suggests that the purchase of insurance increased around the time of the implementation of the disclosure rule in South Dakota.¹⁷⁸ Currently, in South Dakota, approximately ~~six percent~~6% of lawyers in private practice are uninsured, with 8.4% of small firm and solo lawyers in private practice uninsured.¹⁷⁹

e) *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.¹⁸⁰ 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.¹⁸¹ 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).¹⁸²

f) *Other Recent State Efforts to Explore Mandatory Malpractice Insurance*

California

At the direction of the state legislature in 2017, the State Bar of California has appointed a Malpractice Insurance Working Group to conduct a review and study of errors and omissions

¹⁷⁵ Susan ~~Saab-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>.

¹⁷⁶ S.D. ~~Rule R. Of of ProfI Prof~~ Conduct 1.4(c), https://sdlegislature.gov/Statutes/Codified_Laws/DisplayStatute.aspx?Type=Statute&Statute=16-18-A.

¹⁷⁷ S.D. ~~Rule R. Of of ProfI Prof~~ Conduct 1.4(c), 1.4(d), 7.2(l), https://sdlegislature.gov/Statutes/Codified_Laws/DisplayStatute.aspx?Type=Statute&Statute=16-18-A.

¹⁷⁸ Levin, *Lawyers Going Bare*, at 12.

¹⁷⁹ Kritzer ~~and &~~ Vidmar, *When Lawyers Screw Up: Improving Access to Justice for Legal Malpractice Victims* supra note 14, at 41.

¹⁸⁰ *Id.* at 38.

¹⁸¹ *Professional Indemnity Insurance Requirements Around the World*, 9 LAWPRO Magazine “File Retention,” no. 4, (December Dec. 2010) (Vol. 9 no. 4), <https://www.practicepro.ca/wp-content/uploads/2017/06/2010-12-professional-indemnity-around-world.pdf>.

¹⁸² *Id.*

insurance for lawyers licensed in California.¹⁸³ The Working Group is considering enhanced disclosure requirements, mandating insurance as a condition of licensure, developing a PMBR program, and promoting voluntary insurance.¹⁸⁴ The Working Group is actively seeking public comment from both the public and attorneys who provide reduced cost services.¹⁸⁵ The period for public comment closed on November 5, 2018.¹⁸⁶ The Working Group must report its findings to the State Supreme Court, Legislature, and Bar's Board of Trustees by March 31, 2019.¹⁸⁷

Georgia

In late 2018, the State Bar of Georgia convened a Professional Liability Insurance Committee to study and make recommendations concerning lawyer's professional liability insurance coverage.¹⁸⁸ The Committee has met twice since December 13, 2018, and is currently drafting a set of two proposed rules for submission to the State Bar of Georgia's Board of Governors at its March 2019 meeting: One of the proposed rules would impose a mandatory malpractice insurance requirement and the other would impose an insurance disclosure requirement to the state bar.¹⁸⁹

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.¹⁹⁰ Like-As in Washington, Nevada lawyers

¹⁸³ Malpractice Insurance Working Group Charter, the State St. Bar B. of California Cal., <http://www.calbar.ca.gov/Portals/0/documents/cc/Malpractice-Insurance-Working-Group-Charter.pdf>.

¹⁸⁴ Legal Malpractice Insurance The State Bar Seeks Public Comment on Options Under Consideration in Its Statutorily Mandated Malpractice Insurance Study, the State St. Bar B. of California Cal., (Nov. 5, 2018), <http://www.calbar.ca.gov/About-Us/Our-Mission/Protecting-the-Public/Public-Comment/Public-Comment-Archives/2018-Public-Comment/Legal-Malpractice-Insurance> [hereinafter The State Bar Seeks Public Comment].

¹⁸⁵ Open Session Agenda: Item 702 September 2018, Malpractice Insurance Working Group, at 2 (September Sept. 14, 2018), <http://www.calbar.ca.gov/Portals/0/documents/702-Malpractice-Insurance-Working-Group.pdf>.

¹⁸⁶ Legal Malpractice Insurance The State Bar Seeks Public Comment, the State St. Bar B. of California.

¹⁸⁷ Malpractice Insurance Working Group Charter, the State St. Bar B. of California.

