From: Timothy J. Nault
To: Mandatory Malpractice Insurance Task Force
Subject: Mandatory Malpractice Insurance
Date: Thursday, February 28, 2019 4:27:15 PM

Dear Task Force:

I'd like to suggest that a less onerous possibility than mandatory malpractice insurance could be requiring those attorneys who do not have malpractice insurance to disclose such fact to their clients, such as in part of any retainer agreement.

This could be a "softer" way of achieving the goal, assuming that the marketplace would react to it.

Thanks,

Timothy J. Nault

Randall | Danskin
A Professional Service Corporation
601 W. Riverside Avenue, Ste. 1500
Spokane, WA 99201
(509) 747-2052
(509) 624-2528 (fax)
www.randalldanskin.com

From:	Stephen Henderson
To:	Mandatory Malpractice Insurance Task Force
Subject:	Mandatory insurance
Date:	Thursday, February 28, 2019 4:48:40 PM

Hard to understand who the committee listened to. I don't see a need for this new requirement. It may help the insurance companies but not the practicing lawyers.
If I were still on the BOG, I would vote no.
Steve Henderson
Olympia

Sent from my iPhone

From:	Amy Stephson
To:	Mandatory Malpractice Insurance Task Force
Cc:	amystep@aol.com
Subject:	Opposition to Mandatory Insurance
Date:	Thursday, February 28, 2019 5:00:02 PM

Board of Governors:

I am a semi-retired lawyer who has maintained her license in order to do occasional, non-litigation-related, employment law. I do not have malpractice insurance and do not intend to get it since I do very low risk work, not very much of that, and would self-insure if a problem arose. Which is unlikely since I've never had a claim or even a hint of one in my 40+ years of practice.

The TF report states that semi-retired lawyers can get cheap insurance since they are working part-time. In my experience, that is not true. It is very difficult to obtain insurance in such a circumstance and it is not cheap.

I oppose mandatory malpractice insurance except in cases of lawyers who have been sued for malpractice and have not been able or willing to pay the judgment. Otherwise, I oppose it.

I would add that if the WSBA imposes this requirement, I will quit the bar rather than pay for unnecessary malpractice insurance -- and I suspect many others in my position will do it as well, resulting in serious financial loss for the Bar.

Please listen to your members and not an arrogant, out-of-touch task force that has little actual evidence to support its recommendation.

Amy Stephson

Amy J. Stephson
Employment Attorney & Coach
9725 3rd Avenue N.E., Suite 600
Seattle, WA 98115
(206) 223-7215
www.amystephson.com

From: Joseph Quinn
To: Mandatory Malpractice Insurance Task Force
Subject: Government Lawyers exemptions
Date: Thursday, February 28, 2019 5:19:50 PM

WSBA: My practice (90 percent) involves representing municipal clients, and almost exclusively fire district clients. The legal work is indistinguishable from that of a city attorney or civil deputy prosecutor. It seems unfair to require malpractice insurance for the minuscule work I do for private clients so am I forced to forego any private work? In a 42 year career I have never had a malpractice claim when insured (or not). Joseph F. Quinn, #6810.

Sent from my iPhone

From: mmittge@compprime.com
To: Mandatory Malpractice Insurance Task Force
Subject: Mandatory malpractice insurance
Date: Thursday, February 28, 2019 6:06:07 PM

I retired from law practice approximately 2 years ago (at age 68), but have now resumed working for just one client (a property management company) doing exclusively evictions. I had represented them for many years prior to retirement, and only resumed representation at their request (I'm very good at it, "if I do say so myself") My fees average $500 per month, and "it gives me something to do". I practiced in primarily real estate matters for 30 years without a single claim or even a fee dispute. Mandatory malpractice would effectively put me out of my (limited) business, much to the chagrin of my client. I'm sure they would execute a Covenant Not to Sue in a heartbeat, if requested. If I do make a mistake and they want recompense, they could recover most of it by simply not giving me the normal assortment of restaurant gift cards at Christmas.

It is also interesting that in representing plaintiffs in eviction actions, the malpractice exposure is approximately one month's rent for the property in question. If you get it wrong the first time, just start over the next month and get it right, and the client only loses one month's rent (if the tenant does not pay up in the meantime).

Thank you for your consideration.

Michael R. Mittge
Chehalis WA
WSBA 17249

From:	Mary Shea
To:	Mandatory Malpractice Insurance Task Force
Subject:	Mandatory professional liability insurance
Date:	Thursday, February 28, 2019 6:06:54 PM

‘I am adamantly opposed to a mandatory insurance requirement as it is too costly and reduces an attorney’s ability to effectively render legal services. Please do Not make mandatory the obtaining of professional liability insurance.
Sincerely,
Mary Shea, Esq. #34913

From:	Carolyn Cliff
To:	Mandatory Malpractice Insurance Task Force
Subject:	Opposition and Comment On Proposal for Mandatory Malpractice Insurance; Suggestion for Exemption
Date:	Thursday, February 28, 2019 7:37:09 PM

Dear Members of the Board of Governors;

I write to oppose adoption of a mandatory requirement for malpractice Insurance as a condition to practicing law in the state of Washington. I was engaged in the private practice of law in the State of Washington from the time of my admission to the bar, in 1984, until my retirement from private practice in 2016. For the first four years, I worked at a large law firm; for the remainder, I had my own sole practice. Throughout that time, I had malpractice insurance, even though the expense was a significant burden during the initial years that I was establishing my own practice. Throughout that time, none of my carriers ever paid a dime to any claimant; although I was sued twice during the course of my career, both were cases filed by pro se litigants, and both were resolved with orders of dismissal, without any payment to anyone but defense counsel, early in the process. Although hindsight thus demonstrated that I would have done better financially to self-insure, I nonetheless believe that I made the right decision, for me, to pay for malpractice insurance throughout my career: for my own peace of mind and for the protection of my family.

In my judgment, however, the decision whether to maintain or not to maintain malpractice insurance should be the subject lawyer's choice. I do not object to the requirement that any and every prospective client should be able to readily find out whether a lawyer does or does not have such insurance. But not once in over 30 years of private practice did a client or prospective client ever ask me whether I had malpractice insurance; not once in over 30 years of private practice did I ever see any indication that a client or prospective client had checked the records at WSBA to see if I had malpractice insurance (this information was, of course, only available to the public in the latter years of my practice). I do not know what is driving the push for the State of Washington to become what I believe to be only the second state to require its attorneys to secure malpractice insurance as a condition to the right to practice law. If adopted, however, such a requirement could have a significant impact on me. I retired from private practice in 2016. I continue to maintain my license to practice law, however, because I serve, on occasion, as a pro tem judicial officer in state court. Although the income that I earn from that service is not material, I enjoy the opportunity to be of service to my community and the associated costs (annual dues and CLE fees) are not prohibitive. If the Board adopts a requirement that I secure malpractice insurance as a condition to maintain my license, however, the associated cost then **would** be prohibitive, and I would no longer be able to accept opportunities to serve as a pro tem judicial officer. At a minimum, any requirement to maintain malpractice insurance should not be imposed on attorneys who are not representing clients.

Thank you for your consideration. If you are providing some kind of feedback or update to those commenting on this proposal, I will appreciate receiving it.

Very truly yours,

Carolyn Cliff

WSBA 14301

From:	Patricia Evans
To:	Mandatory Malpractice Insurance Task Force
Subject:	Limits
Date:	Thursday, February 28, 2019 8:12:23 PM

Why not make it the same as neighboring state. Idaho is 100,000/300,000. That seems to be the standard.

Thank you.

Patricia Evan's
WSB# 42878
ISB# 4831

Sent from my Samsung Galaxy smartphone.

From:	Swenson, Raymond T
To:	Mandatory Malpractice Insurance Task Force
Cc:	Swenson, Raymond T; [redacted]
Subject:	Comment on Mandatory Malpractice Insurance Recommendation
Date:	Thursday, February 28, 2019 8:36:38 PM

Dear WSBA:
February 28, 2019

I believe the scope of two of the "Recommended Exemptions" (at page 48 of the Task Force Report) are too narrow. Specifically "1. Employment as a government lawyer" and "3. Employment by a corporation or business entity, including nonprofits." I have excerpted these here, with my added emphasis:

> **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).
>
> . . .
>
> **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.

With respect to category 1, the comment seems to be confused about who the party is who would be potential plaintiff alleging injury from attorney malpractice. When it says "Governments, as well as private organizations, are often self-insured", is this referring to a potential claim by a government entity against an attorney it has employed or engaged to provide a service to the government entity? Government entities generally have other attorneys who oversee the work of the attorneys it employs, and have significantly greater financial resources than an individual attorney to assume contingent financial risks. It would be unfair for a government entity, or any large private organization, to require attorneys it employs to purchase malpractice insurance for the purpose of guaranteeing the government's funds from contingent costs.

The next sentence states correctly that "actions by their own employees that might constitute malpractice are treated as acts of the organizations themselves", referring to a situation in which a third party, rather than the government itself, is the injured party. In the Federal realm, as part of the Federal Tort Claims Act, the 1988 Federal Employee Liability Reform and Tort Compensation Act (28 USC Section 2679) specifically provides that the Federal government will be substituted for a Federal employee who is being sued for negligence. This includes Federal attorneys, both civilian and military. Government entities "as well as private organizations" are responsible according to standards of *respondeat superior* for the negligence of their employees, so it would be absurd for a government entity to sue its own attorney to recover the costs of a tort suit against the government entity by an injured party. I fully agree with the Report that employees of government entities should not be expected to pay for malpractice insurance, because, as the general principle stated in the heading to the Recommended Exemptions explains, government entities are not "private clients who need the protection that malpractice insurance affords".

However, the Report fails to address the fact that government entities frequently perform their functions by engaging private contractors. When a government entity engages an attorney to provide legal advice, it does not need to look to the private attorney to insure it against contingent risks arising from the circumstances that created the need for legal advice. For some of the same reasons that government entities should not be looking to their own employees to assume financial risks, they should not look to a private attorney to insure the government entity against contingencies. Government entities have their own lawyers who will interface with outside counsel, and evaluate the advice given by the contracted attorney. Government entities are more sophisticated in hiring outside counsel. The Federal government has contractual remedies under the False Claims Act and other statutes to protect itself against intentional, fraudulent action by a contracted attorney, and does not need to bring a malpractice action, nor does legal malpractice insurance protect an attorney against such contract-based claims for damages. A private attorney who contracts to work for the Federal government who is forced to buy legal malpractice insurance would find himself paying for insurance that does not protect him against these real risks.

For these reasons, I believe the exemption for "government lawyers" should include private attorneys performing work under contract to government entities. Such attorneys would tend to not be performing general legal services for the public, but providing specialized advice in specialties, such as government contracts, public lands, utilities regulation, and environmental law. This would not apply to law firms that offer their services to the general public and business community, who already have malpractice insurance costs as part of their business risk management plan.

With respect to exemption 3, "Employment by a corporation or business entity, including nonprofits", I also agree that attorneys employed by such entities should be exempted for the same reasons that attorneys employed by government entities should be exempted. Corporations are also unlike "private clients who need the protection that malpractice insurance affords", because they have the resources to protect themselves against loss if an attorney they hire makes a mistake. However, the logic of the report breaks down when it denies this exemption to an attorney working for the corporation as "as an independent contractor (rather than as an employee)". The Report says that a contract attorney "would be deemed to be engaged in the private practice of law." But this makes no sense. If an attorney is generally offering services to the general public, including individuals, then the malpractice insurance he purchases for the risks of that work will still be with him if he takes on a corporate client. But if an attorney confines his work to consulting with corporations and government entities, in a specific specialty, and does not offer services to the general run of clients who need protection against his potential negligence, he should have no more duty to buy malpractice insurance to protect his sophisticated corporate clients than the attorneys who work directly as employees for one of those clients. The entire purpose of malpractice insurance is to protect clients against the malpractice risk, but corporations and government entities have other means to manage such risks, and have no more need to collect malpractice claims against their contractors than they do against their employees.

