



Mandatory Malpractice
Insurance Task Force

REPORT TO WSBA BOARD OF GOVERNORS

FEBRUARY 2019



WASHINGTON STATE BAR ASSOCIATION
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Task Force recommends malpractice insurance as a condition of licensing, with exemptions.

BACKGROUND

In September 2017, the WSBA Board of Governors created a task force to evaluate the nature and consequences of uninsured lawyers in the state. The 17-member task force included legal professionals from a range of practice areas and firm sizes as well as an insurance broker and public member. The task force gathered information throughout 2018—including more than 580 comments from members and the public—and found:

- 14 percent of Washington lawyers in private practice do not carry insurance, and determined that this lack of protection poses a distinct risk to clients.
- Uninsured lawyers create an access-to-justice problem: their clients are typically unable to pursue legitimate malpractice claims against them because plaintiffs' lawyers cannot afford to bring actions against uninsured practitioners.

CONCLUSION AND REPORT

The task force concluded that lawyers' fiduciary duties to their clients supports an obligation to obtain and maintain malpractice insurance. The report, therefore, recommends that the WSBA Board of Governors propose a mandatory malpractice insurance rule for consideration by the Washington Supreme Court. Specifics of the proposed rule:

- All Washington lawyers in private practice would be responsible for maintaining malpractice insurance in the minimum amount of \$250,000 per occurrence/\$500,000 total per year.
- Lawyers would obtain coverage through the private, competitive insurance market and would report their coverage status through the annual licensing process. Failure to comply would lead to an administrative suspension of the lawyer's license.
- Several categories of lawyers would be exempt, including: in-house government and private entity lawyers; certain nonprofit legal aid or public defense lawyers; judges, mediators and arbitrators; lawyers providing pro bono services through organizations that provide insurance; and retired lawyers who continue to maintain their licenses.

The task force also recommended that WSBA work closely with volunteer-lawyer programs to increase the availability of malpractice insurance for lawyers whose private practice is limited solely to *pro bono* representations.



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MANDATORY MALPRACTICE INSURANCE TASK FORCE REPORT

FEBRUARY 2019

I. SUMMARY

On September 28, 2017, the Board of Governors established the Mandatory Malpractice Insurance Task Force and adopted a Charter to guide the

Task Force's work. The Charter is attached as [Appendix A](#). The Charter asked the Task Force to focus on the nature and the consequences of uninsured lawyers, to examine current mandatory malpractice insurance systems, and to gather information and comments from WSBA members and other interested parties. The Charter also charged the Task Force with determining whether to recommend mandatory malpractice insurance in Washington, developing a model that might work best in this state, and then drafting rules to implement that model.

The Task Force has 17 members including lawyers from a variety of practice areas and law firm sizes, a federal judge, an LLLT, industry professionals, and members of the public. The list of members is attached as [Appendix B](#). The Task Force was asked to provide an interim report in the summer, 2018, which it provided on July 10. That interim report included a number of tentative recommendations. The Task Force was charged with completing its information gathering and finalizing its recommendations by January, 2019. At its November 2018 meeting, the Board of Governors extended the Task Force's reporting deadline to March 2019. Since January 2018, the Task Force has conducted monthly meetings.¹ In addition to gathering information and data from a variety of sources described in this

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

report, the Task Force made a substantial effort to hear from WSBA members. As of December 1, 2018, the Task Force had received more than 580 written comments, both solicited and unsolicited. The Task Force sponsored informational articles and progress reports in *NW Lawyer* and through other forms of direct communication with members. On October 16, 2018, the Task Force held an open forum for lawyers with an interest in the topic, and heard from 18 people, testifying both in person and through telephonic testimony.

Through the autumn of 2018, the Task Force continued to gather information about the impact of uninsured lawyers on clients, the character of the apparent problem, and the best approach to dealing with that issue. The Task Force spent considerable time discussing which categories of lawyers should be excluded from any malpractice insurance requirement. The Task Force members reached consensus on its recommendations, and then worked on drafting and editing a report to the Board of Governors. At its January 30, 2019, meeting, the Task Force voted unanimously to approve this Report and its recommendations for submission to the WSBA Board of Governors.²

Members of the Task Force started with widely divergent ideas about mandating malpractice insurance, but the group deliberated carefully over its potential recommendations, listened thoughtfully to each other and to the comments it received, and reached consensus. Task Force members also concluded that they should move boldly and not shy away from difficult proposals.

Task Force participants were consistent in their view, reflected in General Rule (GR) 12.1, that the Washington Supreme Court and the WSBA have a duty to protect the public and maintain the integrity of the profession. Consequently, the Task Force has focused on the risk of injury to clients and the public that arises from uninsured lawyers engaged in the private practice of law, a group that constitutes a small but significant percentage of lawyers in Washington State. Further, every lawyer is a fiduciary with ethical and legal duties to protect a client's interests.³ The Task Force concludes that the fundamental obligation of a lawyer to protect clients includes the obligation to obtain and maintain malpractice insurance.

² One Task Force member was absent from the January 30, 2019, meeting, so that Task Force member did not participate in the vote.

³ See, e.g., 1 Restatement (Third) of the Law Governing Lawyers § 16 & Comment (2000) ("A lawyer is a fiduciary, that is, a person to whom another person's affairs are entrusted in circumstances that often make it difficult or undesirable for that other person to supervise closely the performance of the fiduciary. Assurances of the lawyer's competence, diligence, and loyalty are therefore vital. . . . Special safeguards are therefore necessary."). The Rules of Professional Conduct (RPC) impose a number of specific ethics obligations on lawyers to protect a client's interests. These specific obligations include, but are not limited to, providing competent representation to a client (RPC 1.1); protecting client confidences (RPC 1.6); avoiding conflicts of interest to the detriment of a client (RPC 1.7); and protecting client funds and property (RPC 1.15A).

A license to practice law is a privilege, and no lawyer is immune from mistakes. The members emphasized that a key goal of this Task Force is to recommend effective ways to assure that clients are compensated when lawyers make mistakes. Because 14% of Washington lawyers in private practice do not carry malpractice

Lawyers in private practice who do not carry malpractice insurance pose a significant risk to their clients.

insurance, the Task Force members determined that those lawyers pose a significant risk to their clients. Further, when lawyers lack insurance that means that from a practical standpoint, their clients do not have access to the legal system to seek compensation. These clients are often unable to seek compensation because plaintiffs' lawyers are generally unwilling to pursue cases when the defendant lawyer is uninsured and may therefore be effectively "judgment



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.



proof." 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.

Specifically, this Report concludes that:

- The Board of Governors should recommend, and the Washington Supreme Court should adopt, a rule mandating continuous, uninterrupted malpractice insurance for actively-licensed lawyers engaged in the private practice of law, with specified exemptions. Lawyers would be required to obtain minimum levels of malpractice insurance in the private marketplace. For the purposes of this Report, the "private practice of law" means the provision of legal services to clients other than a lawyer's employing organization and that organization's representatives and employees in their organizational capacities.
- The required minimum coverage should be \$250,000 per occurrence/\$500,000 total per year ("\$250K/\$500K").

Several categories of lawyers should be exempt.

- Several categories of lawyers should be exempt because they are not engaged in the private practice of law or are otherwise insured by the organization through which they provide legal services:
 - ▶ Government lawyers;
 - ▶ Judges;
 - ▶ Employees of a corporation or business entity, including nonprofits;
 - ▶ Employees of or independent contractors for nonprofit legal aid or public defense offices that provide insurance to their employees or independent contractors;
 - ▶ Mediators or arbitrators;
 - ▶ Lawyers providing volunteer pro bono services for qualified legal services providers (QLSPs) as defined in APR 1(e)(8) that provide insurance to their volunteers;
 - ▶ Other lawyers either not “actively licensed” or not “engaged in the private practice of law,” including, for example, retired attorneys maintaining their licenses, judicial law clerks, and Rule 9 interns.

The recommended exemptions are described in this report.

- Licensed lawyers should report their type of practice and malpractice insurance coverage status through the annual licensing process. Failure to comply with the requirement would lead to an administrative suspension of the lawyer’s license.
- The WSBA should partner with volunteer lawyer programs (VLPs) in Washington to increase the availability of no- or low-cost malpractice insurance for lawyers whose private practice is limited solely to *pro bono* representations. It is important to make sure that implementation of an insurance mandate does not have a material adverse effect on access to justice.

In shaping its recommendations, the Task Force focused on basic requirements that would be simple and straightforward, avoid multiple requirements, and allow for insurance policy flexibility.

In developing its recommendations, the Task Force listened to the many suggestions from WSBA members, particularly in the area of appropriate exemptions. Those suggestions reshaped the Task Force’s proposals. The Task Force recognizes that notwithstanding the adjustments the Task Force made to its approach, a number of WSBA members have continued to voice ardent opposition to the concept of requiring that lawyers carry insurance. However, this is an important issue of fairness and access-to-justice. While it is important to respect the concerns of those who oppose an insurance requirement, the Task Force believes that these recommendations meet many of those concerns. Ultimately, the Task Force has

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concluded that when one weighs the apprehensions of those who resist malpractice insurance against the large number of clients who are exposed to harm by uninsured lawyers, the balance tips in favor of client protection.