¹⁸⁸ Executive Committee Minutes November 7, 2018, St. B. of Ga.: https://www.gabar.org/committeesprogramssections/executivecommittee/upload/EC_1118a.pdf; Committees, State Bar of Georgia, <https://www.gabar.org/committeesprogramssections/committees/>.

¹⁸⁹ Professional Liability Insurance Committee, Draft January 7, 2019, Minutes, St. B. of Ga.

¹⁹⁰ Robert Horne & Jennifer Smith, Join the Discussion: Whether Malpractice Insurance Should Be Mandatory for Nevada Attorneys, Nevada 25 Nev. Lawyer Law. 28, at 28 (December Dec. 2017), https://www.nvbar.org/wp-content/uploads/NevadaLawyer_Dec2017_Malpractice-Insurance-Discussion2.pdf.

must report their insurance coverage status annually.¹⁹¹ 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.¹⁹² 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.¹⁹³

On June 29, 2018, the State Bar of Nevada submitted a petition to the Supreme Court of Nevada ~~for approval seeking adoption of a free-market malpractice insurance requirement.~~¹⁹⁴ The proposed rule amendment would have required every lawyer ~~who was~~ engaged in private practice ~~and representing clients~~ to attest to having ~~professional liability~~ malpractice insurance coverage at a minimum limit of \$250,000 per occurrence/\$250,000 annual aggregate.¹⁹⁵ 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.¹⁹⁶

New Jersey

In February 2014, the New Jersey Supreme Court formed the Ad Hoc Committee on Attorney Malpractice.¹⁹⁷ The Committee was charged with investigating whether to implement an insurance disclosure rule in accordance with the ABA Model Rule on Insurance Disclosure, as well as whether to implement mandatory malpractice insurance.¹⁹⁸ After three years of study, in June 2017, the Committee issued its report recommending against mandatory malpractice insurance but proposing a court rule requiring lawyers to disclose whether they carry malpractice insurance to the Court and to clients.¹⁹⁹ In a letter dated January 15, 2018, in response to a request for comment on the Committee's Report, the New Jersey State Bar Association agreed with the Committee's recommendation not to impose mandatory malpractice insurance but opposed its recommendation to mandate direct disclosure.²⁰⁰ It is unclear what action, if any, the New Jersey

¹⁹¹ Nevada Nev. Supreme Sup. Courtt. Rule-R. 79, <https://www.leg.state.nv.us/CourtRules/SCR.html>.

¹⁹² Horne & Smith, *Join the Discussion: Whether Malpractice Insurance Should Be Mandatory for Nevada Attorneys*, at 28-29.

¹⁹³ March-Mar. 28, 2018, Task Force Meeting Minutes, at 4.

¹⁹⁴ 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, *supra* note 22, at 1.

¹⁹⁵ *Id.* at 15

¹⁹⁶ Order Denying Petition for Amendment to Supreme Court Rule 79, ADKT 534 (October-Oct. 11, 2018), https://nvcourts.gov/Supreme/Decisions/Administrative_Orders/.

¹⁹⁷ N.J. Sup. Ct. Ad Hoc Comm. on Malpractice Ins., Report of the Supreme Court Ad Hoc Committee on Attorney Malpractice Insurance, June 2017, at 3, <https://www.njcourts.gov/courts/assets/supreme/reports/2017/atmalpracticeinsurance.pdf>.

¹⁹⁸ *Id.* at 5

¹⁹⁹ *Id.* at 7-9.

²⁰⁰ Letter from Robert B. Hille, President of the New Jersey State Bar Association to Hon. Glenn A. Grant, Acting Administrative Director of the New Jersey Court, dated Jan. 15, 2018,

Supreme Court took on the Committee's proposal; however, as of the issuance of this Report, the propose rule had not yet been adopted.²⁰¹

9. 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.²⁰²

Average premium numbers can vary broadly based on the firm's principal area(s) of practice.²⁰³ According to the *Profile*, the practice areas of personal injury (plaintiff), real estate, family law, estate planning, collection/bankruptcy, criminal law, and certain business/corporate law practices have the highest incidences of malpractice claims.²⁰⁴ Not surprisingly, insurance premiums tend to be higher in many of those practice areas.²⁰⁵

