

## **MANDATORY MALPRACTICE INSURANCE TASK FORCE**

### **MEETING MINUTES**

September 12, 2018

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

Also present were Brad Dantic (Vice-President, Secretary and General Counsel of ALPS) (by phone), Doug Ende (WSBA Staff Liaison and Chief Disciplinary Counsel), Thea Jennings (Office of Disciplinary Counsel Disciplinary Program Administrator), Rachel Konkler (Office of Disciplinary Counsel Legal Administrative Assistant), Jean McElroy (WSBA Chief Regulatory Counsel), and Chris Newbold (Executive Vice President of ALPS) (by phone).

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

#### **A. COMMITTEES MEET TO DISCUSS COVERAGE, EXEMPTIONS, AND COMPLIANCE ISSUES**

The Task Force divided into two committees for the first 90 minutes of the meeting. Committee 1 discussed coverage issues. Committee 2 discussed exemptions and compliance issues. The groups then reconvened and each committee reported back on its recommendations.

#### **B. COMMITTEE 1 REPORT ON COVERAGE ISSUES**

Committee 1 discussed possible coverage levels to recommend with a mandatory malpractice insurance rule. Chris Newbold and Brad Dantic of ALPS joined the conference call to assist the Task Force in their discussion. The Committee considered possible coverage level requirements of \$100,000/\$300,000, \$250,000/\$250,000, and \$250,000/\$500,000, recommending a \$250,000/\$500,000 policy. The Committee agreed \$100,000/\$300,000 was too low as a possible coverage level requirement because in too many instances \$100,000 would not cover the cost of payment to a successful claimant and the costs of representing the lawyer. Further, upon consideration, the premium cost difference between a \$250,000/\$250,000 and \$250,000/\$500,000 policy would not be substantial, with an estimated few hundred dollars difference annually. In addition, most claims are for less than \$250,000, so the Committee decided that a policy limit of \$250,000/\$500,000 would likely be sufficient to cover the large majority of claims.

Committee 1 also discussed tail coverage, deductibles, and prior acts (or retroactive) coverage. It decided that tail coverage issues will likely be addressed in individual insurance policies. The



committee decided not to recommend a deductible size limitation because deductible levels will not impact coverage and such matters are most effectively decided by the insurer and the insured. It further noted the impracticality in imposing prior acts coverage, as it can be difficult and expensive to purchase on the open market. However, the Committee noted that the draft rule should require that lawyers maintain continuous, uninterrupted coverage.

### **C. COMMITTEE 2 REPORT ON EXEMPTIONS AND COMPLIANCE ISSUES**

Committee 2 discussed exemptions and compliance issues. As a baseline, the Committee agreed that those who would be mandated to carry malpractice insurance under their recommended rule would include those actively licensed lawyers who are engaged in the private practice of law. With that baseline, the Committee discussed the following exemptions, noting that some exemptions are not technically necessary because they do not constitute the private practice of law and consequently individuals under the category would be automatically exempted:

1. **Government lawyers.** These individuals would be automatically exempted because they would not be “engaged in the private practice of law;”
2. **In-house private company lawyers** because the lawyer would be covered by the organization’s errors and omissions coverage (or self-insurance, or a business decision not to purchase that coverage);
3. **Lawyers employed by a civil legal aid provider or public defender’s office that carries insurance for all of its employees;**
4. **Lawyers providing pro bono services through a civil legal aid provider that maintains malpractice insurance for its volunteers** because those lawyers would have coverage through that organization and clients would therefore have protection;
5. **Retired, non-practicing lawyers.** These individuals would be automatically exempted because they would not be “engaged in the private practice of law;”
6. **Judges/administrative law judges/hearing officers.** These individuals would be automatically exempted because they would not be “engaged in the private practice of law;”
7. **Mediators/arbitrators.** These individuals would be automatically exempted because they would not be “engaged in the private practice of law;”
8. **Judicial law clerks.** These individuals would be automatically exempted because they would not be “engaged in the private practice of law;”
9. **Rule 9 interns/law students.** These individuals would be automatically exempted because they are not “actively licensed lawyers;” and
10. **Lawyers not providing legal services.** This group would be automatically exempted because they would not be “engaged in the private practice of law.”