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

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

MANDATORY
MALPRACTICE
INSURANCE
TASK FORCE
REPORT

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II. TASK FORCE REPORT

A. TASK FORCE APPROACH TO INFORMATION-GATHERING

Since its first meeting in January 2018, the WSBA Mandatory Malpractice Insurance Task Force has focused on gathering the information necessary

to make a considered recommendation on whether malpractice insurance should be required in some form for Washington lawyers. During this information-gathering phase, the Task Force obtained information from the following sources, among others:

- WSBA data on Washington lawyers, their practice areas, how they practice (e.g., solo/small firm/large firm/in-house), malpractice insurance levels, WSBA public disciplinary information, and information about the Client Protection Fund.
- Jurisdictions with mandatory malpractice insurance programs in place or under consideration (Oregon and Idaho mandate malpractice insurance; California and Georgia are considering doing so; in 2018, the State Bar of Nevada proposed a mandatory malpractice insurance rule, which was not adopted by the Supreme Court of Nevada; and, in 2017, New Jersey Supreme Court Ad Hoc Committee on Attorney Malpractice recommended a direct disclosure requirement, which has not been implemented by the Court and was opposed by the New Jersey State Bar Association).

- A jurisdiction (Illinois) that implemented a proactive management-based regulation (PMBR) model. A law professor regarding empirical research on lawyers who go uninsured, other academic studies of the subject, including Herbert M. Kritzer's and Neil Vidmar's *When Lawyers Screw Up: Improving Access to Justice for Legal Malpractice Victims*, and an ABA study of malpractice insurance (*2015 ABA Profile on Legal Malpractice Claims*).
- Experienced insurance industry professionals, including insurance brokers and underwriters.
- A legal malpractice plaintiff's lawyer.
- WSBA members through comments submitted to the Task Force.

The Task Force also received useful technical assistance from ALPS,⁴ as well as from mandatory program administrators in Oregon and Idaho.

As a volunteer-driven and WSBA-funded project, the Task Force was charged with developing a recommendation and report with limited resources, so it focused much of its research and analysis on available sources and studies, the experience of other jurisdictions, and the perspective of industry professionals. Given the fiscal limitations and its reporting deadline, the Task Force did not perform the types of research and analysis that would have required the services of independent consultants and data analysts. However, through targeted outreach, the Task Force received a great deal of information, including comments from WSBA members, that filled in some of these gaps and informed the Task Force's thinking on many key decision points.

As noted above, the Task Force received more than 580 written comments from lawyers throughout the state of Washington. All of those comments were shared with members of the Task Force, and the Task Force received monthly updates on the concerns voiced by WSBA members. On October 16, 2018, the Task Force held an open forum, during which 18 people testified either in person and through video and telephonic testimony. Informational articles and progress reports appeared several times over the course of the year in *NWLawyer* and through other forms of direct communication with members. Each of those communications generated additional member comments and suggestions. All information has been made available to members and the public via the Task Force web page of the WSBA website.

The Task Force received more than 580 written comments from lawyers throughout the state of Washington.

⁴ ALPS is the WSBA's endorsed professional liability insurance provider.

In 2017, 19,813 of actively licensed lawyers were engaged in the private practice of law.

B. KEY FINDINGS

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

1. WSBA Membership Data and Financial Responsibility Requirements

The legal profession in Washington has seen significant and consistent growth over the last decade, with 38,540 licensed lawyers in Washington in 2017.⁵ Of those lawyers, 32,189 were actively licensed to practice law.⁶ In 2017, 19,813 of actively licensed lawyers were engaged in the private practice of law.⁷ See [Appendix C](#) for current information on lawyer demographics.

Washington lawyers are not required to establish proof of financial responsibility to maintain their licenses. Washington lawyers are, however, as part of the annual licensing process, required to disclose to the Bar whether they are in private practice and whether they maintain malpractice insurance.⁸ The information is made available to the public through the legal directory on the WSBA website. Washington is one of 25 states that require disclosure of malpractice insurance either to the licensing organization or directly to the client.⁹

As of February 1, 2019, there are 811 actively licensed limited practice officers (LPOs) and 36 actively licensed limited license legal technicians (LLLTs).¹⁰ Under Admission and Practice Rules (APR) 12(f)(2) and 28(l)(2) respectively, LPOs and LLLTs are required to show proof of financial responsibility on an annual basis to maintain their licenses. That financial responsibility ordinarily is established by certification of the existence of professional liability insurance.¹¹ Specifically, LPOs may choose to submit an insurance policy in the amount of \$100,000 or an audited financial statement in the amount of \$200,000.¹² LLLTs must submit proof of insurance coverage in the amount of at least \$100,000 per claim and a \$300,000 annual

⁵ WSBA Staff, *WSBA Membership Demographics*, PowerPoint Presentation, at 2 (Mar. 28, 2018).

⁶ *Id.*

⁷ Based on data compiled by WSBA staff from APR 26 reporting records.

⁸ APR 26 (adopted effective July 1, 2007).

⁹ *State Implementation of ABA Model Court Rule on Insurance Disclosure*, ABA Standing Comm. on Client Protection (A.B.A., Feb. 10, 2016), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/chart_implementation_of_mcrd.authcheckdam.pdf.

¹⁰ *WSBA Member Licensing Counts*, February 1, 2019 (member licensing counts are published monthly on the WSBA website).

¹¹ APR 12(f)(2); APR 28(l)(2)(a).

¹² APR 12(f)(2).

aggregate.¹³ Failure to comply with this licensing obligation results in administrative suspension.¹⁴

2. Who Is Uninsured and What We Know About Them

What follows is a discussion regarding those lawyers who choose to go uninsured and what the research shows about who they are and why they are uninsured.

a) Trends Relating to Uninsured Lawyers

On March 28, 2018, Leslie C. Levin, Professor at University of Connecticut School of Law, presented to the Task Force her research on uninsured lawyers, who they are, and why they go uninsured.¹⁵ She found that small firm lawyers are more likely to go uninsured;¹⁶ however, a limited amount is known about these lawyers and why they choose to go uninsured, because these lawyers often fly “under the radar.”¹⁷

As part of her research, Professor Levin reviewed surveys of more than 200 lawyers in Connecticut (a state with no malpractice insurance disclosure requirements), New Mexico (a state with direct disclosure requirements), and Arizona (a state with indirect disclosure requirements).¹⁸ Her survey concluded that approximately 15% of private practitioners in New Mexico and 19.6% of private practitioners in Arizona go uninsured.¹⁹ She further found that most uninsured lawyers are small firm practitioners or solo attorneys, who are more likely to work at home without any support staff.²⁰ According to those surveyed, the most common reason for not carrying insurance was cost; in all three surveyed states,

Surveys in Connecticut, New Mexico, and Arizona reveal reasons for going uninsured include cost, philosophical opposition, dislike of insurance companies and belief of no risk of liability because of practice area.

Small firm lawyers are more likely to go uninsured.

¹³ APR 28(I)(2)(a)

¹⁴ APR 17(a)(2)(D).

¹⁵ Leslie C. Levin, *Lawyers Going Bare and Clients Going Blind*, 68 Fla. L. Rev. 1281 (2016).

¹⁶ Levin, *supra* note 15, at 1282-83; see also Herbert M. Kritzer & Neil Vidmar, *When Lawyers Screw Up: Improving Access to Justice for Legal Malpractice Victims* 40-41 (University Press of Kansas) (2018).

¹⁷ Levin, *supra* note 15, at 1282-83.

¹⁸ Leslie C. Levin, *Lawyers Going Bare*, PowerPoint Presentation, at 3 (Mar. 28, 2018). “Direct disclosure” requires uninsured lawyers to disclose directly to clients that they do not carry malpractice insurance. “Indirect disclosure” requires uninsured lawyers to disclose whether they carry insurance on annual licensing forms, which is then posted to state bar or judicial websites in ten of the states that require it. Levin, *supra* note 15, at 1286.

¹⁹ Levin, *Lawyers Going Bare*, at 3.

²⁰ *Id.* at 8.

insurance premiums averaged \$3,000 per lawyer.²¹ Other reasons included philosophical opposition to mandatory insurance, a dislike of insurance companies, and a belief of no risk of liability because of practice area.²² A recent article by Texas A&M University School of Law Professor Susan Saab Fortney adds: “A perplexing explanation

.....
Many apparently do not believe that they have a professional obligation to maintain insurance or assets to be available in the event of a claim.