Basic malpractice policies with modest coverage levels are available to most practitioners at reasonable cost, including those practicing solo or in small firms.²⁰⁶ Based on ALPS-specific data, the average premium of Washington lawyers based on current market trends is \$2,500.²⁰⁷ However, the average premium amount reflects all insured practitioners, some of whom may carry coverage amounts of \$1,000,000 or more.²⁰⁸ According to ALPS, in Idaho, which launched its mandatory malpractice requirement in 2018, the average premium for ALPS' Basic policy issued to solo practitioners (the primary demographic of uninsured lawyers) without prior acts coverage was approximately \$1,200 for the mandated limit of liability of \$100,000 per occurrence/\$300,000 aggregate.²⁰⁹ ALPS' average premium per Idaho solo practitioner was \$2,200, an average that included lawyers who had reached "full maturity" and purchased a

<https://tcms.njsba.com/personifyebusiness/Portals/0/NJSBA-PDF/Reports%20&%20Comments/malpractice%20insurance%20--%202018.pdf>

²⁰¹ See, R. 1:21. Practice of Law, the Rules Governing the Courts of the State of New Jersey, <https://njcourts.gov/attorneys/assets/rules/r1-21.pdf>.

²⁰² Graf, *Mandatory Malpractice Insurance – Task Force*, at 10; Weisenberger, *Mandatory Malpractice Insurance Task Force*, at 4.

²⁰³ Newbold, "Open Market" *Mandatory Malpractice Model*, at 9.

²⁰⁴ *Profile of Legal Malpractice Claims 2012-2015*, at 12.

²⁰⁵ See Newbold, "Open Market" *Mandatory Malpractice Model*, at 9.

²⁰⁶ Newbold, "Open Market" *Mandatory Malpractice Model*, at 6-7, 9.

²⁰⁷ Newbold, "Open Market" *Mandatory Malpractice Model*, at 6.

²⁰⁸ 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..)

²⁰⁹ Email, Newbold to Task Force Member Startzel, Dec. 14, 2018, on file with WSBA.

variety of different limits of liability.²¹⁰ According to Diane Minnich, Executive Director of the Idaho State Bar, reported insurance premiums averaged between \$2,000 and \$3,000.²¹¹ 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 implementation,²¹² so trends may become more apparent with time. However, consistent with how the market operates, premiums will go up in the next several reporting cycles, especially for first-time insurance purchasers and new lawyers.²¹³

New lawyers pay noticeably lower malpractice insurance premiums than more experienced lawyers.²¹⁴ 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.²¹⁵ Insurers set premiums to provide resources to pay claims on incidents that happened in the past.²¹⁶ A first-year lawyer was not practicing in the past, and thus represents a lower risk to insurers.²¹⁷ 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.²¹⁸ 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 provide coverage beginning from the start date of the policy and exclude prior acts.²¹⁹ The start date is the retroactive date for the life of the policy, which means that as with new lawyers, the more years a lawyer maintains a policy, the more the premium will increase until the end of the maturity process.²²⁰

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

²¹⁰ Id.

²¹¹ Interview Notes with Diane Minnich, Dec. 11, 2018, on file with WSBA.

²¹² Interview Notes with Diane Minnich, Dec. 11, 2018, on file with WSBA; [pending approval] Nov. 28, 2018 Task Force Meeting Minutes; * [add link].

²¹³ Interview Notes with Diane Minnich, Dec. 11, 2018, on file with WSBA.

²¹⁴ Newbold, "Open Market" Mandatory Malpractice Model at 7-8.

²¹⁵ Keith Fichtner, Ask an Expert: Why Legal Malpractice Insurance Costs Go Up Every Year, ALPS Blog (Oct. 24, 2017), <https://blog.alpsnet.com/ask-an-expert-why-legal-malpractice-insurance-rates-go-up-every-year>

²¹⁶ Id.

²¹⁷ Newbold, "Open Market" Mandatory Malpractice Model at 7.

²¹⁸ Id. at 8.

²¹⁹ Fichtner, Ask an Expert: Why Legal Malpractice Insurance Costs Go Up Every Year.

²²⁰ Id.

consecutive years (usually five) and retire.²²¹ Tail coverage can be expensive (an unlimited tail can be 300% of the expiring premium) for retiring lawyers who do not qualify for a free extended reporting period endorsement or who do not have a relatively long history with a particular carrier.²²²

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²²¹ Bassingthwaighe, *The Ins and Outs of "Tail" Coverage*; Apr. 25, 2018, Task Force Meeting Minutes, at 2.