Possible exemptions that were discussed but the Committee agreed against included:

1. **Lawyers practicing solely before federal tribunals** because such practice amounts to practicing law in the state, and thus clients would be unprotected;
2. **Lawyers practicing solely out-of-state**, owing to the difficulty of defining where the practice of law occurs and the ability of out-of-state licensed lawyers to choose to practice in Washington State, leaving clients unprotected;
3. **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 and clients would be unprotected. Lawyers could, if they choose, transfer their licenses to emeritus status and work through qualified legal service providers to find their pro bono clients; and
4. **Lawyers engaged in limited practice and continually supervised** because the lawyers are nevertheless actively licensed and engaged in the private practice of law.

The Committee further discussed exemptions regarding law-related services and lawyers providing legal services to family members but arrived at no specific conclusions.

The Task Force tentatively agreed with the recommended exemptions of the Committee.

The Committee also discussed the certification and compliance process. The Committee generally agreed mechanisms should be in place to monitor compliance. The Committee agreed that options might be feasible for lawyers to certify that they are not engaged in private practice when they are unemployed for period of time or have short periods of inability to practice due to illness or familial situations; however, this could prove impracticable because of the claims-made character of lawyer professional liability insurance. Consequences for noncompliance should be administrative suspension. It was noted that some practitioners have a hard time making ends meet in the practice of law, so such a requirement could have a disparate impact on certain lawyers. After discussion, the Task Force agreed the specifics should be left to the rule drafting committee.

#### **D. LEGAL SERVICE PROVIDERS AND MALPRACTICE INSURANCE COVERAGE**

Thea Jennings presented the Interim Memo re Qualified Legal Service Providers and Malpractice Insurance Coverage for Volunteer Lawyers found in the September 12, 2018 meeting materials. The purpose of the interim memo is to provide research on whether qualified legal service providers (QLSPs) are providing insurance to their volunteer lawyers across the state. This research was done in response to member comments related to the effect mandatory malpractice insurance could have on those primarily providing pro bono services.

Ms. Jennings began by noting that her research dealt with lawyers providing pro bono services through organizations serving persons of limited means. She noted that according to the *ABA Report on the Pro Bono Work of Washington's Lawyers* issued in April 2017, approximately 56%

of lawyers in Washington found their clients through referrals from legal aid providers, non-profit organizations, or bar associations, many of which are likely 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. Washington has approximately 60 Bar-approved QLSPs.

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). Approximately five to eight years ago, LFW launched its own group insurance program for all of its grantees that are VLPs. The LFW plan offers coverage up to \$500,000. Many grantees choose to buy additional coverage. This includes the King County Bar Association (KCBA) Pro Bono Services Program and the Eastside Legal Assistance Program (ELAP). The total coverage each maintains is \$1 million per claim/\$2 million aggregate.

Both KCBA and ELAP's plan includes the cost of legal fees for defending a claim. 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. With respect to tail coverage, the coverage extends past the time of volunteering. 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.

QLSPs that provide legal services primarily through staff attorneys, such as Columbia Legal Services, obtain their own insurance plans. Columbia Legal Services plan is approximately \$1 to \$1.5 million and has a pro bono rider for volunteer lawyers that work with Columbia Legal Services. If the volunteer is self-insured, the lawyer's insurance would be the first to cover any claim arising from the pro bono representation. Then, Columbia Legal Services' insurance would cover any amount over and above the lawyer's policy limits. If the lawyer is uninsured, then Columbia Legal Services' plan would cover the lawyer. There are no exclusions on coverage and tail coverage would apply.

Ms. Jennings noted that since the interim memo was issued she had spoken with Catherine Brown, Pro Bono Council Manager, who works with all 17 VLPs that LFW insures. With respect to geographic diversity, Ms. Brown noted some gaps in VLPs across the state with only 20 of 39 Washington counties served by VLPs. For example, Ferry County has no VLP, so a lawyer wishing to volunteer through a VLP would have to travel. It is thus conceivable that not every lawyer would connect with a VLP to provide pro bono services. She stated she imagines VLPs would entertain working with individuals from other counties; however she is unsure to what extent that may have an impact on the already limited staffing resources of the VLPs. The Task Force requested that Ms. Jennings continue her research and specifically look into whether VLPs would host lawyers from other counties.

#### **E. MINUTES**

The minutes of the August 22, 2018 meeting were approved.

**F. NEXT STEPS**

The Task Force will begin drafting its final report to the Board of Governors, and expects to draft rule recommendations for the final report during its November and December meetings.

Two articles have been published in the August issue of *NWLawyer* regarding the topic of mandatory malpractice insurance. The Task Force also discussed hosting an open forum to provide the opportunity for member comments. The Task Force continues to invite comments from membership regarding its work.

**G. ADJOURNMENT**

The meeting adjourned at 3:52 p.m.