**Law Professor
Susan Saab Fortney**

.....
for lawyers ‘going bare’ is that many apparently do not believe that they have a professional obligation to maintain insurance or assets to be available in the event of a claim.”²³

The State Bar of Nevada, as part of its initiative to investigate whether to require malpractice insurance of its lawyers, conducted a survey of uninsured lawyers in Nevada.²⁴ The survey revealed that 79.8% of its uninsured lawyers were in private practice, with 73% of the uninsured lawyers indicating they were solos and 15.25% indicating they were in firms of 2-4 attorneys.²⁵ The survey showed the highest concentration of uninsured lawyers in the practice areas of plaintiff’s general civil practice (29.15%), criminal defense (25.56%), corporate/business organization and transactions (24.22%), plaintiff’s personal injury (22.87%), and family law (22.87%).²⁶ Survey respondents listed the following as their primary reasons for going uninsured: cost, confidence in their practice, and a belief that their practice area did not necessitate coverage.²⁷

²¹ Levin, *supra* note 15, at 1290.

²² *Id.* at 1293-95.

²³ Susan Saab Fortney, *A Tort in Search of a Remedy: Prying Open the Courthouse Doors for Legal Malpractice Victims*, 85 Fordham L. Rev. 2033, 2052 (2017).

²⁴ In the Matter of Amendments to Supreme Court Rule 79 Regarding Professional Liability Insurance for Attorneys Engaged in Private Practice, AKDT 534, at 22 (June 29, 2018), <http://bit.ly/2DHS1BF>.

²⁵ *Id.* at 24.

²⁶ *Id.* at 25 (respondents were permitted to select one or more practice areas in responding to this survey question).

²⁷ *Id.* at 26.

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b) Washington Trends Relating to Uninsured Lawyers

As annually reported by Washington lawyers pursuant to APR 26, from 2015 to 2017, 85% of Washington lawyers in private practice reported carrying insurance.²⁸ 14% of Washington lawyers in private practice have consistently reported being uninsured.²⁹ Specifically, in 2017, of the 19,813 lawyers in private practice, 2,752 lawyers reported that they were uninsured.³⁰

On average, Washington lawyers are practicing longer, and once lawyers reach the age of 71, the number in private practice who carry malpractice insurance drops. With respect to those lawyers in private practice who reported being uninsured, the data suggest that as lawyers age, they are more likely to report not having malpractice insurance: with 86.6% of those lawyers aged 51-60, 83.5% aged 61-70, and 75.6% aged 71-80 reporting they are insured compared to 90% of lawyers aged 30-40 and 89.4% of lawyers aged 41-50.³¹

According to voluntary demographic information collected in 2017, the practice areas where Washington lawyers in private practice were most likely to report being uninsured included business-commercial law, civil litigation, contract law, estate planning and probate, criminal law, family law, general practice, and personal injury.³²

In Washington State, lawyers in private practice who practice in solo or small firms are most likely to be uninsured. According to 2017 voluntary demographic information reported by Washington lawyers as part of the annual licensing process, approximately 28% of solo practitioners reported being uninsured.³³

While the correlation between public disciplinary information and APR 26 insurance disclosure information might not accurately reflect whether the population of uninsured lawyers is more likely to make errors or become subject to malpractice claims, most attorney misconduct grievances and disciplinary actions also involve solo and small firm practitioners. Of the 211 lawyers disciplined between 2014 and 2017, 101 reported maintaining a solo private practice as of the last time they reported voluntary demographic information to the Bar during the annual licensing process.³⁴ Of the 101, 55 reported

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

²⁹ Based on data compiled by WSBA staff from APR 26 reporting records.

³⁰ Based on data compiled by WSBA staff from APR 26 reporting records.

³¹ WSBA Staff, *WSBA Membership Demographics*, at 8; *Mar. 28, 2018 Task Force Meeting Minutes* at 5, [https://www.wsba.org/docs/default-source/legal-community/committees/mandatory-malpractice-insurance-task-force/march-28-2018-minutes\(00409376\).pdf?sfvrsn=76ae07f1_4](https://www.wsba.org/docs/default-source/legal-community/committees/mandatory-malpractice-insurance-task-force/march-28-2018-minutes(00409376).pdf?sfvrsn=76ae07f1_4).

³² WSBA Staff, *WSBA Membership Demographics*, at 12.

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

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

Reasons why Washington lawyers may go uninsured: cost, retirement, a limited practice that may include providing legal services only to family members, friends or on a pro bono basis, and perceptions of uninsurability based on practice area.

that they did not carry malpractice insurance.³⁵ 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.³⁶ Eighteen of those uninsured actively licensed lawyers reported maintaining a solo private practice.³⁷ (It is important to note that these are simply correlations, and the fact that an individual lawyer does or does not obtain insurance will not necessarily affect the likelihood that the lawyer might violate the Rules of Professional Conduct.)

With respect to the reasons why Washington lawyers choose not to carry insurance, written comments to the Task Force suggest that cost is a common reason, along with retirement, a limited practice that may include providing legal services only to family members, friends or on a pro bono basis, and perceptions of uninsurability based on practice area.³⁸

3. The Malpractice Insurance Market, Generally

Virtually all malpractice coverage is claims-made coverage, which covers a claim when the claim is filed during the policy period.³⁹ Claims-made coverage will only cover claims after the policy period expires if the insured purchases “tail” coverage.⁴⁰ Tail coverage protects from claims based on lawyer errors or omissions that occur during the policy period that are not filed until the policy period has expired.⁴¹

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

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

³⁷ Based on data compiled by WSBA staff from APR 26 reporting data and discipline data.

³⁸ *Comments Submitted to the Task Force*, https://www.wsba.org/docs/default-source/legal-community/committees/mandatory-malpractice-insurance-task-force/comments-received-by-the-task-force26b365f2f6d9654cb471ff1f00003f4f.pdf?sfvrsn=296a00f1_2.

³⁹ Mark Bassingthwaighe, *A Young Lawyer’s Guide to Purchasing Lawyer’s Professional Liability Insurance*, ALPS Corp., at 4, <http://www.cobar.org/Portals/COBAR/Repository/Cbrief/Young%20Lawyers%20Guide%20To%20Purchasing%20Lawyers%20Malpractice%20Insurance.pdf?ver=2017-03-16-075338-557>; Judy Graf, Area Vice President and Account Executive at Arthur J. Gallagher Risk Management Services, *Mandatory Malpractice Insurance – Task Force*, PowerPoint Presentation, at 8-9 (Apr. 25, 2018); *Apr. 25, 2018 Task Force Meeting Minutes* at 2, https://www.wsba.org/docs/default-source/legal-community/committees/mandatory-malpractice-insurance-task-force/april-25-2018-minutes.pdf?sfvrsn=c60507f1_2.

⁴⁰ Mark Bassingthwaighe, *The Ins and Outs of “Tail” Coverage*, ALPS Blog (Mar. 2, 2012), <https://blog.alpsnet.com/the-ins-and-outs-of-tail-coverage>; *Apr. 25, 2018 Task Force Meeting Minutes* at 2.

⁴¹ Mark Bassingthwaighe, *The Ins and Outs of “Tail” Coverage*; *Apr. 25, 2018, Task Force Meeting Minutes*, at 2.

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

- services as an attorney;
- services as a notary public,
- services as a title agent;
- an attorney who causes personal injury;
- services as a trustee or executor; and
- pre- or post-judgment interest, appeal, bonds, and related costs.⁴²

Multiple variables apply when underwriting lawyer malpractice insurance. Specifically, some areas of practice present higher risks than others.⁴³ Insurers also consider the number of attorneys in a firm, the years of coverage, the professional experience of the lawyer, limits of liability and deductibles, any claims or disciplinary history, premium payment history, and other factors.⁴⁴

Typical exclusions to malpractice insurance policies include dishonest, fraudulent, criminal, or malicious acts by the insured.⁴⁵ Additional exclusions include, among others, prior acts (committed before the policy period) when the insured knew of or should have foreseen the claim, discrimination and sexual harassment, vicarious liability, and punitive damages.⁴⁶ Again, the exclusions vary noticeably from carrier to carrier.

Both admitted and non-admitted carriers operate in Washington State.⁴⁷ See [Appendix D](#) ABA List of Admitted and Non-admitted Carriers (as of February 6, 2019). Admitted carriers are licensed by the Washington State Office of the Insurance Commissioner (OIC) and must abide by specific regulations governing admitted carriers.⁴⁸ The ABA reports that in Washington there are 21 admitted

⁴² *Understanding Your Insurance Coverage*, ABA Standing Comm. on Law. Prof. Liability, at 2-3 (A.B.A.), https://www.americanbar.org/content/dam/aba/administrative/lawyers_professional_liability/downloads/understandingcoverage.pdf.

⁴³ Graf, *Mandatory Malpractice Insurance – Task Force*, at 10; David Weisenberger, Vice President, Healthcare and Professional Liability, James River Insurance Company, *Mandatory Malpractice Insurance Task Force*, PowerPoint Presentation, at 4 (Apr. 25, 2018).

⁴⁴ Graf, *Mandatory Malpractice Insurance – Task Force*, at 10; Weisenberger, *Mandatory Malpractice Insurance Task Force*, at 4.

⁴⁵ *Understanding Your Insurance Coverage*, ABA Standing Comm. on Law. Prof. Liability, at 3.

⁴⁶ *Id.* at 3-4.

⁴⁷ Graf, *Mandatory Malpractice Insurance – Task Force*, at 3.