²²² Bassingthwaighe, *The Ins and Outs of "Tail" Coverage*; Apr. 25, 2018, Task Force Meeting Minutes, at 2.

B.C. WSBA MEMBER CONCERNS AND TASK FORCE RESPONSES

During a comment period ending December 1, 2018, ~~t~~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.²²³ The Task Force concluded that it would be helpful to address each of those general concerns directly, providing additional background on why ~~we-it~~ decided to make a particular recommendation or chose not to follow a suggested approach.

1. Cost of Malpractice Insurance

The number one concern expressed in written comments from WSBA members—20% of all comments—listed the cost of malpractice insurance as a reason lawyers should not be required to maintain a ~~professional liability~~malpractice insurance policy.

The Task Force has 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 also received information regarding Idaho's experience with mandatory malpractice coverage. Idaho instituted mandatory coverage of ~~\$100k~~100K per occurrence/\$300k~~300K aggregate~~ 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 in the future. The average premium for an ALPS Basic policy for \$100K per occurrence/\$300K aggregate 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 for an ALPS Basic policy in Idaho will grow after six years to close to \$2,400 per year.

²²³ The Task Force accepted and compiled member comments from its inception in January 2018 through its publicized comment deadline of December 1, 2018. The work of the Task Force and its solicitation of member comment was publicized throughout 2018 by means of informational articles and progress reports appearing in NWLawyer, Take Note, and through other forms of direct communication with members, such as email communications.

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

Firm A: Solo practitioner located in Seattle. Purchasing a Retroactive Date (Retro Date)²²⁴ Inception policy on the Basic form (no First Dollar Defense (FDD))²²⁵ 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.

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 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 \$250K per occurrence/\$500K aggregate policy is adopted in Washington, the average premiums will be higher than the 2018 experience 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

²²⁴ A 'retroactive date' is generally the date from which a law firm holds uninterrupted malpractice insurance coverage. The purpose of the retro date is to exclude claims arising from any work undertaken prior to the date shown on the declaration page of the lawyer's insurance policy. Email, Newbold to Task Force Member Startzel, Dec. 14, 2018, on file with WSBA. The retroactive date is thus the inception date of the policy. Email, Newbold to Task Force Staff, Jan. 23, 2019, on file with the WSBA.

²²⁵ "First Dollar Defense" is a coverage option offered to certain law firms based upon eligibility that states [that] when a firm is faced with a claim, the deductible will apply to damages only[,] meaning the insurer pays the 'first dollar' to defend the claim. Email, Newbold to Task Force Member Startzel, Dec. 14, 2018, on file with WSBA. Check with ALPS re definition of FDD and retro date inception policy.

~~individual lawyer~~ uninsured lawyers will generally be able to obtain coverage for a reasonable premium on the insurance market in Washington.

2. Insurance Requirements for Retired and Semi-retired Lawyers

The second largest number of comments received from WSBA members—10% of all comments—were from licensed lawyers who noted they were either retired ~~or~~ semi-retired, or planning to retire, 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 simply 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 believe 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.

3. ~~Negative-Anticipated Adverse~~ 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 might be cost prohibitive and force some of 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—recommend a requirement that might undermines the aspirational recommendation of RPC 6.1 and or materially interfere with a lawyer’s purpose to provide providing legal services to the 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. While the overall impact of, but it appears unlikely that a malpractice insurance requirement on pro bono service might not be large, the WSBA should take positive action to reduce the possibility of a material effect on the number of lawyers willing to volunteer to perform pro bono services. will substantially alter the availability of such services. The primary goal of a mandatory malpractice

requirement is to protect the public, and that need for protection²²⁶ applies with equal force to legal services provided to the disadvantaged.

4. 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 no Idaho lawyer, regardless of specialty, has 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 and recognizes that premiums may vary based on a variety of factors. 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,~~ However, if a malpractice event occurs involving a lawyer in a unique field, the potential damage to the client ~~would~~ could be substantial. The Task Force therefore believes that there ~~may be even a greater~~ is at least equal responsibility for lawyers that practice in unique specialized fields to obtain malpractice insurance coverage.