Indeed, we are all familiar with the vagueness of the legal boundaries between the status of "employee" and of "contractor". The complex rules used by courts to determine where the dividing line lies should not be introduced into WSBA procedures for enforcing mandatory legal malpractice insurance coverage. If an attorney confines his legal practice to government entities and corporate entities that engage him for specialized legal advice, there is no harm being done to exempt him from the malpractice insurance requirement, except for those who want more money put into the fund, especially from attorneys who will never have to claim against the fund. Where on the line are attorneys who volunteer their services to not-for-profit organizations, such as environmental advocacy groups? Can they be employees if they are not paid? A proper extension of exemptions 1 and 3 will not harm clients, but will directly benefit attorneys in these narrow practice areas.

I speak as an attorney who worked in the Air Force JAG Corps for 20 years, and for the last 20 years have been a member of the WSBA employed as corporate counsel for major companies working under contract to the US Department of Energy to cleanup nuclear waste sites. Attorneys exclusively performing work under contract for government agencies and for corporations do not need to buy malpractice insurance to protect their sophisticated clients.

Raymond Takashi Swenson
Lt. Colonel, USAF JAG Corps (Retired)
Senior Counsel
WSBA # 27844

CH2M HILL Plateau Remediation Company
Richland, Washington
[redacted] Office
509-713-0966 Smartphone
509-376-0334 Fax
Raymond_T_Swenson@rl.gov

From:	John Ziegler
To:	Mandatory Malpractice Insurance Task Force
Subject:	Mandatory Malpractice Insurance Will Exclude Me From My Pro Bono Practice
Date:	Thursday, February 28, 2019 9:18:23 PM

JOHN G. ZIEGLER
New Address:
[redacted]
zieggie@hotmail.com
[redacted]

February 28, 2019

Washington State Bar Association
Malpractice Insurance Task Force
1325 Fourth Ave., Suite 600
Seattle, WA 98101-2539

re: Mandatory Malpractice Insurance

Dear Task Force Members,

I was admitted to the WSBA in October 1974 and "retired" in November 1997, meaning that I still practice law but have not charged or accepted a fee from any client for more than 21 years. Each year I donate over 1,500 hours of *pro bono* representation. Most of my time is devoted to assisting criminal defense attorneys, primarily public defenders, with legal advice and mentoring, but I have paid my Bar Dues so that, when called upon, I can represent poor people and criminal defendants regardless of their income. With a Social Security income of only $804 per month, I will not be able to afford malpractice insurance and will no longer be able to represent the needy.

Many great attorneys assisted and encouraged me as a young lawyer, and I have spent nearly half of my "legal life" giving advice, encouragement and mentoring freely back to members of the Bar Association. If the WSBA Board does adopt mandatory malpractice insurance, I implore it to provide an exception for those of us who provide half or more of our practice hours to *pro bono* service.

Thank you for your attention and consideration.

Very Truly Yours,

/s/

John G. Ziegler
Attorney at Law
WSBA # 5875

From: Don Elliott
To: Mandatory Malpractice Insurance Task Force
Subject: RE: Take Note: Malpractice Report, Bar Act Legislative Update, Board Openings and Elections
Date: Friday, March 1, 2019 8:29:27 AM

March 1, 2019

Hello WSBA:

I would like to have no mandatory malpractice insurance.

For several years now, I have been slowly winding down a solo law practice. I have only a few probate cases left to complete, but some probate cases take a long time to finish. I sometimes do minor legal tasks for friends and relatives, such as a power of attorney, directive to physicians, or a simple will.

I have never had to pay a malpractice claim to anyone, nor have I had a malpractice claim filed in court against me in over 45 years of law practice. I have money and assets enough to cover any error that I make that can't be corrected.

The cost of insurance probably would make my complete retirement essential. I would rather not retire completely yet.

Thanks.

Don Elliott
954

From: Washington State Bar Association [mailto:noreply@wsba.org]
Sent: Thursday, February 28, 2019 5:03 PM
To: donald.e.elliott@gmail.com
Subject: Take Note: Malpractice Report, Bar Act Legislative Update, Board Openings and Elections

WSBA Take Note!

WSBA News and Updates

- **Mandatory Malpractice Report:** The Mandatory Malpractice Insurance Task Force has completed its report,

Hands on with Fastcase

which recommends malpractice insurance as a condition of licensing for lawyers, with specified exemptions. The task force will present its report and recommendation at the next Board of Governors meeting on March 7. The 18-member task force has met since January 2018 and considered more than 580 comments from members and the public. The board will consider the recommendation and decide whether to propose a mandatory malpractice-insurance rule change to the Washington Supreme Court. More information can be found here. Members can provide comments to the Board of Governors via insurancetaskforce@wsba.org and/or during public comments at the March 7 meeting.

- **Legislative Update:** As is common during most state legislative long sessions, several bills have been introduced to modify the State Bar Act. One, Substitute House Bill 1788, is gaining some traction; last week, it moved out of the House Civil Rights and Judiciary Committee with a unanimous vote and now goes to the House Rules Committee. The proposed bill's biggest change would be to strike the majority of the State Bar Act by recognizing the Court's inherent plenary authority: "The Legislature recognizes the inherent plenary authority of the Washington Supreme Court to regulate court-related functions, including the practice of law and administration of justice." WSBA leaders are closely monitoring the bill.

- **Take Your Solo Practice to the Next Level:** Come and learn from experienced practitioners how they got through the lean times and built a successful and sustainable business. The next WSBA MentorLink Mixer will be held from 11:30 a.m.-1:30 p.m., March 20, at the WSBA offices in Seattle. The networking event and a free 30-minute CLE (Networking with Authenticity: Creating Your Personal Brand) will be held in partnership with WSBA's Solo and Small Practice Section. If you'd like to attend, please RSVP by March 8.

- **Nominate Before It's Too Late:** WSBA is still seeking nominations for the 2019 APEX (Acknowledging Professional Excellence) Awards. These awards honor exemplary members of the legal community, including legal professionals, judges, and members of the public. Please complete a 2019 APEX Nomination Form, along with supporting materials, to barleaders@wsba.org by March

March 4. Webinar
Register to attend

Sexualized Atrocities during Genocide: Personal and Legal Implications
March 6. Webinar
Register to attend

The Washington Law & Practice Refresher
March 7 & 8. Seattle & webcast
Register to attend

Fastcase v. Google Scholar
March 11. Webinar
Register to attend

Legal Writing Workshop
March 13. Seattle & webcast
Register to attend

15. The awards will be presented at the Annual APEX Awards Dinner in Seattle on Sept. 26.

On Board

- **The Board of Governors is scheduled to hold an** emergency meeting executive session from 3-4 p.m., March 1, via teleconference to update on personnel and litigation matters, and discussion re legislative strategy. The Board will also have a special executive session meeting via teleconference from 12-1 p.m., March 4, to discuss and take action regarding the pending notice of tort claim and to consider the recent proposal as framed by Governor Grabicki.

- **The Board will hold a regular meeting** from 8 a.m.-5 p.m. on March 7 at the Hotel RL in Olympia.

- **Rock the Vote:** WSBA members living in Congressional Districts 9 and 10 are encouraged to vote in the Board of Governors elections, March 15-April 1. Watch your email for a link to your electronic ballot. Learn more about the districts' candidates.

- **Three More Years:** Congratulations to WSBA Governor Carla Higginson, who ran unopposed and continues on the Board of Governors in the District 2 position for an additional three years.

- **New Board Seat Available:** An opening is available to WSBA members who live in Congressional District 1 to serve on the Board of Governors. The application deadline is March 15. For more information, visit www.wsba.org/elections.

Service Opportunities

- **Apply for a Committee, Board, or Panel by March 1:** Applications are now being accepted from members interested in serving on the WSBA's committees, boards, and panels. Committee service gives you an opportunity to contribute to the legal community and your profession, a chance to get involved with issues you care about, and a way to connect with other lawyers around the state. There are over 20 committees, boards, and panels seeking new members, including the Court Rules and Procedures Committee, Judicial Recommendation Committee, and

Character and Fitness Board. Please apply by March 8 at myWSBA. Click here for more information. If you have questions, email barleaders@wsba.org or call Pam Inglesby, WSBA Bar Services Manager, at 206-727-8226.

- **State Committee Opportunities:** Interested in serving as a WSBA representative to the state courts' Washington Pattern Forms Committee or the state Legislature's Statute Law Committee? The application deadline for both positions is March 15. Visit the Represent WSBA page to learn more.

Member Resources

- **Fastcase for Members:** In addition to Casemaker, WSBA members now have complimentary access to Fastcase. WSBA member benefits with Fastcase include primary law research, reference support, and industry-leading technology. Access Fastcase and Casemaker by clicking on the Legal Research box on the upper-right corner of wsba.org, or log in to myWSBA directly. Fastcase offers a free, weekly CLE-accredited webinar, with advanced webinars available for purchase in March to help utilize the tool for your Washington state legal-research needs. If you have questions or feedback about this new option, contact legalresearch@wsba.org.

- The Member Wellness Program offers job search groups and consultations; educational programming on attorney self-care and mental health; web resources; trainings for peer advisors; and support for those concerned about an attorney.

Essentials

- From Printed Page to Sliver Screen: A Legal Primer on Taking Comics to Hollywood in 2019
- Red Light Malfunctioning? Bill in this State Would Allow you to Run It
- 'Meh': Apparent Note-to-Self Makes It Into Published Federal Decision
- Legal Recruiters Say Niche In-House Counsel Roles Are Hard to Fill

Job Listings

- Gonzaga University School of Law Lecturer-AT, Fellow-

Center for law, Commerce, and Ethics

- See current job listings at the WSBA Career Center

Our mailing address is:
Washington State Bar Association
1325 4th Ave., Ste. 600
Seattle, WA 98101

From:	mjbeyer mjbeyer
To:	Mandatory Malpractice Insurance Task Force
Subject:	mandatory malpractice
Date:	Friday, March 1, 2019 10:09:50 AM

I am sure members have commented about these concerns but I will state them anyway. I do not support mandatory malpractice.

1. There has to be some sort of scale or exception based upon income earned from the practice of law;
2. I do mostly collections and must comply with the FDCPA. If the client screws up, I get sued simply because the client agency or individual has made an error. They have the defense of bona fide error under federal law. I would say that 99.9% of this cases settle. The risk is very small because of the regulations and compliance. Mandatory increases the expenses for me and the fee charged the client.
3. The expense is always going to be passed on to the client and fees will climb and people will not be able to afford an attorney.
4. What about the attorneys who do wills and probates? My understanding is their risk is small. Will they pay the same as others?
5. Is the cost different based upon the risk or is there going to be a shared pool?
6. I believe and have talked to attorneys who have small practices. This is going to put them out of business and the public will have to go to the big firms.
7. What are the statistics? Are there that many claims that we need mandatory insurance? Who is going to run it? Who is being hurt with no insurance? Who benefits, the insurance companies and big firms that put the small one out.
8. Right now, the client can choose between someone with insurance and one without, whats wrong with that system?
9. Is the bar looking for a problem that does not exist and attempting to limit practice for only the elite?
10. I believe there should be an educational endeavor to let the bar members know if there really is a problem.

Michael J. Beyer 9109

From: Karen
To: Mandatory Malpractice Insurance Task Force
Subject: Mandatory Malpractice Insurance
Date: Friday, March 1, 2019 12:14:41 PM

I have reviewed the Task Force report. It is not clear where I will fall within the proposed mandatory coverage requirement or exemption from coverage status.

I currently maintain Active practice status. I do not desire to change to Retired status even though I am retired from practicing. I intentionally do not have any clients. Yet, I continue to comply with the Active status CLE requirements, as I desire staying current with aspects of the law in which I have a personal interest.

My path to becoming an Active practicing attorney was long and at times difficult. I had to overcome challenges posed by my disabilities. Thus I am very proud of my accomplishment and do not desire giving up that Active status. When I was actually practicing, as a government attorney, I had malpractice coverage through my governmental entity employer. Thus I fully understand the need for such protection when clients are involved.

For those of us maintaining Active status while intentionally retired from practice, we need to have our decision to retain our Active respected and appropriately recognized. If this requires a certification of non-representation on an annual basis, so be it.

Finally, I strongly suggest requiring a greater number of ethics CLE credits. Throughout my years of actually practicing, I was stunned by the number of attorneys I encountered who were on ethical "thin ice". Even more stunning was their respective ignorance as to the RPC's applicable to their practice.