⁴⁸ Graf, *Mandatory Malpractice Insurance – Task Force*, at 11; *Apr. 25, 2018, Task Force Meeting Minutes*, at 1

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Some areas of practice that are higher risk and receive greater underwriting scrutiny include entertainment and sports law, patent law, securities law, and mergers and acquisitions work.

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carriers that write lawyer malpractice policies.⁴⁹ The OIC issues to each admitted carrier a certificate of authority to do business in the state and requires the carrier to file its rates and coverage forms annually.⁵⁰ Because they are subject to strict government oversight, admitted carriers have less flexibility in setting rates and deviating from their filings.⁵¹ If an admitted carrier becomes insolvent, a state fund operates to protect consumers by paying out claims (up to statutory maximums) and refunding premiums.⁵²

In contrast, non-admitted carriers are not governed by state insurance departments and are not required to file their rates with the state.⁵³ They provide what is known as “surplus line” coverage.⁵⁴ With less regulation, non-admitted carriers are free to set their own rates and underwrite higher risk insurance packages.⁵⁵ Some areas of practice that are higher risk and receive greater underwriting scrutiny from admitted carriers such as ALPS include entertainment and sports law, patent law, securities law, and mergers and acquisitions work.⁵⁶ Practitioners in these higher risk areas may need to seek insurance from non-admitted carriers rather than through admitted carriers.⁵⁷ Non-admitted carriers can further accommodate certain complex risks for which the traditional insurance marketplace does not provide adequate coverage.⁵⁸ No state fund protects consumers from non-admitted carrier insolvency.⁵⁹ The ABA reports that in Washington there are six non-admitted carriers that write lawyer malpractice policies.⁶⁰

⁴⁹ *LPL Insurance Directory – Washington*, ABA Standing Comm. on Law. Prof. Liability (A.B.A.), https://www.americanbar.org/groups/lawyers_professional_liability/resources/lpl-insurance-directory/washington/.

⁵⁰ RCW 48.05.110; RCW 48.05.400; *Apr. 25, 2018, Task Force Meeting Minutes*, at 1.

⁵¹ Graf, *Mandatory Malpractice Insurance – Task Force*, at 11; *Apr. 25, 2018, Task Force Meeting Minutes*, at 1.

⁵² *What’s a Guaranty Association and How Does It Work?*, Wash. St. Office of the Insurance Commissioner (OIC), <https://www.insurance.wa.gov/whats-guaranty-association-and-how-does-it-work>.

⁵³ *Surplus Line Insurance*, Wash. St. OIC, <https://www.insurance.wa.gov/surplus-line-insurance>; Graf, *Mandatory Malpractice Insurance – Task Force*, at 11; *Apr. 25, 2018, Task Force Meeting Minutes*, at 2.

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

⁵⁵ *Surplus Line Insurance*, Wash. St. OIC; *Apr. 25, 2018, Task Force Meeting Minutes*, at 2.

⁵⁶ Email, Chris Newbold to Task Force Member Todd Startzel, Dec. 14, 2018, on file with WSBA.

⁵⁷ *Id.*

⁵⁸ *Surplus Line Insurance*, Wash. St. OIC; *Apr. 25, 2018, Task Force Meeting Minutes*, at 2.

⁵⁹ *Surplus Line Insurance*, Wash. St. OIC.

⁶⁰ *LPL Insurance Directory – Washington*, ABA Standing Comm. on Law. Prof. Liability.

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4. Current Malpractice Insurance Market Statistics

The *ABA Profile of Legal Malpractice Claims (2012-2015)* (“*ABA Profile*”) is issued periodically by the ABA Standing Committee on Lawyers’ Professional Liability and reflects malpractice insurer statistics.⁶¹ The *ABA Profile* is based on self-reporting by insurers, so it does not present a comprehensive review of the legal malpractice insurance market.⁶² Data collected include claims by area of law, size of firm, disposition, types of alleged errors, expenses paid, indemnity dollars paid, and file processing times.⁶³ Much, but not all, of the information in this section of the Report is drawn from the results of the *ABA Profile*.

a) Firm Size and Malpractice Claims

Solo and small firm practitioners represent a disproportionate share of the malpractice claims. During the period of 2012-2015, the firms nationwide with the highest percentage of claims had between one and five attorneys, with 34% of claims against solo practitioners and 32% of claims against firms with two to five attorneys.⁶⁴ In other words, over 65% of claims arose from firms with five or fewer attorneys. In Oregon, the state’s Professional Liability Fund in 2015 paid out \$6.52 million in claims against solo practitioners, only \$1.64 million in claims against lawyers in small firms (2-5 lawyers), and \$1.71 million in claims against attorneys in large firms (15 or more).⁶⁵ It is unclear to what the higher incidence of malpractice claims among solo and small firm lawyers is attributable, but, according to available national statistics, small firm practitioners constitute the majority of private practitioners with solo practitioners constituting between 45% to 49% of private practitioners, and lawyers in firms of two to five lawyers constituting 14% to 15% of private practitioners.⁶⁶ Further, larger firms may have more robust practice management systems⁶⁷ and the clients of such firms may use means other than the filing of malpractice claims to resolve situations involving lawyer error.

The potential claims against solo practitioners might be even greater than the statistics suggest.

Even though solo practitioners represent the greatest number of claims, as a whole the evidence suggests they are underrepresented as a source of malpractice claims⁶⁸; in other words, the potential claims against solo practitioners might be even greater than the statistics suggest. The underrepresentation of solo practitioners

⁶¹ ABA Standing Comm. on Law. Prof. Liability, *Profile of Legal Malpractice Claims 2012-2015*, at 7 (A.B.A.) (Sept. 2016).

⁶² *Id.* at 2.

⁶³ *Id.* at 9.

⁶⁴ *Id.* at 14.

⁶⁵ Carol J. Bernick, Oregon Professional Liability Fund Chief Executive Officer, *PLF: History, How It Works, Why It Works*, PowerPoint Presentation, at 17 (Feb. 21, 2018).

⁶⁶ Kritzer & Vidmar, *supra* note 16, at 78.

⁶⁷ *Id.* at 5.

⁶⁸ *Id.* at 79.

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Highest claims areas include plaintiff’s personal injury; real estate law; family law; estates, trusts, and probate; collection and bankruptcy; and commercial/corporate law.

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Lawyers with more than ten years of practice produce a disproportionate share of claims.

may be due to the fact that many do not carry insurance and thus would not appear in reports by insurers.⁶⁹

b) Percentage of Claims by Practice Area

Nationwide, the areas of practice with the highest incidences of malpractice claims include plaintiff’s personal injury at 18.24%; real estate law at 14.89%; family law at 13.51%; estates, trusts, and probate at 12.05%; collection and bankruptcy at 10.59%; and commercial/corporate law at 9.74%.⁷⁰ These statistics tend to mirror those practice areas with the highest reported number of uninsured lawyers in Washington.⁷¹ Specifically, among the practice areas where Washington lawyers in private practice were most likely to report being uninsured included business-commercial law, estate planning and probate, family law, and personal injury.⁷²

c) Years in Practice and Claim Rates

Evidence nationally suggests that lawyers with more than ten years of practice produce a disproportionate share of claims.⁷³ For example, a 2015 report from the Missouri Department of Insurance, Financial Institutions, and Professional Regulation showed that over a ten-year period, 87.5% of claims were against lawyers with ten years or more of practice experience.⁷⁴ Further, the Wisconsin Lawyers Mutual Insurance Company reported that, between 1983 and 2013, 29% of claims filed were against lawyers with eleven to twenty years of practice experience, and 75% were against lawyers with more than ten years of experience.⁷⁵ Further, in 2013, Minnesota Lawyers Mutual Insurance Company reported that 39% of its policyholders who reported claims had eleven to twenty years of experience, and 72% of claims were against lawyers with more than ten years of experience.⁷⁶ Why this group is overrepresented among claims is unclear; however, it may be attributable to the fact that lawyers in that stage of their careers are more likely to experience burnout, which may be reflected in the quality of their work.⁷⁷

⁶⁹ Levin, *Lawyers Going Bare*, at 5.

⁷⁰ *Profile of Legal Malpractice Claims 2012-2015*, *supra* note 61, at 12.

⁷¹ WSBA Staff, *WSBA Membership Demographics*, at 12.

⁷² *Id.*

⁷³ Kritzer & Vidmar, *supra* note 16, at 81-82.

⁷⁴ *Id.* at 67-68, 81.

⁷⁵ *Id.* at 81-82.

⁷⁶ *Id.* at 82.

⁷⁷ *Id.* at 83.