5. “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.²²⁶ 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

²²⁶ See, *e.g.*, Shaila Dewan, *Moral Hazard: A Tempest-Tossed Idea*, N.Y. Times, Feb. 25, 2012, at BU1, <https://www.nytimes.com/2012/02/26/business/moral-hazard-as-the-flip-side-of-self-reliance.html>.

argument. ~~We~~ The Task Force simply ~~does~~ 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.”

6. 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~~ occur. ~~But t~~ That is the point. If more clients ~~who think they~~ who 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.

7. Adverse Impact on Public Attitude ~~towards~~ towards Lawyers

The Task Force received a small number of comments to the effect that the public ~~will~~ might 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.²²⁷ Further, the Task Force believes that to the extent there are existing negative public attitudes about lawyers, these will not be materially affected one way or the other by an insurance mandate.

8. Mandatory Insurance ~~not~~ 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.”).

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²²⁷ Levin, *supra* note 13, at 1325-1327.

G.D. 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-lawyers~~ to evaluate and assume personal risks created by lack of ~~professional liability malpractice~~ insurance, ~~we the Task Force~~ concluded that it is simply not fair 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 Washington Supreme Court'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 would have 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 approaches 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-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 lawyer 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 direct disclosure of a lawyer’s lack of malpractice insurance to clients and prospective clients).

- 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
- Noncompliance puts lawyers at risk of permanent record of professional discipline

4. Combine PMBR with more extensive disclosure requirements (Combine 2 and 3 above, *i.e.*, require uninsured lawyers to both undergo self-assessment and education on risk reduction, practice management, and bookkeeping and directly 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 options for 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

1. ~~Potential Solution 1: Do nothing-Nothing and maintain-Maintain the status-Status quoQuo~~

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~~malpractice insurance. The insurance coverage disclosure requirement ~~is insufficient~~notwithstanding, ~~and~~ it is not reasonable to assume that most consumers check the WSBA website to ascertain whether their prospective lawyer has a ~~professional liability~~malpractice 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~~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~~are 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.

2. ~~Potential Solution 2: Implement a Proactive Management-Based Regulation (“PMBR”) model~~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,”²²⁸ 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 approach 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.

3. ~~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.” As a rule of professional conduct, the potential consequence of noncompliance is professional discipline. 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, notwithstanding South Dakota’s disclosure requirement, there are still many uninsured lawyers practicing in that state,

²²⁸ Illinois Becomes First State to Adopt Proactive Management-Based Regulation (Jan. 25, 2017) Press Release, Supreme Sup. Court Ct of Illinois, statement of Chief Justice Lloyd A. Karmeier, supra note 163).

and when incidences of malpractice occur with damaging consequences, the clients of uninsured lawyers can suffer serious adverse consequences.

4. ~~Potential Solution 4: Couple Illinois' PMBR model Model with South Dakota's Extensive InsuranceDirect Disclosure Requirements~~

Washington State could impose a two-pronged approach coupling Illinois' ~~intensive~~ Proactive Management-Based Regulation with South Dakota's ~~direct~~ 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.

5. ~~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 ~~unreasonably inordinately~~ expensive or unavailable to some practitioners.

6. ~~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.²²⁹ 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 (\$3,500-300 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~~lawyers, 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.

7. ~~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~~malpractice 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.

²²⁹ In the late 1980s, the WSBA previously considered and rejected such a proposal. Specifically, in 1986, the WSBA Board of Governor's considered creating a professional liability fund and system for requiring malpractice insurance, which would have been incorporated into the former Admission to Practice Rules. Status Report on Malpractice Insurance Coverage and Professional Liability Fund Proposal, Wash. St. B. News, October 1986, at 27. In December 1986, by a 7-4 vote, the BOG approved the proposal for submission to the Supreme Court, subject to submission of the issue to a referendum of the membership. Carole Grayson, Washington State Bar Newslines: The Board's Work, Wash. St. B. News, January 1987, at 29. The membership defeated the referendum by a vote of 6,971 to 1,693. Carole Grayson, Washington State Bar Newslines: The Board's Work, Wash. St. B. News, March 1987, at 16.

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.

DRAFT

D.E. 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 "WSBA Member Concerns and Task Force Responses".)