Respectfully,

Karen Carlson Gulliver
WSBA # 21370

Sent from Mail for Windows 10

From:	stanley bonner
To:	Mandatory Malpractice Insurance Task Force
Subject:	re: mandatory malpractice insurance
Date:	Friday, March 1, 2019 1:19:59 PM

Dear Sir or Madam:

Malpractice insurance should not be mandatory. At the very least, all members of the WSBA should have the opportunity to vote on a measure of this magnitude.

Sincerely,

Stanley D. Bonner, WSBA #22604

From: George Kolin
To: Mandatory Malpractice Insurance Task Force
Subject: Mandatory liability insurance
Date: Friday, March 1, 2019 2:35:04 PM

Bad idea. Enforce the RPCs. This simply shifts the burden and punishes members who work at or below reasonable pay levels in order to help those in society who cannot afford a $300/hour attorney.

From:	Donald H Graham
To:	Mandatory Malpractice Insurance Task Force
Subject:	Tone of Insurancee Report "Establish minimum" NOT "Impose mandatory"
Date:	Saturday, March 2, 2019 12:40:46 PM

Committee Members and Board Members:

I object to the tone of the malpractice insurance report. It is just as substantive to use the words "establish minimum" insurance requirements as it is to insultingly use the words "impose mandatory" insurance requirements. We are a professional association and members should be treated so. The vast majority of members do not commit malpractice, are covered by insurance and are overwhelmingly compliant with Bar Association expectations. So why treat us as non-complying wayward souls that need to be "compelled".

The same goes for "Mandatory" continuing education that could just as properly be "Minimum" continuing education. In fact, minimum standards would imply additional activity is encouraged while manadatory hardly creates an expectation that additional will be forthcoming.

A quick word processing search and replace of the two words would fix this issue. It might be good to find out who would opposed the change in tone and why.

By the way, I have always carried malpractice insurance for over 25 years so this is not about being disgruntled with the report. Although I do have some substantive issues that I will share in another email.

Respectively submitted,

Donald Graham
#22554

From:	Debra Rhinehart
To:	Mandatory Malpractice Insurance Task Force
Subject:	Comment on recommendation
Date:	Sunday, March 3, 2019 9:05:21 AM

I am a licensed but not actively in practice attorney and public servant. After nearly 12 years, I still struggle under a mountain debt against a loan system that is determined to keep me enslaved. As I'm not young and willing to work 90 hours a week, I've little chance of being hired in a traditional firm even if I had litigation experience. On good days when I cling to the idea that there was some reason for me to graduate and pass the bar and then plunge into the Great Recession, I hope to hang on long enough to retire in two years so I can volunteer for legal aid work. No one pays for my license or the fundraising scheme called CLE. I hope the bar is serious about exemptions for government work, pro bono and perhaps sliding scale assessment or there will be no one willing to do legal work that is not high paid and glamorous. Why enrich more insurance companies? Why not consider a risk pool for those of us who can barely make the license fees? What happens to the bar when so many attorneys abandon their license because they cannot or will not bear another cost without a decent chance of compensation through good work? Respectfully but on the verge of giving up,

Debra Rhinehart

From: Courtney Lewis
To: Mandatory Malpractice Insurance Task Force
Subject: Mandatory Malpractice Insurance
Date: Monday, March 4, 2019 9:36:01 AM

For the committee's consideration:

I am an out of state lawyer that maintains an active Washington license because Washington state does not authorize inactive status for licensed attorneys who are active in another state. I commented during the task force's comment period that mandatory insurance I will never use while I am out of state is a financial burden for me. I understand this situation was considered but not recommended for an exemption, and the recommendation of the task force was I surrender my Washington license instead because it's "too difficult" to determine if I'm practicing in Washington. I strenuously disagree -- I work for the State of Alaska and am not counsel of record for any Washington case so it is very easy to ascertain that I do not currently practice in Washington. My situation is not unique. Further, Washington's ethics rules would never authorize me to hide practicing in Washington from the bar so there is already a remedy.

I maintain a Washington license because my husband is from Washington and we may wish to relocate to Washington. I am licensed in four states -- Alaska, Colorado, Texas, and Washington -- so I am familiar with how several states manage their professional licenses. Washington is the only one that makes me maintain an active -- and therefore a substantially more expensive -- license because I'm active elsewhere. If Washington adopts mandatory malpractice insurance then I urge Washington to also authorize inactive status for out of state lawyers with Washington licenses. It is unfair to penalize lawyers who cannot afford the continued high cost of maintaining a Washington license or ask us to continually sacrifice our finances just to maintain a professional license. I work in the public sector, and I anticipate many public sector and nonprofit attorneys will be pushed out of Washington because we cannot afford the cost. That does not make a diverse bar nor is it necessary to ensure professionalism/protect the public. As noted by this entire controversy, almost no states have mandatory insurance to begin with.

Thank you,

Courtney Lewis

From: Julie Shankland
To: Executive Management Team
Subject: FW: Report of the Malpractice Insurance Task Force
Date: Monday, March 4, 2019 11:11:22 AM
Attachments: image001.png

FYI.

Julie Shankland | General Counsel | Office of General Counsel
Washington State Bar Association | 206.727-8280 | julies@wsba.org
1325 Fourth Avenue, Suite 600 | Seattle, WA 98101-2539 | www.wsba.org

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From: Athan Papailiou <Athan.Papailiou@pacificalawgroup.com>
Sent: Monday, March 4, 2019 10:54 AM
To: Julie Shankland <julies@wsba.org>
Subject: FW: Report of the Malpractice Insurance Task Force

From: Stan Sastry [mailto:stan_sastry@frontier.com]
Sent: Monday, March 04, 2019 10:53 AM
To: 'Bill Pickett'; 'Rajeev Majumdar'; 'Dan Bridges'; 'Carla Higginson'; kyle.s@millernash.com; 'Dan Clark'; 'PJ Grabicki'; BHMTollefson@outlook.com; 'Paul S'; jkang@smithfreed.com; 'Kim Hunter'; meservebog@yahoo.com; Athan Papailiou; rknight@smithalling.com; 'Alec Stephens'
Subject: Report of the Malpractice Insurance Task Force

To the Board of Governors:
As a Washington lawyer I am writing my response to the Final Report of the Malpractice Insurance Task Force. I am opposed to the imposition of Mandatory Malpractice insurance for personal reasons, and for reasons that the Final Report is not an unbiased analysis of Washington State situation right now with respect to solo practitioners, who bear the brunt of the negative impact by the recommendations of the task force.

My personal objection to carrying malpractice insurance: I am an intellectual property-patent lawyer. I simply cannot afford malpractice insurance. I just don't make enough money to buy malpractice insurance. Clients have become so cost-conscious that they simply expect bargain basement prices for my services. Even small businesses will not pay my hourly rate. If I were to buy malpractice insurance, the premium per year would be 30-50% of my revenue. Malpractice insurance for patent practice is almost impossible to get if you are a solo private practitioner. Even if I give a flat fee for clients, my actual hourly rate is less than $15 for the amount of work I put in for each patent case. If I add the cost of all the CLEs, business cost, Bar

dues, taxes etc., there is practically very little revenue left for profit. This is quite untenable. The recommendation of Malpractice Task Force is unworkable in my practice. It is either buy malpractice insurance and go broke or quit.

Remarks on the Final Report of Malpractice Insurance Task Force:

1. The sample size of the law firms examined is statistically insignificant compared to the total number of solo and small firm lawyers in the state of Washington. According to task force numbers (Page 8, item 1) 59% (19,813/32,189) of active WA layers are in private practice. However, the Task Force gives only 3 examples of malpractice insurance policy premiums for Firms A-C. This is a statistically insignificant sample of the cost of buying malpractice insurance. Clearly, the task force is cherry picking or is unwilling or unable to collect a broader demographic and statistically significant data. As a result, the cost of malpractice insurance is skewed toward a lower amount. Ideally, the task force should have presented a more unbiased statistics of malpractice insurance cost in Washington based on practice areas and firm size *vis-a-vis* cost of insurance.

2. The task force's approach is flawed because nowhere in the report it affirmatively makes a case for need to mandate malpractice insurance at this time. What has changed in the practice of law in Washington that requires a change in the court rule to mandate malpractice insurance? In other words, what is the new problem that has arisen which is solved by mandatory malpractice insurance? Instead, the Task Force makes pithy high falutin conclusory virtue-signaling assertions like:
"Lawyers in private practice who do not carry malpractice insurance pose a significant risk to their clients" See Page 3.
"Lack of malpractice insurance 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." See page 3.
No independent concrete proof is offered as to the veracity of these assertions or to back up these assertions with evidence such as statistical number of Washington malpractice cases that have been decided by the Supreme Court where a sanctioned lawyer without malpractice insurance actually did not comply with the Court order to compensate the injured client. Instead, we are supposed to believe these assertions as self-evident truths because, otherwise we should feel guilty

3. Furthermore, the Report claims "A license to practice law is a privilege, and no lawyer is immune from mistakes." This is another example of an unexamined virtue-signaling statement (more like an aphorism) designed to tug at your heart and elevate the "nobility" of the profession. Firstly, a license to practice law is NOT a privilege. A license by definition is a PERMISSION to do something (Contacts 101). A license to practice law is hard EARNED and NOT simply granted by a fiat, like in a monarchy. In our profession, a license as a lawyer is EARNED by going to law school, earning a law degree, passing the bar, paying bar dues etc. Secondly, if the license to practice law is a

PRIVILEGE, why are there 32,189 practicing lawyers in WA, and growing by 800-1000 every year! Shouldn't a PRIVILEGE by definition be conferred on a few only?

4. The practice of law is not a "privilege". It is an EARNED RIGHT to a career path to make money (a property right), like any other employment career. It a fundamental property right under the Fifth Amendment of the United States Constitution (No person shall ---- be deprived of life, liberty, or property, without due process of law). By mandating malpractice insurance as a condition of licensing, the WSBA would be imposing a prior restraint on a Fundamental Right to earn money (property), in my humble opinion. The WSBA's mission statement includes client (public) protection. In this sense, if WSBA (a quasi-governmental organization) mandates malpractice insurance as a precondition for licensing, it is taking my property right under the Fifth Amendment and using my property for public use because WSBA is in the business of public client protection i.e., public use. This is a violation of the Fifth Amendment due process.

5. The malpractice insurance task force report states that its recommendation is consistent with the "client protection" mission of the WSBA." The Washington Supreme Court and the WSBA have a duty to protect the public and maintain the integrity of the profession." See Page 2. If so, the WSBA should raise money from the public for the public's own protection (from lawyers-good or bad) and <u>not</u> mandate the lawyer dues for client protection. It is like robbing Peter to pay Paul. This whole idea of "client protection" needs a closer examination. It is based on the false premise that clients are unsophisticated and can be easily led by the nose by an unscrupulous lawyer. Nothing could be farther from the truth. In my experience, the average client who walks into my office is a shrewd intelligent person who knows what she wants and knows that there are many options available. The idea of ""protecting the client" as a raison d'être for the existence of Bar Associations is a figment and is outdated The real way to protect clients is to ensure that ONLY very high quality lawyers are licensed. This starts with drastically cutting down the law school admission numbers, have very high standards for law school accreditation and admissions, and have not more than one law school per state, make the bar exam so tough to pass that only a few hundred takers per year will pass the bar exam. That is the right way to ensure "client protection" because only highly qualified and motivated lawyers will be allowed to practice. Mandatory malpractice insurance will not reduce the number clients injured by lawyers facing disciplinary action.

6. Elsewhere the Task Force makes another indefinite assertion: "Solo and small firm practitioners represent a disproportionate share of the malpractice claims. " Page 18. If the highest number of malpractice claims were on solo and small firms nationwide, that is because the highest numbers of lawyers are in solo and small firms. How is that a "disproportionate share of the malpractice claims" against solo and small firm lawyers? Quite the contrary, it is to be expected! In Washington, if only 14% of lawyers are uninsured (page 11), that

means most of the malpractice claims are against the 85% that are insured. This means that the small fraction of uninsured lawyers i.e., 14% DO NOT contribute "disproportionately" to the total number of malpractice victim claims. This also means that lack of malpractice insurance has no bearing on malpractice claims. The corollary is that lack of malpractice insurance makes the lawyer more cautious in taking on clients.