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Nationally, 89.1% of malpractice claims are resolved for less than \$100,000.

d) Percentage of Indemnity Dollars and Expenses Paid

Nationally, 89.1% of malpractice claims are resolved for less than \$100,000 (including claims payments and expenses).⁷⁸ 95.2% of malpractice claims are resolved for less than \$250,000.⁷⁹ ALPS reports that based on its experience, over the past ten years, about half of all its claims were resolved without payment, and 97% of its closed claims were resolved for less than \$250,000, including defense costs.⁸⁰ According to ALPS, in Washington, for all claims, its average loss payment was \$60,548 and average loss expense to defend those claims was \$20,406.⁸¹ Where payments were made by ALPS, its average loss payment was \$119,856, and average loss expenses were about \$40,454.⁸²

e) Frequency Rate of Claims

National frequency rates of claims, meaning the percentage of lawyers per 100 lawyers against whom claims are filed, appears to be less than six percent annually for all lawyers.⁸³ Some evidence suggests that where insurance is mandated, claim rates rise. In Oregon, where insurance is mandated, the annual rate is 12.4% per 100 lawyers.⁸⁴ Also, in Canada, where lawyers must be insured, Ontario has a claims rate of 10.3%; British Columbia has a rate of 12.3%; and Alberta has a rate of 11.8%.⁸⁵ Given that the market is claims made, claim rate percentages include matters lawyers report to their insurers as possible claims.⁸⁶

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Civil legal aid providers and most organized volunteer lawyer programs provide malpractice insurance for participating lawyers.
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5. Insurance Options for Lawyers Providing Primarily Pro Bono Services

Civil legal aid providers and most organized volunteer lawyer programs (typically provided through nonprofit organizations) provide malpractice insurance for participating lawyers. According to the *ABA Report on the Pro Bono Work of Washington’s Lawyers* issued in July 2017, approximately 56% of lawyers in Washington are connected to their pro bono clients through referrals from legal aid providers, non-profit organizations, or bar association or

⁷⁸ *Profile of Legal Malpractice Claims 2012-2015*, *supra* note 61, at 22.
⁷⁹ *Id.*
⁸⁰ Chris Newbold, Executive Vice President of ALPS, “Open Market” *Mandatory Malpractice Model*, PowerPoint Presentation, at 11 (June 27, 2018).
⁸¹ *Id.*
⁸² *Id.*
⁸³ Levin, *supra* note 15, at 1309-10.
⁸⁴ Levin, *Lawyers Going Bare*, at 13.
⁸⁵ *Id.* at 14
⁸⁶ Levin, *supra* note 15, at 1310.

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other independent pro bono programs,⁸⁷ many of which are likely QLSPs. QLSPs, as defined in APR 1(e)(8), are nonprofit legal service organizations whose primary purpose is to provide legal services to low income individuals. QLSPs are required either to provide malpractice insurance for their volunteers or have a policy in place to require that all volunteers carry their own malpractice insurance.⁸⁸ Washington has over 50 Bar-approved QLSPs.⁸⁹

Qualified legal services providers (QLSPs) are required either to provide malpractice insurance for their volunteers or have a policy in place to require that all volunteers carry their own malpractice insurance.

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

Both KCBA and ELAP's plan includes the cost of legal fees for defending a claim, providing total coverage of \$1 million for claims/\$2 million aggregate.⁹⁵ For lawyers to be covered under the plan, the lawyers must be providing services through one of the VLP's pro bono programs for no fee.⁹⁶ With respect to tail coverage, the coverage extends past the time of volunteering.⁹⁷ The lawyer would thus be covered if a client files a claim arising from services provided through KCBA or ELAP's pro bono program long after the

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

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

⁸⁹ *Id.*

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

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

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.* at 3-4.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

There are some gaps in volunteer lawyer programs (VLPs) across the state with only 20 of 39 Washington counties served.

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

With respect to the geographic reach of VLPs, there are some gaps in VLPs across the state with only 20 of 39 Washington counties served by VLPs.¹⁰¹ It is thus likely that not every lawyer would connect with a VLP to provide pro bono services.¹⁰² Ferry County, for example, has no VLP, so an uninsured lawyer wishing to volunteer to represent a Ferry County resident would have to purchase insurance or arrange to perform the work through an out-of-county low-income legal services provider.

6. The Client Protection Fund and Applications Alleging Malpractice

The Washington Supreme Court’s Client Protection Fund (CPF), administered by the Bar, is funded by a mandatory assessment on lawyers and provides gifts to clients who are victims of licensed legal professional dishonest conduct or the practitioner’s failure to account for money or property entrusted to the practitioner. The CPF receives its mandate from APR 15. Under APR 15(b)(4), the CPF provides gifts to clients only for lawyer theft or dishonest activities—not for negligent mistakes or incidents of malpractice that result in harm.

Applications are investigated only when there is a chance the fund could pay the victim, meaning that there is evidence of malfeasance.¹⁰³



Client Protection Fund applications regarding malpractice cannot be considered and, thus, are not investigated.



Applications regarding malpractice cannot be considered and, thus, are not investigated.¹⁰⁴ Consequently, the CPF has no evidence of whether the applicants’ malpractice claims were meritorious.¹⁰⁵ Over the last five years, CPF application statistics indicate that 11%

⁹⁸ *Id.*

⁹⁹ *Id.* at 4-5

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 6.

¹⁰² *Id.*

¹⁰³ *Apr. 25, 2018, Task Force Meeting Minutes*, at 4, https://www.wsba.org/docs/default-source/legal-community/committees/mandatory-malpractice-insurance-task-force/april-25-2018-minutes.pdf?sfvrsn=c60507f1_2

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

of applications were denied because they described instances of malpractice rather than theft or dishonest conduct.¹⁰⁶ Specifically, from 2013-2017, 598 applications were considered.¹⁰⁷ Of those considered, 129 (22%) were denied because the application was regarding a fee dispute, 29 (5%) were denied because the application alleged malpractice and/or negligence, and 37 (6%) were denied because the application was regarding both a fee dispute and alleged malpractice.¹⁰⁸

7. Public Perceptions About and Impact on Clients of Uninsured Lawyers

Many members of the public believe that all lawyers already carry insurance, and data shows that decisions about whether to hire a lawyer would likely be impacted by whether the lawyer is insured.¹⁰⁹ Of note, on December 13, 2018, the non-partisan and objective research organization, NORC at the University of Chicago, issued a survey of California members of the public regarding legal malpractice insurance and public perceptions regarding whether lawyers should carry malpractice insurance.¹¹⁰ The survey revealed that almost one in four members of the public (23%) believe that lawyers are currently required to carry malpractice insurance, with only 10% believing they are not required to do so and 65% unsure.¹¹¹



In one survey of the public, 78% of respondents believed that legal malpractice insurance should be required in order to practice law.



Of those surveyed, 78% believed that legal malpractice insurance should be required in order to practice law.¹¹² Of those who believed that lawyers should be required to carry malpractice insurance, 86% agreed that lawyers should be required to do so even if that means that lawyers might charge higher fees to cover the cost of premiums.¹¹³

¹⁰⁶ WSBA Staff, *Client Protection Fund Statistics*, PowerPoint Presentation, at 3 (Apr. 25, 2018).

¹⁰⁷ *Id.* at 2.

¹⁰⁸ *Id.* at 2-3.

¹⁰⁹ Levin, *supra* note 15, at 1325-1327.

¹¹⁰ *State Bar of California Legal Malpractice 2018*, NORC, U. of Chicago (Dec. 18. 2018) (commissioned by the State Bar of California); see also *PLI Disclosure Survey of the Public*, St. B. Tex. (Nov. 2009), <http://www.texasbar.com/pliflashdrive/material/PublicSurvey.pdf> (a public opinion survey in Texas revealed that 52.6% of the public believes that lawyers should be required to carry malpractice insurance).

¹¹¹ *Id.* at 5.

¹¹² *Id.*

¹¹³ *Id.*

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When lawyers without insurance make mistakes that injure their clients, there is a very low likelihood that those clients will be able to file a claim and a smaller likelihood of recovery.

With respect to the impact on clients of uninsured lawyers, when lawyers without insurance make mistakes that injure their clients, there is a very low likelihood that those clients will be able to file a claim and a smaller likelihood of recovery.¹¹⁴ Plaintiffs' lawyers rarely agree to pursue professional negligence cases when the potential defendant is an uninsured lawyer,¹¹⁵ in part because even a successful lawsuit ultimately may result in the defendant filing for bankruptcy or taking other actions that make recovery difficult or impossible.¹¹⁶ Attorney malpractice cases are complicated and difficult to bring and to prove,¹¹⁷ and for malpractice plaintiff's lawyers, economic

¹¹⁴ See, e.g., *Cleveland B. Ass'n v. Smith*, 102 Ohio St. 3d 10, 2004-Ohio-1582, 806 N.E.2d 495 (2004) (six-month suspension imposed for an uninsured lawyer, who among other misconduct, failed to file her client's case before the statute of limitations had run and then negotiated a \$50,000 settlement with her client related to the error. After several bounced checks and paying only \$14,000 of the amount owed, the lawyer filed for bankruptcy. Though the bankruptcy did not discharge her debt, the lawyer's debt to her client remained unpaid as of the time of the imposition of discipline); *Parker v. Marcus*, 281 N.J. Super. 589, 685 A.2d 1326 (1995) (motion to reinstate plaintiff's dismissed complaint in a personal injury action granted where dismissal was due to plaintiff's lawyer's failure to appear at an arbitration proceeding. The Court granted the motion despite the option to sue for malpractice given that "any claim against [the plaintiff's] disbarred and uninsured attorney would undoubtedly be futile. Thus, plaintiff ... would be left without any viable remedy"). See also, Andrew Wolfson, *Malpractice Award Still Unpaid 18 Years Later*, *The Courier-Journal*, June 17, 2014, at A7 (judgment of \$390,000 plus interest still unsatisfied for client who, due to his uninsured lawyer's negligence, was convicted of murder and arson and spent two years in prison before he was later acquitted); Jay Stapleton, *Hard-to-Collect Verdict Raises New Questions; Attorneys Mixed on Need to Mandate Legal Malpractice Policies*, 39 Conn. L. Trib. No. 20, 1, May 20, 2013 (judgment in excess of \$530,000 unrecoverable against uninsured and judgment-proof lawyer who failed to name the proper party to a personal injury suit, which led to dismissal of the case).