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

Active Washington-licensed attorneys engaged in the private practice of law, with specified exemptions, should be required to be covered by continuous, uninterrupted malpractice insurance. Attorneys should be required to obtain minimum levels of professional liability malpractice 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 malpractice 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 Washington Supreme Court'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 every lawyer engaged in the business of providing legal services should be financially responsible for 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. Mistakes made by ~~When~~ lawyers without professional liability malpractice insurance make mistakes, it has ~~have~~ a disproportionate impact on low and middle income Washingtonians. This is simply unfair, and it is a problem that can be ~~fixed~~ addressed as a regulatory measure.

The Task Force reviewed the range of potential approaches described in the preceding section of this Report. We ~~it~~ 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 the 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, ~~would have significant startup costs~~, 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 a~~ free-market model ~~that was was analogous to the system~~ 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-The Task Force~~ recommends 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-Task Force~~ 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-The Task Force~~ further noted 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-D to this ~~report~~Report.**

2. ~~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 “private practice” character that calls for insurance requirements. In this context, “private practice” means the provision of legal services to clients other than the lawyer’s employing organization and that organization’s representatives and employees. Specific exemptions should include:

Commented [TJ2]: List reorganized and reworded to reflect the draft rule.

1. Employment as a government lawyer;
2. Employment as a judge;
3. Employment by a corporation or business entity, including nonprofits;
4. Employee or independent contractor for a nonprofit legal aid or public defense office that provides insurance to its employees or independent contractors;
5. Mediation or arbitration;
4. ~~Volunteer pro bono service for a qualified legal services provider as defined in APR 1(e)(8) that provides insurance to its volunteers; and Government lawyers. A lawyer employed by government whose work as a government lawyer constitutes all of that lawyer’s practice.~~
5. ~~House counsel. An in-house for-profit or nonprofit organization lawyer whose work in that role constitutes the lawyer’s entire practice.~~
6. ~~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.~~
7. ~~Mediators and arbitrators. Mediators and arbitrators, if the lawyer’s practice is limited to serving as a mediator or arbitrator.~~
- 8-6. ~~Judges or administrative law judges. Judges and ALJs, if the lawyer’s practice is serving exclusively as a judge or administrative law judge.~~
- 9-7. ~~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 those recommended exemptions discussed in more detail below. Fundamentally, these “exemptions” are more like exclusions because these categories are of lawyers who are not in private practice and therefore not serving private clients who need the protection that malpractice insurance affords. following:

a) Recommended Exemptions

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Fundamentally, these recommended “exemptions,” with the exception of the pro bono category, are more like can be thought of as exclusions because these are categories are of lawyers who

are not in private practice and therefore not serving private clients who need the protection that malpractice insurance affords.

1. **Employment as a Government-government Lawyers.** This category would include lawyers who are employed by:
 - The U.S. Government;
 - State of Washington;
 - A federally-recognized American-Indian ~~Tribal-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. **Employment as a judge.** 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. Adjudicators are neutrals and are not “representing” any clients when they are acting in an adjudicative capacity.

- 2-3. **Employment by a corporation or business entity, including nonprofitsHouse 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. Similar to lawyers employed by government agencies, house counsel’s malpractice is treated as an act of the organization itself, so an insurance requirement is inapposite. At the same time, a lawyer ~~who~~ 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.

4. **Employee or independent contractor for a nonprofit legal aid or public defense office that provides insurance to its employees or independent contractors.** A lawyer employed to provide public defense services or civil legal aid through an organization that insures its employees or independent contractors would be insured for the purposes of the malpractice insurance mandate. This exemption anticipates that there may be some circumstances under which lawyers will not be insured when providing indigent service or civil legal aid representation to clients. This exemption makes clear to those lawyers who are not insured through any organization that they must obtain malpractice insurance. If lawyers who qualify for this exemption choose to engage in private practice apart from their work as public defenders or in civil legal aid, 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).

5. **Mediation and arbitration.** 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 is thought of in the legal representation context.

3-6. **Volunteer pro bono service for a qualified legal services provider as defined in APR 1(e)(8) that provides insurance to its volunteers.** ~~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. As discussed in more detail elsewhere in this Report, ~~with~~ the Task Force recommends 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. Obviously, adjudicators are neutrals and are not "representing" any clients when they are in an adjudicative capacity.