7. The Task Force recommended that "The required minimum coverage should be $250,000 per occurrence/$500,000 total per year ("$250K/$500K")". Page 45. "In Washington, for all claims, its average loss payment was $60,548 and average loss expense to defend those claims was $20,406." "Nationally, 89.1% of malpractice claims are resolved for less than $100,000 (including claims payments and expenses)". See Page 17. This statistic shows that the Task Force recommendation on minimum coverage for malpractice insurance is over-inflated by a factor of 2.5-4. The Task Force appears to have presented its "$250K/$500K" minimum coverage arbitrarily without a rationale or evidence. Where is the evidence that such highly inflated malpractice coverage is warranted? This is again an example of capricious and/or lack of reasoning displayed in the task force report.

8. Testimonial evidence in the task Force report is limited to a Law Professor, (who does not really practice law on a daily basis), an insurance industry person (lobbyist) and a state bar executive (may be a non-practicing bureaucrat). No testimonial evidence has been presented in the report from Washington solo and small practice attorneys (with or without malpractice insurance), who will be highly impacted by the Task Force Recommendations.

9. CONCLUSION: My assessment of the malpractice Insurance Task Force report is that the report is an advocacy document. It is not a comprehensive and objective analysis of the two key questions: Why is there an urgent and imminent need for all lawyers in Washington to carry malpractice insurance. Why we should change the existing APR or Court rules regarding malpractice insurance as a condition for license to practice law in Washington. On these two key questions the task force report is unfortunately not convincing in its analysis. The Report has some interesting statistics. But the conclusions of the report do not come from these statistics. The report is heavily biased in favor of mandating insurance coverage because it is supposedly a virtue ("access-to-justice issue") and an obligation ("privilege to practice law", "client protection") as a good lawyer to have malpractice insurance. It never addresses the core question: Why <u>now</u> have mandatory malpractice insurance? The Report pretends to be comprehensive by padding itself with large amounts of facts and figures in terms of statistics; bombastic and virtue-signaling grandiose and aspirational statements (some I have referenced above); and has conclusory statements that are not derivational but assertive. I RESPECTFULLY URGE THE BOARD OF GOVERNORS TO REJECT THE RECOMMENDATIONS OF THE MALPRACTICE TASK FORCE.

Stanley Sastry

WSBA# 36391
The Law Office of Stan Sastry PLLC
http://stansiplaw.com/
[redacted]
Mill Creek, WA [redacted]

Phone/FAX 425-357-6241

To: Bill Pickett <Bill@wdpickett-law.com>
Subject: WSBA Task Force on Mandatory Malpractice Insurance

Dear Bill,

I have attached a letter to you on the subject (again) of the Bar Task Force on Mandatory Malpractice Insurance. I was disappointed to read the report, in that it touted the "public welfare" as the paramount concern, then adopts an approach which is not supported by the necessary data, or economic analysis, but rather with non sequitur logic premised on solo practitioner disciplinary data. If the experience of the national health care paradigm put in place by Congress several years back suggests any lesson, reliance on the private insurance industry does not enhance broad affordability of health care nor broad public benefit. In the legal malpractice field, mandatory insurance could just as easily drive up insurance costs for the entire legal profession (presuming, as did the Task Force Report, that those who currently are uninsured (small firms) are the greater risk pool, that claims against them will be greater and that the insurance industry will raise the premiums on all its risk classes in order to cover the greater claims exposure they will have in the small firm sector). As the Task Force has presented absolutely no data on the risk/claim history of Washington practitioners (either by size of claim, substance or size of practice), I do not see how the Board, or later the state Supreme Court, can evaluate the advisability of the proposed course of action. I see no documented certainty of delivering public benefit. And I emphasize again that we, as practitioners, look to the bar association to responsibly qualify and discipline members of our profession as a manner of sustaining the public's interest, rather than to the insurance industry.

Please submit this e-mail and the attached letter to the Board's record of consideration of the proposed report.

With respect and thanks,

Jim Davenport

--
Jim Davenport
PO Box 297
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(509)969 2141

James H. Davenport

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Washington State Bar # 7879
jhdavenportllc@gmail.com

March 1, 2019

William D. Pickett
President, Washington State Bar Association
917 Triple Crown Way Ste 100
Yakima, WA 98908-2426

Re: WSBA Proposal for Mandatory Malpractice Insurance

Dear Bill,

On October 12, 2018, I wrote you with my questions about the process then underway to evaluate whether the WSBA should require that all Washington lawyers carry malpractice insurance. On February 28, the WSBA published notice that the Mandatory Malpractice Insurance Task Force will present its final recommendation to the WSBA Board of Governors on March 7. Without adequate documentation of public harm, the Task Force premises its decision singly on the theoretical notion of "protection of the public."

> "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." Report, p. 5

In my October 12, 2018 correspondence to you, I asked the following questions:

"Has the WSBA collected any:

> "1. statistics on the total annual number of malpractice claims against WSBA members over any extended period of time?
>
> "2. statistics showing the number or nature of malpractice claims made against insured and uninsured WSBA members, respectively?
>
> "3. statistics on the dollar amount of collection on judgments against insured and uninsured WSBA members, respectively, found to have engaged in malpractice?

> "4. statistics on the number of malpractice claims related to particular forms or subject matters of practice?
>
> "5. statistics on the amount of profit (premiums paid minus claims paid) enjoyed by malpractice insurance companies doing business in Washington?
>
> "Has WSBA compared any of the above statistics against states where malpractice insurance is mandatory?" See comment # 346 in Comments-received-by the-mmi-task-force.pdf, pp. 7, 561-562/1165.

Although the Task Force has not answered these questions, the answer to all of them obviously is "no." Dodging these questions, the Task Force categorizes my questions as "other" and begs off on insufficient funds. The Task Force states at page 7 of its Report:

> "As a volunteer-driven and WSBA-funded project, the Task Force was charged with developing a recommendation and report with limited resources, so it focused much of its research and analysis on available sources and studies, the experience of other jurisdictions, and the perspective of industry professionals. Given the fiscal limitations and its reporting deadline, the Task Force did not perform the types of research and analysis that would have required the services of independent consultants and data analysts. However, through targeted outreach, 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." Report, p. 7

The Task Force apparently did listen to:" experienced insurance industry professionals, including insurance brokers and underwriters," and a "legal malpractice plaintiff's lawyer," Report, p. 7, and relied upon American Bar Association data accumulating information received from insurance companies. These parties are necessarily biased, as they and the insured are the beneficiaries of the requirement, not the public. It doesn't appear that the Task Force listened much to WSBA membership.

You may want to note that the basis for the Nevada Supreme Court's denial of a similar proposal was "inadequate detail and support . . .demonstrating that the proposed amendment . . . is appropriate." (Comments-received-by the-mmi-task-force.pdf, 670/1165).

Will the Bar Association's final record of decision in this matter, subject of course to the State Bar Act (Ch. 2.48 RCW) and Washington State Administrative Procedures Act (Ch. 34.05 RCW), reflect the data necessary to conclude that Washington's public is in fact injured by 14 % of the bar membership not currently carrying malpractice insurance?

The fallacy of the Task Force' argument from statistics is just so glaring as to be somewhat embarrassing. They report, from the ABA Profile of Legal Malpractice Claims (2012-2015) that 66% of all claims relate to lawyers in law firms sized 1-5, which consort represents 64% of the total number of practitioners. Report, p. 15. This is essentially a one-to ratio, an

equivalence of number of claims to number of lawyers. Yet the Task Force concludes that "Solo and small firm practitioners represent a disproportionate share of the malpractice claims." And it should not be overlooked that the cited data reflects only those attorneys with insurance, including those in jurisdictions where insurance coverage is mandated. If anything, the data suggests that mandated insurance doesn't make a difference, that solo and small firm lawyers aren't any greater risk and that the incidence of malpractice by uninsured lawyers is no greater than those with insurance.

The Task Force Report lists total Washington Bar membership in 2017 at 32,189, 19,813 of whom were in private practice (Report, p.8). 85% of them (16,842) were insured; 14 % of them (2,752) were not. Report, p. 11. 6,799 of the 19,813 lawyers in private practice (34%) were solo practitioners. Report, Appendix A, p. 75, "Members in Firm Type".

The Task Force Report states that 14 % of the Bar's private practitioners reported being uninsured (Report, p. 11) but that 28 % of solo private practitioners reported being uninsured. (Report, p.11) At these percentages, 2,774 of the total 19,813 private practitioners would be uninsured, 1,904 of whom would be solo private practitioners (28 % of 6,799 solo practitioners). While 34% of all private practitioners (6,799/19,813) thus represent 69% of the total uninsured (1,904/2,774), no evidence is presented that solo practitioners engage in any more malpractice than others.

The Task Force Report admits that "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. . . ." Report, p. 11. It also admits that whether "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." Report, p. 12. As a matter of fact, a lawyer's choice not to carry malpractice insurance may induce him/her to be more conscientious of error avoidance (he/she being a self insurer) than those who are insured.

In the absence of demonstrative evidence, and notwithstanding it's admissions, the Task Force Report argues *non secuitur* (stating a conclusion that does not follow from its premises) that a correlation of the number of could-be malpractice claims if malpractice insurance coverage were mandated with the number of solo practitioners follows from disciplinary data argued to be correlated with solo practice . That criminal maybe has blue eyes. Therefore, all blue-eyed persons are criminals. The Task Force Report falsely relies on disciplinary data to make its point, pinning the blame on solo practitioners:

> "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. Of the 101, 55 reported that they did not carry malpractice insurance. 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. Eighteen of those uninsured actively licensed lawyers reported maintaining a solo private practice. Report, p. 12 (all premised on WSBA staff research of member-reported data).

No mention was made whether the discipline related to any client or public fiscal harm. Based on this data, however, 70 lawyers were disciplined per year on average (211 lawyers in 3 years (2014-2017)), 34 of them (101 lawyers in 3 years) were in solo private practice. (49%) Thus, we can calculate that 0.537% of non-solo lawyers (70/13,014) were disciplined and that 0.500% of solo practitioners (34/6,799) were disciplined each year (less than 1% is both cases). It does not appear that solo practice demographics bear any significant correlation with discipline or, at least from this data, that discipline bears any significant correlation with malpractice insurance coverage. Comparison of data for those not carrying malpractice insurance (14%) and those being disciplined (less than 1%) suggests that the two variables are not highly correlated. Neither does the data reflecting solo practitioners' 69% share of the total uninsured practitioners market (above) suggest anything other than the largest potential gain for the insurance industry. The Task Force Report contains no data on Washington State malpractice insurance claims history or analysis of it by market sector.

The data provided by the Task Force Report does permit some economic analysis, however. Only 6 (18/3) of the 70 lawyers disciplined each year, or 8.5 %, would arguably be different had they been licensed and mandated to purchase malpractice insurance. 3 of them (46%) would be solo practitioners. Half of these (1½ solo practitioners) would be "resolved without payment." (Report, p. 17). Presuming that every discipline case represented a malpractice case, a clearly questionable presumption, then the other half (1½ solo practitioners) would have an average loss payment of $60,548 plus a defense costs of $20,406 (Report, p. 17), or a total economic benefit of $121.431. If all of Washington's 2,752 uninsured practitioners' made claims on malpractice insurance policies in a single year (half of them "resolved without payment"), an absurd possibility, the total economic benefit would be $83,314,048 ($60,548*2,752*.5).

On the other hand, if all 2,752 of Washington's uninsured practitioners were mandated to purchase insurance, at $2,500 to $3,000 per year (Report, pp. 10, 30), the economic cost would be $6,880,000 to $8,256,000. It would take a minimum of 226 to 272 successful claims per year to recover the total costs. The economic benefits (public benefits) simply do not justify the costs. And more likely, the number of lawyers disciplined who had foregone their licenses altogether would increase (some, at least, giving up their license rather than purchasing malpractice insurance).

The Task Force Report does not compare the aggregate annual number nor amount of malpractice claims made or settled in Washington. Nor does it sort those amounts in terms of claims covered or not covered by malpractice insurance. Nor does it identify the aggregate amount of malpractice claims made in Washington against solo and larger law firms respectively. Neither the "Percentage of Claims by Practice Area" nor the "Years in Practice and Claims Rate" (Report, p. 15) reveal that the stated rates are proportionate or representative of the

membership distribution of Washington' bar association membership, or successful malpractice claims.