Additionally, Task Force Member Mark Johnson, a plaintiff's malpractice lawyer, recounted a past case in which he represented a client who sued a lawyer for real estate developers for breach of contract, breach of fiduciary duty, and negligence related to a real estate investment deal. The defendant lawyer improperly drafted a deed of trust conveying significantly less of a security interest in a development property than agreed upon to the plaintiff, leaving the plaintiff's loan essentially unsecured. The venture later failed. The suit resulted in a jury verdict against the lawyer and in favor of the plaintiff investor. Mr. Johnson noted that the uninsured defendant lawyer subsequently filed for bankruptcy and the plaintiff recovered nothing. Email, Task Force Member Mark Johnson to Task Force Staff, Feb. 5, 2019, on file with the WSBA; see *Stiley v. Block*, 130 Wn.2d 486, 925 P.2d 194 (1996).

¹¹⁵ Kritzer & Vidmar, *supra* note 16, at 92, 148; See also, Bob Egelko, *Lawyers Battle Over State Malpractice Proposal*, *San Francisco Chronicle*, June 18, 2007, at A1; Apr. 25, 2018, Task Force Meeting Minutes, at 3.

¹¹⁶ See *supra* note 114 and accompanying text.

¹¹⁷ Susan Saab Fortney, *A Tort in Search of a Remedy: Prying Open the Courthouse Doors for Legal Malpractice Victims*, 85 *Fordham L. Rev.* 2033, 2034-37 (2017).

viability must be a significant factor in determining whether to take a case.¹¹⁸ When limited avenues exist for recovery, malpractice plaintiff’s lawyers must determine whether acceptance of the case makes financial sense both for the client and for the firm.¹¹⁹ Because the bulk of potential malpractice claims are relatively small in size,¹²⁰ the impact of uninsured lawyers on clients with smaller claims is exacerbated because it is already challenging to find a plaintiffs’ lawyer who will agree to handle a case involving less than \$100,000 in damages.¹²¹ The problem is heightened by the fact that some lawyers in small firm and solo practices are involved in representations involving smaller amounts of money, but those are the same practitioners who are much more likely to be “going bare” in terms of insurance. As Professors Kritzer and Vidmar point out in their study, they know of no way to estimate how much harm caused by uninsured lawyers goes uncompensated; at the same time, they observe that national statistics on claims paid out for insured solo practitioners suggest that the harm in that context amounts to tens, if not hundreds, of millions of dollars each year.¹²² They further note that clients of lawyers outside the large corporate firm context

face a greater likelihood of a lawyer making a costly error, and they face greater limitations in securing the kind of assistance needed to prosecute a claim against the negligent lawyer. This is an access-to-justice problem as well as a potential image problem for the legal profession.¹²³

Evidence of the effectiveness of required insurance is provided by Oregon’s experience. That state reports a higher rate of claims than the other jurisdictions the Task Force reviewed.¹²⁴ In their study, Professors Kritzer and Vidmar found that “[t]he much higher rate of claims per 100 insured in Oregon compared with what we found for other insurers of small to medium-sized practices clearly indicates that the absence of required insurance discourages claims.”¹²⁵ The annual frequency of claims rate in Oregon is about 12 per 100 lawyers, higher than in other states, and Canadian provinces with mandatory malpractice insurance report similar rates.¹²⁶ Required malpractice insurance appears to increase the number of claims made and claims paid. While this might be viewed as a disadvantage

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While [an increase in the number of claims made and claims paid] might be viewed as a disadvantage, it should be viewed as promoting the regulatory objective of protecting the public.
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¹¹⁸ Robert B. Gould, *Deciding to Take a Plaintiff Legal Malpractice Case*, *Law. Liability Rev.*, 2 (Apr. 1987).

¹¹⁹ *Id.*

¹²⁰ *Profile of Legal Malpractice Claims 2012-2015*, *supra* note 61, at 22; Newbold, “Open Market” *Mandatory Malpractice Model*, at 11.

¹²¹ Kritzer & Vidmar, *supra* note 16, at 147-48.

¹²² *Id.* at 43.

¹²³ *Id.* at 169-70.

¹²⁴ Levin, *Lawyers Going Bare*, at 13; Kritzer & Vidmar, *supra* note 16, at 70.

¹²⁵ Kritzer & Vidmar, *supra* note 16, at 171.

¹²⁶ *Id.* at 171 n.10.

In Oregon, licensed lawyers with offices in that state must belong to the Oregon State Bar's (OSB) Professional Liability Fund (PLF), paying a flat assessment (premium) of \$3,300 per year.

to lawyers, it should be viewed as promoting the regulatory objective of protecting the public.

8. Various Regulatory Schemes

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

a) Oregon Model, Professional Liability Fund

In Oregon, licensed lawyers with offices in that state must belong to the Oregon State Bar's (OSB) Professional Liability Fund (PLF), paying a flat assessment (premium) of \$3,300 per year. The Oregon program was established in 1977 by legislative mandate¹²⁷ to create a shared risk pool to ease the difficulty in obtaining insurance, which at the time was scarce and expensive.¹²⁸

The PLF is an independently managed subdivision of the OSB governed by a Board of Directors, which is appointed by the OSB Board of Governors.¹²⁹ Under the PLF program, all licensed Oregon lawyers engaged in private practice with a principal office in Oregon who are not otherwise exempt must participate.¹³⁰ Each participating lawyer pays the same flat-rate annual assessment of \$3,300 for coverage of \$300,000 per claim/\$300,000 aggregate, with optional excess coverage and no deductibles.¹³¹ Coverage also includes \$50,000 of expenses (principally costs of representation).¹³² The PLF is a shared risk pool, with no underwriting of the individual participants.¹³³ The program covers lawyers, and not law firms.¹³⁴ The annual assessment is reduced for new lawyers in their first three years of practice.¹³⁵ A major advantage of Oregon's PLF approach is that all lawyers are covered, so no lawyer is in the position of being unable to obtain insurance.

The PLF has high favorability ratings among the OSB membership and is seen as a resource for lawyers facing problems.¹³⁶ The PLF

¹²⁷ *About the PLF*, OSB PLF, <https://www.osbplf.org/about-plf/overview.html>; Or. Rev. Stat. § 9.080.

¹²⁸ *Statement of the Board of Governors Professional Liability Fund*, OSB, at 1 (1977).

¹²⁹ *Id.* at 3.

¹³⁰ Coverage, OSB PLF, <https://www.osbplf.org/coverage/overview.html>; Exemptions, OSB PLF, <https://www.osbplf.org/assessment-exemptions/exemptions.html>.

¹³¹ Coverage, OSB PLF; Excess Coverage, OSB PLF, <https://www.osbplf.org/excess-coverage/overview.html>; Bernick, *PLF: History, How It Works, Why It Works*, at 2.

¹³² Coverage, OSB PLF.

¹³³ Bernick, *PLF: History, How It Works, Why It Works*, at 2-3.

¹³⁴ *Id.* at 2.

¹³⁵ Bernick, *PLF: History, How It Works, Why It Works*, at 8.

¹³⁶ *Id.* at 20-21.

Actively licensed lawyers in Idaho who represent private clients must report coverage annually and provide proof of minimum coverage of \$100,000 per claim/\$300,000 aggregate.

emphasizes loss prevention through legal education, publications, and practice aids, as well as funding of the Oregon Attorney Assistance Program and a practice management advisor program.¹³⁷

b) Idaho Model, Free Market Model

Idaho's malpractice insurance mandate began in 2018, based on a free-market model.¹³⁸ The malpractice insurance requirement was proposed in Idaho without creation of a formal task force or vetting committee.¹³⁹ Rather, the Idaho State Bar's then-president proposed a rule change to implement mandatory malpractice insurance, which was submitted to the Idaho State Bar's membership for a vote in 2016.¹⁴⁰ The measure won by a slim majority of 51% to 49%.¹⁴¹ Following membership approval, the Idaho Supreme Court adopted the proposed rule with an effective date of January 1, 2018.¹⁴²

Under the new requirements, actively licensed lawyers who represent private clients must report coverage annually and provide proof of minimum coverage of \$100,000 per claim/\$300,000 aggregate.¹⁴³ Idaho lawyers may purchase insurance from any provider they wish on the free market.¹⁴⁴ The rule purposely provides for no hardship or other exemptions.¹⁴⁵

No Idaho attorneys reported an inability to obtain the required insurance.¹⁴⁶ Further, although some expressed concern about the cost, the average premium ranged between \$2,000 and \$3,000, and no premium quoted exceeded \$3,500.¹⁴⁷ However, some lawyers indicated that the requirement would affect their decision to retire from practice.¹⁴⁸

¹³⁷ *About the PLF*, OSB PLF; Bernick, *PLF: History, How It Works, Why It Works*, at 20-21.