6-7. **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, unemployed lawyers, and fully retired lawyers who do not practice law but choose to maintain their active licenses without engaging in the private practice of law.

b) Exemptions Considered But Not Recommended

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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 the private practice of law, notwithstanding that their work is before federal rather than state courts or agencies. The Task Force concluded that 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/malpractice 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 family members, many other policies written for Washington lawyers do not have such exclusions, e.g. policies written by the CNA Financial Corporation, Hanover Insurance Group, and Travelers Indemnity Company.²³⁰
3. **Lobbying and/or ~~Legislative-legislative Advocacy-advocacy Exemption~~ 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) and the lawyer is providing those services to private clients, then the lawyer would be required to obtain professional liability/malpractice 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

²³⁰ Email, Insurance Industry Professional and Task Force Member Rob Karl to Task Force Chair Hugh Spitzer, Dec. 20, 2018, on file with WSBA.

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.

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 given the lack of known parameters and the wide variability in the subjective concept of affordability. 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.

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~~ a lawyer has a Washington license, ~~he or she~~ the lawyer 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 in this state. If a lawyer's entitlement to practice elsewhere is based solely on the possession of a Washington state license, then it is a legitimate regulatory objective to require insurance coverage for the legal services provided to private clients.

3. ~~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 given existing processes for administering insurance disclosure under APR 26. 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~~malpractice 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.

4. Increasing Insurance Availability for Pro Bono Representation

The WSBA should develop and put into effect an improved statewide program to increase access to malpractice insurance for lawyers whose private practices are limited solely to pro bono representations.

Comment: As described earlier in the Report, a majority of lawyers who provide pro bono services already carry malpractice insurance or are able to obtain coverage through volunteer lawyer programsVLPs or Qualified Legal Service ProvidersQLSPs. However, only 20 of Washington's 39 counties are served by VLPs, and the unserved counties are typically those with small populations. In order to obtain coverage, otherwise-uninsured lawyers in the unserved counties have to work through a program based elsewhere. This appears to work in many instances, but it is important to makes sure that a pro bono client can be matched with an insured lawyer in any community in Washington. As noted above, lawyer malpractice insurance is an access-to-justice issue, and pro bono clients should have the same access to an insured lawyer as anyone else.

A more robust pro bono insurance program statewide will require cooperation and effort with the existing VLPs and QLSPs, with the Statewide Pro Bono Council, and with local and specialized bar associations. The Task Force recommends that before a malpractice insurance requirement

~~goes into effect, the WSBA should begin work with these groups to develop and implement an improved statewide program to increase the access to professional liability malpractice insurance for lawyers whose private practices are limited solely to pro bono representations. Such a program improvement might be workable (and financially achievable) within the existing pro bono framework. Alternatively, it might require the allocation of additional WSBA or other funds. The development of an expanded pro bono insurance coverage program is beyond the scope of the Task Force's work. However, while this issue could slow down the implementation date will require a separate initiative that could take time, it should not delay the basic fundamental decision to move ahead on mandating lawyer malpractice insurance coverage.~~

IV-III. CONCLUSION

With this Report, the Task Force recommends to the WSBA Board of Governors that 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 CD. The Rule incorporates the Task Force's recommended mandatory minimums and exemptions. The Task Force submits this draft Rule-rule for the Board's consideration and any further action the Board deems appropriate.

D.
Draft of Amended APR 26

APR 26. INSURANCE DISCLOSURE

(a) Unless exempted under section (b) of this rule, Each active lawyer member of the Bar who is to any extent engaged in the private practice of law shall must certify annually in a form and manner approved by the Bar by the date specified by the Bar (1) whether that the lawyer is covered by engaged in the private practice of law; (2) if engaged in the private practice of law, whether the lawyer is currently covered by professional liability insurance at a minimum limit of \$250,000 per occurrence/\$500,000 annual aggregate; and (3) whether the lawyer intends to maintain insurance during the period of time the lawyer is on active status in the current licensing period engaged in the practice of law; and (4) whether the lawyer is engaged in the practice of law as a full-time government lawyer or is counsel employed by an organizational client and does not represent clients outside that capacity.