The Task Force Report does not document a single case of lawyer-injured clients whose recovery is barred by insufficient lawyer wealth together with lack of malpractice insurance coverage, although it does suggest a chilling effect on potential claims. Report, p. 21 The lack of lawyer wealth has more to do with lawyer qualification and discipline, for which the State Bar is responsible than the presence of third-party insurance. And the insurance disclosure requirement already in effect is sufficient to apprise would-be clients of this risk.

The Task Force Report clearly reflects an urban, large firm bias denigrative of small, and often small town or rural law practice. Yet, at least according to the ABA's numbers, this is still the practice format that a majority of lawyers choose. Why, do you suppose? Because they want to be helpful, responsive and close to their clients—the same reason that they care about the quality of their work and the cost of it to their clients, as well as about the intellectual challenge they enjoy. The Task Force recommendations will drive them out of the practice of law—to no advantage of the public to whom the Task Force states such an unswerving allegiance.

The Task Force Report is a smear of solo practitioners, suggesting that they are less competent than lawyers in large, corporate style law firms. It favors big city style over country/rural practitioners. And it injures the public—not everyone lives in the city, or wants to pay big-city law firm fees.

I again respectfully propose that the idea of mandatory malpractice for WSBA members be dropped. If the device must be utilized, use it only as a disciplinary sanction or condition of reinstatement.

Sincerely,

James H. Davenport

James H. Davenport
Attorney at Law

From: Mary-Anne Linden <[redacted]>
Sent: Friday, March 1, 2019 4:57 PM
To: Sciuchetti, Kyle <Kyle.Sciuchetti@MillerNash.com>
Subject: comment re: Mandatory malpractice insurance

Hi Kyle,

I would like to express a concern about the upcoming decision of the WSBA regarding malpractice insurance. I am totally in favor of requiring attorneys to carry malpractice insurance. However, the WSBA may be unaware of the difficulties Washington attorneys encounter in seeking coverage if they are employed by out-of-state firms.

I am licensed in Washington (WSBA #41553) and work for an Oregon firm. The firm represents clients in both states. I was hired specifically to represent our Washington clients. Here is the problem: Everybody else in the firm I work for is insured through the Oregon State Bar mandatory professional liability fund (PLF), which insures individuals. I cannot be insured through the Oregon PLF because I'm a Washington attorney. Washington insurers cover only firms, not individuals. In order to get malpractice insurance in Washington, my employer would have to buy insurance for the whole firm in Washington. Of course, she does not need double coverage nor double expense. This dilemma leaves me uninsured at the present.

Ideally for me and for others similarly situated, the WSBA would establish a professional liability fund similar to that in Oregon. I'm aware that many WSBA members oppose this idea, but I'm not sure why. This model is very simple and efficient and not, as far as my inquiries indicate, more expensive that malpractice insurance available for Washington firms.

I hope that, as my representative on the Board of Governors, you would ensure that this problem is part of the discussion and decision about mandatory malpractice insurance!

--
Mary-Anne Linden
[redacted]
www.WiscarsonLaw.com

From: Donald H Graham
To: Mandatory Malpractice Insurance Task Force
Subject: Malpractice Insurance Report Recommendations
Date: Monday, March 4, 2019 2:48:40 PM

Board Members and Committee Members;

I am writing in response to the general WSBA invitation to comment on the report recommending mandatory malpractice insurance. I have been in private practice for over 30 years, been continuously insured, had no malpractice claims and am not planning to be uninsured. Nevertheless, I have followed the development of this report and submitted comments from time to time in response to invitations to comment. I continue to find the report could be significantly improved..

First, the WSBA should consider using a private professional consulting firm to confirm the findings of the committee. The report confirms that the volunteer committee did not have resources to use independently develop data and could not afford a professional consultant to support analysis. The WSBA has an almost 18 million budget, and, specifically as a 2 million dollar reserve doing nothing in the bank. For a topic that will affect thousands of members and cost millions of dollars, it seems amateurish. To use an article about three East Coast states that do not require insurance seems inadequate if not almost irrelevant. Using scraps of information from here and there really seems inappropriate when the association is considering imposing millions of dollars on parts of it membership.

Secondly, to "boldly assert and plausibly maintain" that this problem is one of public protection is really passing the buck. The actual problem is attorney competence and discipline, which is the main responsibility of the WSBA. Washington had 62 bad actors without insurance out of 32,000 members. It is the fact that many clients seek and obtain services from small firms due to prices charged by large firms. Clients actually do have access and do obtain legal services and therefor access the justice system. The issue is therefore do clients obtain quality services. Competency is at issue. Insurance will only secondarily address this actual problem. More practical would be a requirement to provide clients with clear notice about lack of insurance after clients have been injured. Clients will continue to feel that incompetent lawyers deny them justice even if they lawyer is insured. It appears that continued harm to clients is acceptable if plaintiff attorneys are compensated and clients may be "made whole" by money payments. Probably only lawyers think money damages makes up for a sense of justice provided by competent attorneys. Money rarely makes the client whole after first damages from original error and suffering a lapse of time and suffering continued emotional distress during the malpractice litigation or settlement phase. Justice continues to be elusive for many. And with currently uninsured attorneys having to pay millions more insurance costs, the cost of engaging attorneys to seek services will continue to go up and justice will be even more elusive. Implementation of clear and specific warnings can be implemented much faster than selling insurance. The warnings would dissuade clients from risking using low cost private practitioners rather than high priced large practices. It might better than continuing to be injured in the first place and suffering damages and then being made whole later. Is this type of justice worth the access? Clients do not want to be damaged and then fixed, they want competent help in the first place. Requiring insurance, of course, will have a welcomed and immediate benefit to malpractice plaintiff attorneys and insurance companies

Thirdly, there is a fiction in the report that government, corporate and non-profit organizational attorneys are insured by their organization and the lawyers do not occasionally if not regularly provide "moonlighting" services to friends, family, acquaintance and perhaps even local service agencies. Surely, even if not paid, government lawyers, for instance, do not tell their relatives that

they cannot talk about, for example, what is community property. The relative is going to rely on the trusted family member. Quite simply, every lawyer gets hit up for free legal advice in one way or another and refusing to answer is not always possible. Surely, every lawyer knows this. Often this is considered pro-bono work or some necessary part of overhead in being a lawyer. This issue is essentially ignored or dismissed in the report, including when it indicates that retired attorneys who are involved in even very small legal issues must carry insurance.

Many of these proposed exempt attorneys will be in violation. It is unlikely that an attorney will break away from a lunch conversation with a low income acquaintance to buy malpractice insurance (retroactive coverage is never provided) when asked about a non-work related legal issue. I have practiced law for over 30 years and I know of no lawyer, except judges, who disqualifies themselves based on their employer. Do we really want to say that corporate lawyers can talk, if they choose, about any random legal topic even beyond their corporate practice, while private practitioners must have insurance?

Fourthly, apparently one concern is that malpractice plaintiff attorneys do not find it financially viable to prey on low income lawyers. Perhaps the WSBA efforts to encourage pro-bono work could be focused in-part on addressing claims against “judgment proof” attorneys. The report almost makes it sound like judgement proof attorneys plan to avoid malpractice claims by unethically maintaining a low economic lifestyle. There is no evidence of such activity.

Finally, what to do? Private clients could be asked to agree in writing after clear and obvious notice, before engaging services from uninsured attorneys. This would enable people to seek small firms to avoid cost of large firms. Potential clients should be informed that insurance coverage is not available and they assume the risk at their peril.

Is access to justice improved by mandating cost increases on small firms that are the only ones available to poor clients? The WSBA is establishing minimum overhead costs for law practice in Washington. It would seem to the proposed minimum cost to call oneself an active private practice attorney would be close to $3, 000 annually including dues, insurance and CLE.

Other less costly and more relevant approaches to assuring competence of the membership should be explored. Clients should not be protected simply by relying on after-the-fact monetary compensation for attorney errors.

On a personal note, as I approach full retirement, I do appreciate the recommended exemption to allow retired attorneys to still call themselves lawyers without spending thousands on insurance. It does seem a pity that even if I pay active bar dues and having decades of well-practiced experience, I will have to tell grandchildren they cannot rely on what I tell them about the law and they should go find themselves a real lawyer.

Thank you for your consideration.

Donald Graham
#22554

JOHN G. ZIEGLER,
Attorney at Law
New Address:
[redacted]
zieggie@hotmail.com
[redacted]

March 2, 2019

Washington State Bar Association
Malpractice Insurance Task Force
1325 Fourth Ave., Suite 600
Seattle, WA 98101-2539

re: Mandatory Malpractice Insurance

Dear Task Force Members,

I was admitted to the WSBA in October 1974 and "retired" in November 1997, meaning that I still practice law but have neither charged nor accepted a fee from any client for more than 21 years. Each year I provide over 1,500 hours of *pro bono* representation.

Most of my time is devoted to assisting criminal defense attorneys, primarily public defenders, with legal advice and mentoring, but I have paid my Bar Dues so that, when called upon, I can represent poor people in civil cases and criminal defendants regardless of their income. With a Social Security income of only $804 per month, I will not be able to afford malpractice insurance and will no longer be able to represent the needy.

Many great attorneys assisted and encouraged me as a young lawyer, and I have spent nearly half of my "legal life" giving advice, encouragement and mentoring freely back to Bar members. If the WSBA Board does adopt mandatory malpractice insurance, I implore it to provide an exception for those of us who devote a significant portion of our practice hours to *pro bono* service.

Thank you for your attention and consideration.

Very Truly Yours,

John G. Ziegler
Attorney at Law
WSBA # 5875

cc. WSBA Board of Directors

From: Margaret Shane
To: Thea Jennings
Subject: FW: Mandatory Malpractice Insurance
Date: Tuesday, March 5, 2019 11:40:54 AM
Attachments: image001.png
Importance: High

HI Thea –

Please post Mr. Anderson's email on the "Comments to the Board of Governors" link on the Task Force webpage.

Thank you!

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Margaret Shane | Executive Assistant
Washington State Bar Association | 206.727.8244 | fax 206-727.8316 | margarets@wsba.org
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From: Bill Pickett [mailto:Bill@wdpickett-law.com]
Sent: Tuesday, March 05, 2019 11:39 AM
To: Margaret Shane
Cc: Paula Littlewood; Julie Shankland; [redacted]
Subject: FW: Mandatory Malpractice Insurance

Margaret,
Please include Mr. Anderson's email in the late materials for the Board to review in advance of this week's meeting.

Thank you Martin. I enjoyed speaking with you and appreciate your thoughtful comments. I look forward to your ongoing input and/or participation as a member of WSBA.
As always, call with any questions.

Peace,
Bill WSBA President

Work Cell [redacted]

Bill Pickett
Trial Lawyer
The Pickett Law Firm
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Fax: 509-972-1826

From: Martin W. Anderson [redacted]
Sent: Tuesday, March 05, 2019 11:01 AM
To: Bill Pickett <Bill@wdpickett-law.com>

Subject: Mandatory Malpractice Insurance

Hi Bill,

Thanks so much for speaking with me this evening and for sharing your thoughts about the WSBA's proposal to require mandatory malpractice coverage for private practice attorneys. I enjoyed our conversation, and I appreciate your willingness to share your thoughts and to hear mine, even if we don't necessarily agree on every point.

I understand that the WSBA is considering adopting a rule requiring mandatory legal malpractice insurance for attorneys who are in private practice, and I would like to share several thoughts on the idea with the WSBA. I have no opinion on whether the WSBA should or should not impose a requirement of carrying legal malpractice insurance, at least in the abstract. I think that there are very good arguments on both sides of the issue. However, if the WSBA adopts a mandatory malpractice insurance requirement, I do have some thoughts on how the requirements should be structured:

1. If the goal of adopting mandatory malpractice insurance is to protect clients from errant lawyers, then the WSBA should not adopt a one-size-fits-all approach to coverage limits. Rather, the limits of coverage should depend entirely upon the scope of a lawyer's potential liability.