¹³⁸ Idaho B. Comm'n R. 302(a)(5), https://isb.idaho.gov/wp-content/uploads/ibcr_sec03_licensing.pdf

¹³⁹ *Feb. 21, 2018, Task Force Meeting Minutes*, at 2.

¹⁴⁰ Annette Strauser, *2018 Malpractice Coverage Requirement – General Information*, Idaho St. B. (Aug. 29, 2017), <https://isb.idaho.gov/blog/author/astrouser/>; *Feb. 21, 2018, Task Force Meeting Minutes*, at 2. Under Idaho Bar Commission Rule 906, all changes to Idaho court rules must be submitted to a vote of the membership or the district bar associations. Idaho B. Comm'n R. 906(a).

¹⁴¹ Strauser, *2018 Malpractice Coverage Requirement – General Information*.

¹⁴² Strauser, *2018 Malpractice Coverage Requirement – General Information*; Idaho B. Comm'n R. 302(a)(5).

¹⁴³ Idaho B. Comm'n R. 302(a)(5).

¹⁴⁴ Strauser, *2018 Malpractice Coverage Requirement – General Information*.

¹⁴⁵ *Feb. 21, 2018, Task Force Meeting Minutes*, at 3.

¹⁴⁶ *Feb. 21, 2018, Task Force Meeting Minutes*, at 3; Interview Notes with Diane Minnich, Dec. 11, 2018, on file with WSBA.

¹⁴⁷ *Feb. 21, 2018, Task Force Minutes*, at 3; Interview Notes with Diane Minnich, Dec. 11, 2018, on file with WSBA.

¹⁴⁸ *Feb. 21, 2018, Task Force Minutes* at 3.

c) Illinois' Proactive Management-Based Regulation

In 2017, Illinois became the first state to adopt proactive management-based regulation (PMBR).¹⁴⁹ PMBR is an approach to lawyer regulation that focuses on programs intended to promote the ethical practice of law and hopefully reduce the incidence of grievances and malpractice claims.¹⁵⁰

Prior to adoption of PMBR in Illinois, Illinois studied PMBR models in other jurisdictions including New South Wales, Australia, and Nova Scotia, Canada.¹⁵¹ PMBR models typically include the following features:

1. Measures to complement traditional reactive disciplinary processes, usually through the use of self-assessment tools;
2. Education of lawyer/firm management to develop and employ an ethical infrastructure to prevent misconduct and unsatisfactory performance; and
3. Information sharing and collaboration among the lawyer regulator and lawyer/firm.¹⁵²

Prior to adoption, Illinois investigated whether there was a need to implement PMBR in the state. The research revealed that 41% of solo practitioners in Illinois were uninsured and another 77% had no succession plan, statistics that alarmed regulators and practitioners alike.¹⁵³

With the adoption of PMBR, beginning in 2018, every two years, Illinois lawyers in private practice who do not have malpractice insurance must complete a four-hour self-assessment online, evaluating their law firm management and business practices.¹⁵⁴ The self-assessment is administered by the Attorney Registration and Disciplinary Commission (ARDC), the Illinois Supreme Court agency that regulates Illinois lawyers.¹⁵⁵ Uninsured lawyers who fail to complete the self-assessment cannot register in the following year to renew their license and may be administratively suspended.¹⁵⁶

Every two years, Illinois lawyers in private practice who do not have malpractice insurance must complete a four-hour self-assessment online.

¹⁴⁹ Ill. Sup. Ct. R. 756, http://www.illinoiscourts.gov/SupremeCourt/Rules/Art_VII/artVII.htm#Rule756; Press Release, Sup. Ct. of Ill., *Illinois Becomes First State to Adopt Proactive Management Based Regulation* (Jan. 25, 2017), <http://www.illinoiscourts.gov/Media/PressRel/2017/012417.pdf>.

¹⁵⁰ Press Release, Sup. Ct. of Ill., *supra* note 149.

¹⁵¹ Jerry Larkin, Attorney Register and Disciplinary Commission (ARDC) Administrator, *PMBR – The Illinois Experience*, PowerPoint Presentation, at 10 (Mar. 28, 2018); *Mar. 28, 2018, Task Force Meeting Minutes*, at 3.

¹⁵² Larkin, *PMBR – The Illinois Experience*, at 9.

¹⁵³ Larkin, *PMBR – The Illinois Experience*, at 19-20; *Mar. 28, 2018, Task Force Meeting Minutes*, at 3.

¹⁵⁴ *PMBR Self-Assessment Course FAQs*, ARDC, https://registration.iardc.org/attyreg/Registration/regdept/Rule_756e2_Self-Assessment_FAQ_s.aspx.

¹⁵⁵ Press Release, Sup. Ct. of Ill, *supra* note 149.

¹⁵⁶ *PMBR Self-Assessment Course FAQs*, ARDC.

South Dakota requires [non-covered] lawyers to disclose the lack of insurance at the formation of the attorney-client relationship.

A vast majority of common law countries outside the U.S. (as well as civil law countries) require some form of malpractice insurance for lawyers in private practice.

The self-assessment is confidential, and also provides free CLE credit.¹⁵⁷ The self-assessment covers the following topics: technology; conflicts; fees and billing; client relations; trust accounting; wellness; civility and professionalism; and diversity and inclusion.¹⁵⁸ Of those lawyers who have completed the self-assessment, a large majority have responded positively to the program.¹⁵⁹

d) South Dakota's Direct Disclosure Model

Of the 25 states that require lawyers to make disclosures regarding whether they carry malpractice insurance, at least seven require the disclosure be made directly to clients.¹⁶⁰ Among the most stringent of those seven states is South Dakota, which adopted its rule in 1999.¹⁶¹ For lawyers who do not carry a minimum of \$100,000 in insurance, South Dakota requires the lawyers to disclose the lack of insurance at the formation of the attorney-client relationship.¹⁶² The Rule further requires the lawyer to disclose the information in every written communication with the client on firm letterhead and in all advertising.¹⁶³ Some anecdotal evidence suggests that the purchase of insurance increased around the time of the implementation of the disclosure rule in South Dakota.¹⁶⁴ Currently, in South Dakota, approximately 6% of lawyers in private practice are uninsured, with 8.4% of small firm and solo lawyers in private practice uninsured.¹⁶⁵

e) International Regulatory Schemes

The vast majority of common law countries outside the U.S. (as well as civil law countries) require some form of malpractice insurance for lawyers in private practice.¹⁶⁶ All Australian states, all Canadian provinces and territories, the great majority of countries in the European Union, and several Asian countries require insurance of

¹⁵⁷ *Id.*

¹⁵⁸ *PMBR Modules*, ARDC, <https://www.iardc.org/pmbr.html>.

¹⁵⁹ Matthew Hector, *ARDC Reports Positive Early Reaction to Lawyer Self-Assessment*, 106 Ill. Bar J. N. 10 (Apr. 2018).

¹⁶⁰ Levin, *supra* note 15, at 1297-99; *State Implementation of ABA Model Court Rule on Insurance Disclosure*, ABA Standing Comm. on Client Protection.

¹⁶¹ Susan Saab Fortney, *Law as a Profession: Examining the Role of Accountability*, 40 Fordham Urb. L.J. 177, 194 (2012), <https://ir.lawnet.fordham.edu/ulj/vol40/iss1/4>.

¹⁶² S.D. R. of Prof. Conduct 1.4(c), https://sdlegislature.gov/Statutes/Codified_Laws/DisplayStatute.aspx?Type=Statute&Statute=16-18-A.

¹⁶³ S.D. R. of Prof. Conduct 1.4(c), 1.4(d), 7.2(l), https://sdlegislature.gov/Statutes/Codified_Laws/DisplayStatute.aspx?Type=Statute&Statute=16-18-A.

¹⁶⁴ Levin, *Lawyers Going Bare*, at 12.

¹⁶⁵ Kritzer & Vidmar, *supra* note 16, at 41.