(b) A lawyer is exempt from the coverage requirement of section (a) of this rule if the lawyer certifies to the Bar in a form and manner approved by the Bar that the lawyer is not engaged in the practice of law or the lawyer's practice consists exclusively of any one or more of the following categories and that the lawyer does not represent any clients outside of that service or employment:

- (1) Employment as a government lawyer or judge;
- (2) Employment by a corporation or business entity, including nonprofits;
- (3) Employee or independent contractor for a nonprofit legal aid or public defense office that provides insurance to its employees or independent contractors;
- (4) Mediation or arbitration; and
- (5) Volunteer pro bono service for a qualified legal services provider as defined in APR 1(e)(8) that provides insurance to its volunteers.

(c) Each active lawyer who certifies coverage under section (a) of this rule must, reports being covered by professional liability insurance shall certify in a form and manner prescribed by the Bar, notify the Bar in writing within 3010 days if the insurance policy providing coverage lapses, is no longer in effect, or terminates for any reason.

(b)(d) The information submitted pursuant to this rule as to the existence of coverage will be made available to the public by such means as may be designated by the Bar, which may include publication on the website maintained by the Bar.

(c)(e) Any active a lawyer of law who is required to certify coverage under section (a) of this rule who fails to comply with this rule by the date specified by the Bar or fails to maintain the coverage required throughout the licensing period, the lawyer may be ordered suspended from the practice of law by the Supreme Court until such time as the lawyer complies- and the Court orders the lawyer's reinstatement to active status.

(f) A lawyer who has certified the existence of professional liability insurance coverage under section (a) of this rule must provide proof to the Bar, upon request, of the existence of the certified coverage, including a copy of any applicable insurance policy and other relevant information. A lawyer who has not complied with a request under this section for more than 30 days may be ordered suspended from the practice of law by the Supreme Court until such time as the lawyer complies with the request and the Court orders the lawyer's reinstatement to active status.

(g) Supplying false information in a certification under section (a) or (e) of this rule or in response to a request for information under section (f) of this rule, or failure to provide timely notice under section (c) of this rule, may~~shall~~ subject the lawyer to appropriate disciplinary action.

APR 26. INSURANCE

(a) Unless exempted under section (b) of this rule, each active lawyer member of the Bar who is to any extent engaged in the private practice of law must certify annually in a form and manner approved by the Bar by the date specified by the Bar that the lawyer is covered by professional liability insurance at a minimum limit of \$250,000 per occurrence/\$500,000 annual aggregate and intends to maintain insurance during the period of time the lawyer is on active status in the current licensing period.

(b) A lawyer is exempt from the coverage requirement of section (a) of this rule if the lawyer certifies to the Bar in a form and manner approved by the Bar that the lawyer is not engaged in the practice of law or the lawyer's practice consists exclusively of any one or more of the following categories and that the lawyer does not represent any clients outside of that service or employment:

- (1) Employment as a government lawyer or judge;
- (2) Employment by a corporation or business entity, including nonprofits;
- (3) Employee or independent contractor for a nonprofit legal aid or public defense office that provides insurance to its employees or independent contractors;
- (4) Mediation or arbitration; and
- (5) Volunteer pro bono service for a qualified legal services provider as defined in APR 1(e)(8) that provides insurance to its volunteers.

(c) Each lawyer who certifies coverage under section (a) of this rule must, in a form and manner prescribed by the Bar, notify the Bar in writing within 10 days if the insurance policy providing coverage lapses, is no longer in effect, or terminates for any reason.

(d) The information submitted pursuant to this rule as to the existence of coverage will be made available to the public by such means as may be designated by the Bar, which may include publication on the website maintained by the Bar.

(e) If a lawyer who is required to certify coverage under section (a) of this rule fails to comply with this rule by the date specified by the Bar or fails to maintain the coverage required throughout the licensing period, the lawyer may be ordered suspended from the practice of law by the Supreme Court until such time as the lawyer complies and the Court orders the lawyer's reinstatement to active status.

(f) A lawyer who has certified the existence of professional liability insurance coverage under section (a) of this rule must provide proof to the Bar, upon request, of the existence of the certified coverage, including a copy of any applicable insurance policy and other relevant information. A lawyer who has not complied with a request under this section for more than 30 days may be ordered suspended from the practice of law by the Supreme Court until such time as the lawyer complies with the request and the Court orders the lawyer's reinstatement to active status.

(g) Supplying false information in a certification under section (a) or (e) of this rule or in response to a request for information under section (f) of this rule, or failure to provide timely notice under section (c) of this rule, may subject the lawyer to appropriate disciplinary action.