I handle lemon law cases involving automobiles. The average car costs around $35,000. I avoid taking cases involving cars that cost more than $100,000, because that is the maximum amount for which I can self-insure and I currently do not carry malpractice insurance. Any requirement that I carry malpractice insurance with more than $100,000 of coverage per incident would be wasteful and unnecessary. Conversely, if another attorney handles personal injury cases involving $10,000,000 claims, the goal of protecting the public would require that he carry sufficient coverage to protect the entirety of that claim.

I have chosen not to have malpractice insurance coverage because I can easily self-insure for the risk that I assume. I have received quotes for malpractice insurance coverage with rates starting at round $4,000 for the first year and increasing to about $8,000 for the fifth year forward. Over my 24 yours of practice, I would have paid more than $100,000 for insurance coverage - which I would never have used.

2. If the WSBA adopts a mandate that private attorneys obtain insurance through the private marketplace, the WSBA will be allowing insurance companies to decide which risks will be insured. By extension, that means that private insurance companies (and not the WSBA) will have the power to decide not to allow certain types of practice in Washington at all, simply by refusing to issues policies covering those types of practice. Insurance company underwriting practices will likely also impose other requirements on attorneys that are traditionally things that are considered and adopted by bar associations. For example, if insurance companies choose not to offer discounted rates to attorneys who only work part-time, or who handle only *pro bono* cases, then those types of practices may disappear.

This concern is not merely a hypothetical. I have a friend who handles cases similar to mine. She has never had a malpractice claim. However, she was sued for malicious prosecution several years ago after she lost a case at trial. The malicious prosecution claim was dismissed on the merits. However, her malpractice insurance carrier cancelled her policy. She was required to obtain insurance through Lloyd's of London. Thereafter, she paid $18,000 a year for malpractice insurance, even though her typical claim, like mine, involves about $35,000.

3. If the WSBA adopts a mandate that private attorneys obtain insurance through the private marketplace, the WSBA will be allowing insurance companies, and not the WSBA, to decide how to spread the risks associated with legal malpractice. If the WSBA believes that mandatory malpractice insurance is appropriate in order to protect clients, then the WSBA, and not private insurance companies, should decide how to spread those risks. Should attorneys who handle higher value claims bear more the risk? Or should attorneys who earn more money each year do so? What about part-time attorneys? What about attorneys who have had prior claims? What about attorneys who have never had a claim? If the WSBA doesn't make these decisions, the free market will. It may not do so in a manner that is fair to WSBA's members. In addition, because the cost of malpractice insurance will ultimately be passed along to clients in the form of higher fees, the fairness of these decisions is ultimately part and parcel of WSBA's obligation to protect clients.

For these reasons, I believe that if the WSBA chooses to require mandatory malpractice insurance, it should either (1) adopt the Oregon PLF model or (2) negotiate an agreement with a single provider that ensures that any lawful practice can receive coverage and that ensures that the risks are spread in a fair and equitable manner, rather than through the whims of private insurance companies.

As you may know, the Oregon PLF currently charges each attorney $3,300 per year for $300,000 of malpractice insurance, and excess coverage is available. Members may participate only if they have their principal office in Oregon. OSBA members whose offices are outside of Oregon are not allowed to participate, and are not required to have malpractice insurance unless they practice in Oregon. As I noted above, the cost of PLF in Oregon is roughly 1/3 of the cost that I would pay for similar coverage in the private marketplace in California.

I understand that the WSBA has rejected the Oregon PLF model because WSBA views the mechanism as too complex and too expensive. While I agree that setting up an insurance company is complicated, I see it as part and parcel of the decision to require malpractice insurance. If the WSBA is requiring malpractice insurance in its capacity as *parens patriae* to clients who would otherwise hire a lawyer without insurance, then the WSBA also has the responsibility to its members and to their clients to ensure that the risk is spread in a fair and equitable manner, that the client's interests are fully protected, and that members are protected from the whims of the free market.

Because every participating member must pay premiums, the expense of setting up an insurance company will be paid by WSBA members (and ultimately their clients), either to a WSBA sponsored PLF-like organization or to a private insurance company. By having a single, state-run provider, the Oregon PLF has dramatically reduced the administrative costs that its members must pay and allows Oregon to control the decisions on how to spread the risks. In the case of Oregon's PLF, Oregon has chosen to have every member share the risks equally. WSBA could set-up a PLF-like system but choose to spread the risks differently. If the WSBA adopts a private insurance model, then WSBA should negotiate a single contract with a single insurer that addresses the issues that I discussed above. Merely requiring attorneys to obtain malpractice insurance with a fixed limit, without addressing the issues that I discussed above, constitutes an abdication of WSBA's obligations to protect both the public **and** its members.

Finally, any mandate should exclude those active members who, like myself, do not actually practice law in Washington.

Again, thank you very much for speaking with me last night and for passing these concerns on to the Board.

Martin W. Anderson | Attorney | The Anderson Law Firm
Tel: (714) 516-2700 | Fax: [redacted]
2070 N. Tustin Ave., Santa Ana, CA 92705

From: Margaret Shane
To: Thea Jennings
Subject: FW: Your Update Email
Date: Tuesday, March 5, 2019 3:10:15 PM
Attachments: image001.png

HI Thea –

Please post Mr. Neal's email on the "Comments to the Board of Governors" link on the Task Force webpage.

Thank you!

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From: Bill Pickett [mailto:Bill@wdpickett-law.com]
Sent: Tuesday, March 05, 2019 3:08 PM
To: Margaret Shane
Cc: Paula Littlewood; Julie Shankland; Chris Neal
Subject: FW: Your Update Email

Hi Margaret,

Please include the following email string from member Chris Neal in this week's materials for the governors to review. Chris has a number of points that he would appreciate consideration of in advance of the mandatory malpractice insurance discussion. I know this is late material, but I would greatly appreciate it being added to everything being considered.

S_____

Chris ccing you on my email to WSBA. Thanks again for your comments. I am a trial lawyer, and suspect that I have been accused of having a "plaintiff's bias" on more than one occasion. That being said, please know that all comments are both welcome and appreciated when it comes to matters of consideration before WSBA.

Thanks and Peace,
Bill

Bill Pickett
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From: Chris Neal [redacted]
Sent: Tuesday, March 05, 2019 12:30 PM
To: Bill Pickett <Bill@wdpickett-law.com>
Subject: Re: Your Update Email

Bill,

Thanks for the prompt response. Please do share my comments with anyone in position to affect the outcome of this issue. My Bar No. is 25685 and my wife's is 25686.

I see you identify yourself as a Trial Lawyer, which term frequently suggests a plaintiff bias. If that is the case with you, please know that I do not mean to impugn the motives of that group - each type of practitioner has his/her place in the arena and I respect all of them, even the ones who prosecute legal malpractice cases - everybody's got to eat. That said,I forgot to mention another concern I have - the likelihood of an increase in frivolous claims/suits against lawyers filed by clients disappointed with their outcome, who want to get something back from the lawyer's E&O carrier with a sweetener for their E&O lawyer's efforts, all of which will come at the (potentially) innocent lawyer's expense.

From my 30+ years experience, some of which I spent as a plaintiff's lawyer, I know there will be lawyers to take those cases, but the impact on decent hardworking lawyers will be huge, even if they committed no harm, and even if the cases settle early. The affected lawyers will see E&O premium increases, their names on court dockets, their personal credit ratings will take a hit, some good home/auto companies (eg Amica) won't even take people who have been sued for any reason, a claim/suit will impact their getting future clients, affect their credibility with courts and opposing counsel, employers, neighbors, etc. - the beatdown goes on. Non-legal folk won't know the claim/suit was just a shakedown for quick cash - they'll just a lawyer who was sued and assume the worst. That will hurt, not help, the profession. Good lawyers may exit claim-prone practices to avoid frivolous claims, reducing the number of available lawyers to the public. All to fix a problem that the WSBA has not managed to convince me, or my brethren (per surveys and letters I've seen in NW Lawyer), even exists.

The last issue concerns the availability of suitable insurance products. I carried individual E&O coverage for my work as a part-time lawyer doing insurance coverage work. Several years ago, I obtained my coverage through a broker in Tacoma who handled lots of E&O insurers. Do you know how many offered a part-time program for my area of legal work?

One (Zurich), and it wasn't clear at the time they would continue to offer it. I'm sure if the E&O folks get their foot into Washington via mandatory insurance that they'll offer more "products," but it's less clear whether there would be sufficient competition to keep Washington's lawyers from being victimized on that end, as well. Incidentally, I was paying $800/yr for my coverage then (2012), and the number I'm hearing bandied about lately is $3,000 per lawyer (so $6K from our household), which, with already outsized health insurance premiums ($14K/yr) and high ($5K per) deductibles, is simply a bridge too far for this retirement-horizen couple.

I very hope much hope the WSBA does not force mandatory insurance on Washington's lawyers. If it does, my back-up hope is that lawyers in my and my wife's position who limit their practices to work done for others under their policies will be allowed to keep their law licenses lit. If not, we might have to fold up shop in Washington, sell our home, and move back to Texas, one of the 48 states that does not mandate insurance, where we're both licensed - nothing like starting over in your 60s, but it shouldn't have to end that way when we've been good/loyal legal soldiers in Washington for more than 20 years. We've spent our entire adult lives working to get to this point, and forcing us into insurance will simply pull the rug out from under me and my wife, just as we're trying to thread the retirement needle at the same time we're also heading into the infirmaries of old age while also trying to avoid being ground up by the medical insurance/expense machine. Nobody's saying it should be easy, but, after 30+ years of blemish-free legal practice, it just shouldn't be this hard at the end.

Thanks again for the response, and for listening.
- Chris Neal

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On Mar 5, 2019, at 11:42 AM, Bill Pickett <Bill@wdpickett-law.com> wrote:

Thank you Chris. Good point and know that I appreciate your comments.
I will hope to include more issues in any future bar message.

With your permission I would like to relay your email to the full board for their consideration as they prepare to this week's meeting. Let me know.

As always, feel free to email and/or call with any questions or concerns. Again, your comments are well taken and appreciated.

Peace,
Bill

Work Cell [redacted]

Bill Pickett
Trial Lawyer
The Pickett Law Firm

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From: Chris Neal [redacted]
Sent: Tuesday, March 05, 2019 10:38 AM
To: Bill Pickett <Bill@wdpickett-law.com>
Subject: Your Update Email

Mr. Pickett,

This email address may not be the most appropriate way to contact you, so my apologies in advance if that's so.

I write to express concern that your update email omitted any reference to the only thing that's on the mind of every lawyer I know - mandatory insurance. Like too many others, I will be forced into early (and underfunded) retirement if/when the rule goes into effect. My solo firm's business model anticipates I do work only for larger firms to whose own insurance I am added for the work that I do - the public is protected. So, while I do not carry my own insurance, all of the work that I do is covered by insurance. However, under the new mandatory arrangement, it appears I will not be able to maintain my law license unless I can prove I, personally, carry my own separate liability coverage. My revenue stream is reduced as I head toward retirement, so that's not possible, and I'd have to leave the Bar, and the remainder of my career/income. As mentioned, many are in my boat, including my wife, Lisa Neal. We've practiced in Washington for more than 20 years.

And, yes, I have written Comments to this effect during the input period, asking that an exemption be applied to those in my position. I do not know the status of that request, and I received no response.

So far as I know, all of WSBA's polling shows Washington's lawyers are overwhelmingly against the mandatory insurance requirement for several reasons, including that WSBA has failed to make its case that the public has suffered in any way from the absence of mandatory insurance, even anecdotally. Cynically, this looks to me like an effort by the malpractice lawyers and E&O insurance industry (which has a seat at the table that I help pay for) to bring money in from the sidelines to further their own economic agendas at the expense of the very lawyers who want, and pay for, the WSBA to watch out for their interests, in addition to the public's.

For these reasons, I am surprised and disappointed your update email made no reference to the status of this important issue.
- Chris Neal

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From: Kary Krismer
To: Mandatory Malpractice Insurance Task Force
Subject: Exemptions From Mandatory Malpractice Coverage
Date: Tuesday, March 5, 2019 3:13:44 PM

I was sad to see that the report on mandatory malpractice insurance did not even give a mention of the exemption I requested. My situation is hardly unique. I am a licensed attorney, not actively practicing, and also licensed as a real estate broker. I have held this status for over 10 years and have not once during that time charged for my legal services. Part of my practice as a real estate broker though arguably covers the practice of law (drafting forms, explaining forms to clients, etc.)

It would be meaningless for me to buy malpractice insurance because the malpractice carriers would exclude any coverage for activities pertaining to my activity as a real estate broker. That means if you do not provide the exception I am requesting my choices would be:

1. Resigning as an attorney.

2. Paying for insurance that does not provide anyone any coverage.

As I mentioned above, there are a number of attorneys who are similarly situatuated. We should not be forced to make the choice of quitting the bar or paying an insurance company for what would effectively be no coverage.

--

Kary L. Krismer
206 723-2148

From: Margaret Shane
To: Thea Jennings
Subject: FW: Analysis of the Mandatory Malpractice Insurance Task Force Report
Date: Tuesday, March 5, 2019 5:50:40 PM
Attachments: image001.png

HI Thea –

Please post Michael's email on the "Comments to the Board of Governors" link on the Task Force webpage.

Thank you!

_____

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From: Dan Bridges [mailto:dan@mcbdlaw.com]
Sent: Tuesday, March 05, 2019 5:38 PM
To: Michael J. Cherry
Cc: Bill Pickett (bill@wdpickett-law.com) (bill@wdpickett-law.com); Rajeev Majumdar (rajeev@northwhatcomlaw.com); Margaret Shane; Paula Littlewood; Hugh Spitzer (spith@uw.edu); P.J. Grabicki (pjg@randalldanskin.com)
Subject: RE: Analysis of the Mandatory Malpractice Insurance Task Force Report

Michael, thank you so much for that very detailed and thoughtful discussion. I am including some others here so they can have the benefit of your input and, although I suspect it is too late to be included in this specific Board book, hopefully we can capture this input so it is not lost.

Thank you so much for your time ! I hope things are going well.

Don't be a stranger.

DB

Dan'L W. Bridges
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From: Michael J. Cherry <mikech@lexquiro.com>
Sent: Tuesday, March 5, 2019 4:17 PM
To: Dan Bridges <dan@mcbdlaw.com>
Cc: Michael J. Cherry <mikech@lexquiro.com>
Subject: Analysis of the Mandatory Malpractice Insurance Task Force Report
Importance: High

Dan,

I am writing about the Mandatory Malpractice Insurance Task Force (Task Force), "Report to the WSBA Board of Governors" (Report), which you will be considering at the March 7th meeting of the Board of Governors (BOG). I spent considerable time researching this matter before resigning from the BOG for health reasons. I attended many Task Force meetings. And I have reviewed the draft and final Report, and my analysis is that the BOG *should not support* the Task Force recommendation because the Report is inadequate in several areas, which are outlined in this letter.

Rather than supporting a requirement for mandatory malpractice insurance please consider requiring attorney's report their insurance status to the WSBA (a requirement already in place), combined with a new requirement of mandatory disclosure of malpractice insurance status in all communications between an attorney and their clients. The Task Force can then monitor the effectiveness of disclosure over an adequate period to make a more informed decision about the need for mandatory malpractice insurance. The combination of mandatory reporting and disclosure will accomplish the goal of the Task Force of protecting the public, without introducing damaging unintended consequences to the profession.

I understand, the Task Force spent a lot of time on the Report. However, they had limited time and money, and could not afford to perform extensive or custom research. The Report's conclusion calls for a big and irreversible step. The goal of protecting the public can be achieved with the intermediate step of mandatory reporting and disclosure. If the intermediate step of mandatory disclosure and reporting does not work, the BOG can always implement mandatory malpractice coverage. But the reverse will be virtually impossible. If I am correct, and mandated malpractice insurance has unintended consequences, it cannot be easily reversed to repair the consequences.

In consideration of your time, I have attempted to keep this letter on point. I am available to discuss the individual points with you, however; due to medical

appointments I cannot reschedule, I may not be available when this matter comes up on Thursday's agenda. Please call me at your convenience before the meeting if you wish to discuss my conclusions.

My issues with the Task Force Report are:

Impact of Insurance Companies on the Profession. The Task Force Report appears to ignore the impact of mandatory malpractice insurance on how lawyers practice law. Consider that rising rates for Ob-Gyn doctors have resulted in these doctors changing how they practice, including withdrawing from providing services.[1] In other cases, which I have encountered in my struggles to battle a chronic illness, health insurers employ a variety of strategies to control their expenditures, including one that is common but has received relatively little attention: step therapy.

Step therapy programs require patients to try less expensive treatments and find them to be ineffective or otherwise problematic before the insurer will approve a more high-priced option.[2] When used, step therapy involves the insurance company telling the doctor how to practice their profession. Insurance companies may think of similar practices they demand we as attorneys use in place of our ability to decide with our client's wishes how to handle a matter.

It is feasible that insurance companies could have similar impacts on our profession. Not that they will tell us what to do, but, behavioral economics suggests lawyers will be nudged in the direction the companies want us to go. For example, based on what I have learned studying this issue, as I am renewing my insurance, I have backed off performing any legal service that falls below 20% of my total work. I am doing this because if you only practice in an area such as real estate law below a certain percent, the insurance company may label you as a "dabbler," and you will pay larger premiums. In my case, I previously reported I engage in real estate work because a client would occasionally ask me to review a lease. I interpreted this a real estate work. Going forward I must refuse clients seeking advice about a lease because of the cost of insurance coverage and honestly reporting practice areas to my insurance company. This is a prime example of the negative impact that mandatory insurance coverage may have on a solo practitioner's practice.

It is also conceivable that under mandatory insurance, a competent lawyer could be constructively disbarred because no insurance carrier will write an affordable policy. There is no backstop or appeal process I am aware of identified in the Report should this happen.

I am not aware that the Task Force gave this serious matter any consideration. Instead they viewed the insurance industry as neutral, and an ally or friendly partner whose only interest is helping the public. This is naïve. The impact of giving the insurance industry a defacto monopoly merits review. Such an internal review could be conducted while a mandatory reporting and disclosure program is in place. It is important to highlight that without such review the State's legal profession may be at the mercy of insurance companies once mandatory insurance requirements are enforced.

Impact of Mandatory Insurance on Access to Justice. The Task Force considered the implementation of mandatory malpractice insurance would have a net positive effect on Access to Justice (ATJ). The net positive effect stems from a shift from lawyers refusing cases involving a person harmed by a lawyer to lawyers taking these cases. Such cases will become enticing because malpractice insurance guarantees a payout to the client harmed by another attorney. The lawyer representing the harmed client now has a certain financial outcome.

I submit the effect on ATJ may be overall negative. The Task Force assumes that the cost of insurance is minimal or insignificant, and that it can be easily passed on to clients. This is a false premise. Few solo practitioners can simply pass increased costs onto clients. Therefore, rising costs for legal services will likely limit the number of people who can afford a lawyer to take any case—such as the tenant side of a landlord tenant dispute, and, simultaneously increase the number of people excluded from obtaining legal services.

To illustrate this point, I created a spreadsheet documenting corporate and living costs for solo practitioners and small firms. Based on this model, without malpractice insurance, an attorney can afford to charge $120 an hour, and not lose money. Leaving all other expenses the same, but adding in $2,500 per year for malpractice insurance from the Report,[3] the same attorney would have to charge $125 an hour. The $2,500 per year is an average across all practice areas and could be to low an estimate.

In addition, considering licensing fees, continuing legal education (CLE) costs, malpractice insurance costs, business license costs, taxes, student loan payments, and health care are mandatory costs—that is a lawyer cannot choose not to pay them —adding mandatory malpractice insurance means 45% of all corporate and living expenses are mandated. And, three of these fixed costs areas will be mandated by the Bar.

Finally, consider that fixed costs increase annually, effectively marginalizing other business-related opportunities such as marketing costs and retirement funding. More important, as business costs increase, solo practitioners are less likely to volunteer valuable hours to pro bono work; instead billing clients or spending to market new clients will become paramount to business survival.

The cost of running a small business is an issue the Task Force should have examined in more detail to properly address ATJ. If a large population cannot afford legal services because the cost of legal services continue to rise, even by five dollars as my model suggests, then the public is not being “protected;” it is actually being harmed by the additional costs of legal services in part mandated by the Bar. The Idaho bar reports: “No Idaho attorneys reported an inability to obtain the required insurance … some lawyers indicated that the requirement would affect their decision to retire from practice.[4] I validated these conclusions by calling several attorneys in Idaho to inquire about their experience obtaining insurance. All the lawyers I spoke with decided to pass their increased costs onto their clients. One indicated they were retiring earlier than originally planned because of the insurance mandate.

I also spoke with an attorney newly-admitted to the Oregon Bar who is also a member of the Washington State Bar Association. Her practice is low risk for malpractice claims because she advises clients on federal regulatory matters, all of which have outside legal counsel with final oversight of work product, and work product are not a function of Oregon state law. Further, as a new lawyer in Oregon, she is struggling to establish a solid client base and keep the business operating. The cost of mandatory malpractice insurance was greater than 10% of her earned income in Oregon in 2018. This is a significant expense when added to the business costs described above, and membership in two state bar associations; a possible deterrent to remaining a solo practitioner, and an actual deterrent to pro bono work.

I can provide the spreadsheets to the BOG for its own review of these data. The data are clear that negative financial effects are realized annually by solo practitioners and small legal firms. This impact increases each year. Further, insurance costs will increase each year. The costs of insurance coverage typically double over 5 years.

As suggested, the impact of rising rates for legal services on the legal services market and ATJ (due to fewer solo practitioners, early retirements, closed practices/displaced attorneys), could be studied while a program of mandatory reporting and disclosure is in place. Monitoring the beneficial and negative effects of a disclosure requirement is a harmless financial impact on solo practitioners. But if mandatory insurance is in place, and my data are valid, there is a significant negative risk to small legal firm culture and ATJ in the state.

Too Many Exemptions. The Task Force states in several places, that “A license to practice law is a privilege, and no lawyer is immune from mistakes.”[5] Lawyers make mistakes. A license to practice law is a privilege, and no lawyer should be immune from his or her responsibility to clients because of those mistakes.”[6] If this is true, then why is this mandate restricted to “lawyers in the private practice of law” and not all lawyers?

I am not being flip. Given the Task Force is correct—Lawyers make mistakes. Then let’s consider prosecutors for example. Then prosecutors make mistakes. Such mistakes harm the public, and this is easy to prove.[7] Settlements between those harmed by prosecutors are significant, and likely paid by taxes which must reduce services in some other part of the government.

The Task Force assumes all lawyers except those in solo practice or small firms have insurance through the organization that hires them. However, if lawyers in Washington must have malpractice insurance, then all lawyers should have to show they, or the organization they work for have such insurance or funds capable to self-insure. Otherwise, if you accept the Task Force’s recommendation then the Task Force and the bar is saying to its members “solo practitioners and small firms make mistakes and only they have to take personal responsibility for their mistakes.”

Improper Statistical Analysis. Many lawyers joke they are lawyers because they are bad at math. Unfortunately, if they are bad at math, they are worse at statistics.

Admittedly, the Task Force did not have funding to conduct its own studies. It relied on the work done, including a book that attempts to summarize a variety of studies about malpractice insurance.[7]

Based on my analysis of some of these statistical studies, many use varying metrics and categories (that is, an “apples-to-apples” data comparison cannot be made). Further, none of the studies relied upon were conducted in Washington State, and therefore, there are no statistics representative of Washington State Bar conditions to make an informed decision about the impact of Washington solo practitioners on malpractice claims. Attempting to use such varied statistical methods without representative data to spot trends or decide may introduce mistakes and errors in the Report conclusions.

For example, it is not clear all studies (or other state bars) define “private practice of law” the same. Using these statistics without proper analysis may lead to faulty decisions.

In addition, in at least one case where the statistics raises a question that should be answered to ensure an informed decision, was ignored by the Task Force. The Report states “Evidence suggests that lawyers with more than ten years of practice produce a disproportionate share of claims.”[8] Rather than examining this point the Task Force makes a conclusion that maybe the fact results from burnout, and moves on.

Insurance attempts to make a party whole long after the wrong has occurred and at a point where, frankly, making someone whole is impossible. The Task Force missed a tremendous opportunity to examine what could be done before the 10-year mark to reduce or eliminate the harm.

You do not just have to take my word for this point. Ms. Inez Petersen has sent the BOG and Mr. Spitzer several messages about such potential statistical analysis errors. Her analysis of the statistical data may be more thorough than my analysis. Although her delivery of her concerns may not be easy to read, I encourage you all to look at Ms. Petersen’s concerns and ensure the statistical analysis supports the decision which the Task Force is recommending.

Further, Ms. Petersen’s comments suggest that there are Bar members skilled in statistical analyses who should have been invited to assist the Task Force with its study. A call-out for such assistance could be made while the Bar is monitoring the effects of mandatory disclosure and studying the impacts of mandatory insurance.

Again, while such a review is being conducted, and consideration into what happens at the 10-year mark is reviewed, mandatory reporting and disclosure could be put in place to protect the public, and then should the analysis support the decision than mandatory insurance could be implemented on a solid foundation of valid decision making.

Conclusion. I hope I have convinced you that although the Task Force worked hard to produce its Report, there are still sufficient unaddressed issues that require a hard

look; supporting the Task Force conclusion is premature and could have irreversible, significant negative financial and ATJ consequences.

Your choice is not to do nothing, or to require mandatory malpractice insurance. Rather, you can take steps that will garner positive results acceptable to all parties including the public and the members. You can require mandatory reporting and disclosure with subsequent WSBA monitoring and study. You can ask for disclosure statement templates be provided to Bar members. You can approve a program of public education to teach people how to hire an attorney and how to work with an attorney to stop harm before it happens. You can work with Bar members to foster law school programs to instruct new lawyers on how to properly manage a solo practice. These measures will help prevent practice issues that insurance coverage will not cure by fostering good will among Bar members and the BOG and between Bar members and the public and improving the practice of law. And you will not cede power over the profession to the insurance industry.

I implore the BOG to take these intermediate steps. You can still take the next step of mandatory insurance requirements in a year or two if adequate, reliable research demonstrate the public remains unprotected by solo practitioners. Finally, if the BOG decides it must recommend mandatory malpractice insurance, please consider putting this to a vote of the membership. This is too critical of an issue with possible negative impacts on members to avoid member input beyond commenting.

Thank you for your time and consideration of this important Bar matter. If I can answer questions, or if you wish to discuss this further, please call me.

Respectfully yours,

Michael Cherry (Bar Number 48132)

(425) 8765-8977

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[1]See American College of Obstetricians and Gynecologists, "2015 ACOG Ob-Gyn Professional Liability Survey Results," available at https://www.acog.org/About-ACOG/ACOG-Departments/Professional-Liability/2015-Survey-Results?IsMobileSet=false.

[2] See Sharona Hoffman, "Step Therapy: Legal and Ethical Implications of a Cost-Cutting Measure," Case Western Reserve University School of Law, available at https://scholarlycommons.law.case.edu/cgi/viewcontent.cgi?article=3009&context=faculty_publications

[3] Hugh Spitzer, et. al, "Mandatory Malpractice Insurance Task Force Report to the WSBA Board of Governors," 30, February 2019. (The $2,500 per year is taken from the Task Force Report).

[4] *Id.* at 24.

[5] *Id.* at 3

[6] *Id.* at 38.

[7] Mary B. McCord, Douglas Letter, "How Mistakes by State and Local Prosecutors Can Lead to Unfair Trials," The

Washington Post, May 22, 2018, available at https://www.washingtonpost.com/news/posteverything/wp/2018/05/22/how-mistakes-by-state-and-local-prosecutors-can-lead-to-unfair-trials/?noredirect=on&utm_term=.0e802c0c909a.

[8] See generally, Kritzer and Vidmar, "When Lawyers Screw Up, Improving Access to Justice for Malpractice Victims, University of Kansas Press, 2018.

[9] Spitzer *supra*, at 16.

From: weissinger@rockisland.com
To: Mandatory Malpractice Insurance Task Force
Subject: Objection from retired attorney about mandatory malpractice insurance
Date: Wednesday, March 6, 2019 9:26:33 AM

I'm already 11.5 hours in CLE credit toward my reporting which is next due in 2021. But I will certainly surrender my WSBA license to practice if you require I buy mandatory malpractice insurance.

The exemption for pro bono doesn't help. In a typical pro bono case involving litigation (say I'm defending a tenant), I'd say "I'm doing this pro bono, but if the Court awards attorneys fees against the Landlord I'm collecting that for the time I've incurred." But I couldn't do that under the pro bono exemption.

And I should be able to help out a few people here and there if I want to do that, without having to spend a few thousand dollars each year on insurance.

Have you investigated the conflicts of interest of those on the "malpractice insurance task force"? My understanding, for example, is that Mark Johnson is in the business of suing lawyers, and according to what he said in a CLE he taught, he won't take the case against those lawyers without malpractice insurance. It is offensive to me that someone with so clear a monetary interest in the outcome would have been allowed on the task force to begin with.

Sincerely,

William Weissinger
Friday Harbor, WA
360-378-5674

WASHINGTON DEFENDER ASSOCIATION

March 5, 2019

Washington State Bar Association
Mandatory Malpractice Insurance Task Force
1325 Fourth Ave., Suite 600
Seattle, WA 98101-2539
VIA EMAIL: insurancetaskforce@wsba.org

Re: Mandatory Malpractice Insurance

Dear Task Force Members:

We write in support of John Ziegler's suggestion that if the WSBA recommends a rule requiring practicing Washington attorneys to carry malpractice insurance, it make an exception for attorneys who do much of their legal work *pro bono*.

Mr. Ziegler provides a great deal of *pro bono* assistance to public defenders throughout Washington. For example, Mr. Ziegler generously shares his tremendous knowledge about the complex case law and statutes that govern writs in Washington. Writs are often the only avenue available to criminal defendants in courts of limited jurisdiction who seek pre-trial review of rulings of the court in which they are charged. Pre-trial review by a higher court can be necessary if, for example, a court of limited jurisdiction sets illegal conditions of pre-trial release from jail or incorrectly requires bail. Mr. Ziegler has shared templates for writs with numerous public defenders and coached them through the legal and procedural hurdles they must navigate before superior courts can consider their arguments. Writs are just one area of the law where Mr. Ziegler has shared his expertise. There are others, including statutory construction, contempt of court, and appellate procedure.

In assisting public defenders *pro bono*, Mr. Ziegler has helped protect the rights of indigent people accused of crimes and improved the quality of criminal defense in Washington. We hope the WSBA will recommend a rule that would allow Mr. Ziegler to continue his important *pro bono* work even though he cannot afford malpractice insurance. It would be a significant loss to the criminal defense bar statewide if he could not continue to share his knowledge and expertise.

Sincerely,

Christie Hedman

Magda Baker

Christie Hedman, Executive Director

Magda Baker, Misdemeanor Resource Attorney

cc: WSBA Board of Governors

March 6, 2019

TO: WSBA Board of Governors

From: Ronald T. Schaps, WSBA#2203

Re: Mandatory Malpractice Insurance Task Force Report

PROPOSED APR 26 (b)(2) and (3)

Proposed APR 26 (b)(2) and (3) deal with exemptions from the malpractice coverage requirements and read as proposed:

> "(2) Employment by a corporation or business entity, including nonprofits:
>
> (3) Employees or independent contractors for a nonprofit legal aid or public defense office that provides insurance to its employees or independent contractors;"

There are two problems with this language.

First, as to subsection (2), there is no explanation or analysis in the Report as to why independent contractors for "a corporation or business entity, including nonprofits" cannot, and should not, also be exempt from the malpractice coverage requirements if the corporation or business entity itself provides insurance covering the independent contractor. There is no logical or rational basis for such a distinction. In each case the independent contractor would have the requisite insurance coverage. There would also not be any additional administrative burden on the WSBA as the independent contractor would certify that he or she is providing legal services only to that entity and that the entity provides insurance.

Second, as to subsection (3), the manner in which it uses the word "or" creates an ambiguity.

It is suggested that the language of proposed APR (b)(2) and (3) be changed to read:

> (2) Employment by a corporation or business entity, including nonprofits, and independent contractors to such an entity when the entity itself provides insurance coverage for the independent contractor;
>
> (3) Employees and independent contractors for a nonprofit legal aid or public defense office that provides insurance coverage for such employee and/or independent contractor.

PROPOSED APR 26 (e)

A review of the Report indicates that the problem is not so much a matter of "collectability" of any judgment, but the fact that in virtually all civil cases (not just malpractice cases) it is difficult for a private plaintiff's attorney to economically handle claims for under $100,000 (or $150,000) particularly if it is likely that the claim will have to be processed al; the way through a trial and possibly an appeal. Note that the Report's own statistics etc. tend to focus on claims under $100,000.

This is where insurance becomes a critical factor. Insurance companies are decidedly "for profit" entities. If a case, no matter how tenuous, will cost $200,000 to defend and defeat but can be settled early for $75,000, the insurance company will want to force a settlement. Such a settlement not only allows the insurance company to save money, but it allows the insurance company to double-dip by using the settlement as a basis for increasing the attorney's premiums. If you think this is an exaggeration, please note the handling of *Schmidt v Coogan* in the article immediately following the task force's interim report in the August 2018 NW Lawyer. That Washington Supreme Court decision involved two separate issues as to the damages that could be recovered in that malpractice case – each of which was considered a major issue of first impression for the court. The plaintiff won one and lost one. There, however, was no discussion in the article on any problem with the "collectability" of the final judgment. Instead the emphasis of the article was that if there had been insurance, the insurance company would have forced a settlement and plaintiff and plaintiff's attorney would have been spared the effort and expense of litigation.

The above discussion provides a background for the fact that a common way malpractice insurance companies force a defendant attorney to consent to a settlement the insurance company wishes to make, even if the defendant attorney feels the claim is legally and/or factually unjustified, is to provide that if the defendant attorney fails to consent, the coverage limits are then reduced to the amount of the proposed settlement. For example, if the coverage limit is $500,000, and the proposed settlement that is rejected is $175,000, then the policy limits immediately and automatically reduced to $175,000 (including defense costs) for that claim.

This raises an issue as to the intent and effect of some language to be added by the proposed APR 26(e):

> "If a lawyer … fails to maintain the coverage required throughout the licensing period, the lawyer may be ordered suspended from the practice of law..."

Under the circumstances described above, where a malpractice insurance company has reduced the coverage for a particular claim below $250,000 because the defendant attorney has refused to consent to a settlement the attorney considered unjustified, has the defendant attorney now violated APR 26(e) and is subject to suspension. In other words, is the WSBA using the coercive powers of its disciplinary system to coerce a defendant attorney to consent to a settlement the attorney feels is legally and/or factually unjustified? If that is not the Board of Governors' intent, I would suggest adding the following language to APR 26 (e):

> Provided, however, an insurance carrier's reduction of coverage limits for a particular claim because the defendant attorney refuses to consent to a proposed settlement shall not constitute a violation of this APR.

<u>ALTERATIVES NOT CONSIDERED IN REPORT</u>

The Report reflects a review of alternatives that other state have already enacted, considered or rejected, but does not attempt to develop or analysis any new approach.

I would repeat a suggestion that I previously made to the task force.

Combine enhanced malpractice insurance disclosures directly to clients with a new form of fund that would simply mimic the collectability potential of the proposed claims made insurance coverage, without getting involved in claims analysis and adjudication, settlements, or extensive administration maters --- such as:

1. Claim must arise from an act of malpractice occurring after the commencement date of the fund.
2. There is no claim if at the time the act of malpractice occurred the attorney had malpractice insurance in an amount of at least $250,000.
3. There is no claim until it has been reduced to a final settlement or a final judgment no longer subject to appeal.
4. For a claim that meets all of the above three criteria, the maximum amount of the claim shall be the LESSER of the amount of the settlement or judgment or $250,000, minus ALL of the following:
    a. The amount of any malpractice insurance coverage less than $250,000 in existence at the time of the act of malpractice; and
    b. All unreimbursed defense costs incurred by the defendant attorney; and
    c. All amounts recoverable from the defendant attorney within 180 days of the settlement or final judgment.

Any amount paid from the fund would be subject to the same terms of collection and/or discipline as exist for the WSBA's current fund for the protection of client assets.