¹⁶⁶ *Id.* at 38.

their practitioners.¹⁶⁷ The minimum coverage requirements in most Australian states is either AUS\$1.5 million or AUS\$2 million (US\$1.11 million or US\$1.48 million); in British Columbia, the required minimum is CDN\$1 million (US\$760,000); in Singapore, the requirement is S\$1 million (US\$730,000); and for solicitors in England and Wales, the minimum is £2 million (US\$2,628,000).¹⁶⁸

9. Other Recent State Efforts to Explore Mandatory Malpractice Insurance

a) California

At the direction of the state legislature in 2017, the State Bar of California has appointed a Malpractice Insurance Working Group to conduct a review and study of errors and omissions insurance for lawyers licensed in California.¹⁶⁹ The Working Group is considering enhanced disclosure requirements, mandating insurance as a condition of licensure, developing a PMBR program, and promoting voluntary insurance.¹⁷⁰ The Working Group actively sought public comment from both the public and attorneys who provide reduced cost services.¹⁷¹ The period for public comment closed on November 5, 2018.¹⁷²

On January 14, 2019, the Working Group voted against recommending mandatory malpractice insurance.¹⁷³ The Working Group must report its findings to the State Supreme Court, Legislature, and Bar's Board of Trustees by March 31, 2019.¹⁷⁴

¹⁶⁷ *Professional Indemnity Insurance Requirements Around the World*, 9 LAWPRO Magazine "File Retention," no. 4, (Dec. 2010), <https://www.practicepro.ca/wp-content/uploads/2017/06/2010-12-professional-indemnity-around-world.pdf>.

¹⁶⁸ *Id.*

¹⁶⁹ *Malpractice Insurance Working Group Charter*, the St. B. of Cal., <http://www.calbar.ca.gov/Portals/0/documents/cc/Malpractice-Insurance-Working-Group-Charter.pdf>.

¹⁷⁰ *The State Bar Seeks Public Comment on Options Under Consideration in Its Statutorily Mandated Malpractice Insurance Study*, the St. B. of Cal., (Nov. 5, 2018), <http://www.calbar.ca.gov/About-Us/Our-Mission/Protecting-the-Public/Public-Comment/Public-Comment-Archives/2018-Public-Comment/Legal-Malpractice-Insurance> [hereinafter *The State Bar Seeks Public Comment*].

¹⁷¹ *Open Session Agenda: Item 702 September 2018*, Malpractice Insurance Working Group, at 2 (Sept. 14, 2018), <http://www.calbar.ca.gov/Portals/0/documents/702-Malpractice-Insurance-Working-Group.pdf>.

¹⁷² *The State Bar Seeks Public Comment*, the St. B. of Cal.

¹⁷³ Email, Linda Katz, Principle Program Analyst, the St. B. of Cal., to Task Force Staff, Jan. 30, 2019, on file with WSBA.

¹⁷⁴ *Malpractice Insurance Working Group Charter*, the St. B. of Cal.

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b) Georgia

In late 2018, the State Bar of Georgia convened a Professional Liability Insurance Committee to study and make recommendations concerning lawyer malpractice insurance coverage.¹⁷⁵ The Committee has met three times since December 13, 2018, and currently is considering two alternative proposed rules: One of the proposed rules would impose a mandatory malpractice insurance requirement and the other would impose an insurance disclosure requirement to the state bar.¹⁷⁶ The Committee intends to submit a proposed rule to the State Bar of Georgia's Board of Governors at its March 2019 meeting.¹⁷⁷

c) Nevada

During 2017 to 2018, a Task Force of the State Bar of Nevada investigated whether to institute a mandatory malpractice insurance program in Nevada.¹⁷⁸ As in Washington, Nevada lawyers must report their insurance coverage status annually.¹⁷⁹ As part of its process, Nevada investigated both the Idaho and Oregon models, reviewed the Illinois PBMR model, and looked at forming its own captive insurance company.¹⁸⁰ It further conducted a public focus group, which revealed that the public is generally uninformed about malpractice insurance requirements, or the lack thereof, among lawyers.¹⁸¹

On June 29, 2018, the State Bar of Nevada submitted a petition to the Supreme Court of Nevada seeking adoption of a free-market malpractice insurance requirement.¹⁸² The proposed rule amendment would have required every lawyer engaged in private practice to attest to having malpractice insurance coverage at a minimum limit of \$250,000 per occurrence/\$250,000 annual aggregate.¹⁸³

¹⁷⁵ *Executive Committee Minutes November 7, 2018*, St. B. of Ga.; https://www.gabar.org/committeesprogramssections/executivecommittee/upload/EC_1118a.pdf; *Committees*, State Bar of Georgia, <https://www.gabar.org/committeesprogramssections/committees/>.

¹⁷⁶ Professional Liability Insurance Committee, *January 7, 2019, Minutes*, St. B. of Ga.

¹⁷⁷ *Id.*

¹⁷⁸ Robert Horne & Jennifer Smith, *Join the Discussion: Whether Malpractice Insurance Should Be Mandatory for Nevada Attorneys*, 25 Nev. Law. 28, at 28 (Dec. 2017), https://www.nvbar.org/wp-content/uploads/NevadaLawyer_Dec2017_Malpractice-Insurance-Discussion2.pdf.

¹⁷⁹ Nev. Sup. Ct. R. 79, <https://www.leg.state.nv.us/CourtRules/SCR.html>.

¹⁸⁰ Horne & Smith, *Join the Discussion: Whether Malpractice Insurance Should Be Mandatory for Nevada Attorneys*, at 28-29.

¹⁸¹ *Mar. 28, 2018, Task Force Meeting Minutes*, at 4.

¹⁸² ADKT 534, *supra* note 24, at 1.

¹⁸³ *Id.* at 15

On October 11, 2018, the Nevada Supreme Court declined to adopt the proposal on grounds that the State Bar's petition had provided inadequate detail and support.¹⁸⁴

d) New Jersey

In February 2014, the New Jersey Supreme Court formed an Ad Hoc Committee on Attorney Malpractice.¹⁸⁵ The Committee was charged with investigating whether to implement an insurance disclosure rule in accordance with the ABA Model Rule on Insurance Disclosure, as well as whether to implement mandatory malpractice insurance.¹⁸⁶ After three years of study, in June 2017, the Committee issued its report recommending against mandatory malpractice insurance but proposing a court rule requiring lawyers to disclose whether they carry malpractice insurance to the Court and to clients.¹⁸⁷ In a letter dated January 15, 2018, in response to a request for comment on the Committee's Report, the New Jersey State Bar Association agreed with the Committee's recommendation not to impose mandatory malpractice insurance, but opposed its recommendation to mandate direct disclosure.¹⁸⁸ As of February 5, 2019, the recommendation of the Ad Hoc Committee was still pending before the New Jersey Supreme Court, which had yet to take action on the recommendation.¹⁸⁹

10. Insurance Costs and Availability

As noted above, malpractice insurance premiums vary significantly based on many factors, including years in practice, area of practice, size and practice mix of a firm, lawyer history with malpractice claims and disciplinary actions, state characteristics, and whether lawyers are practicing full-time or part-time, among other factors.¹⁹⁰

Average premium numbers can vary broadly based on the firm's principal area(s) of practice.¹⁹¹ According to the *ABA Profile*, the

¹⁸⁴ Order Denying Petition for Amendment to Supreme Court Rule 79, ADKT 534 (Oct. 11, 2018), https://nvcourts.gov/Supreme/Decisions/Administrative_Orders/.

¹⁸⁵ N.J. Sup. Ct. Ad Hoc Comm. on Malpractice Ins., *Report of the Supreme Court Ad Hoc Committee on Attorney Malpractice Insurance*, June 2017, at 3, <https://www.njcourts.gov/courts/assets/supreme/reports/2017/atmalpracticeinsurance.pdf>.

¹⁸⁶ *Id.* at 5

¹⁸⁷ *Id.* at 7-9.

¹⁸⁸ Letter from Robert B. Hille, President of the New Jersey State Bar Association to Hon. Glenn A. Grant, Acting Administrative Director of the New Jersey Court, dated Jan. 15, 2018, <https://tcms.njsba.com/personifyebusiness/Portals/0/NJSBA-PDF/Reports%20&%20Comments/malpractice%20insurance%20--%202018.pdf>.

¹⁸⁹ Interview Notes with Carol Johnston, Court Executive for the State of New Jersey, Feb. 5, 2019, on file with WSBA.

¹⁹⁰ Graf, *Mandatory Malpractice Insurance – Task Force*, at 10; Weisenberger, *Mandatory Malpractice Insurance Task Force*, at 4.

¹⁹¹ Newbold, "Open Market" *Mandatory Malpractice Model*, at 9.

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practice areas of personal injury (plaintiff), real estate, family law, estate planning, collection/bankruptcy, criminal law, and certain business/corporate law practices have the highest incidences of malpractice claims.¹⁹² Not surprisingly, insurance premiums tend to be higher in many of those practice areas.¹⁹³

Basic malpractice policies with modest coverage levels are available to most practitioners at reasonable cost, including those practicing solo or in small firms.¹⁹⁴ Based on ALPS-specific data, the average premium of Washington lawyers based on current market trends is \$2,500.¹⁹⁵ However, the average premium amount reflects all insured practitioners, some of whom may carry coverage amounts of \$1,000,000 or more.¹⁹⁶ According to ALPS, in Idaho, which launched its mandatory malpractice requirement in 2018, the average premium for ALPS' Basic policy issued to solo practitioners (the primary demographic of uninsured lawyers) without prior acts coverage was approximately \$1,200 for the mandated limit of liability of \$100,000 per occurrence/\$300,000 aggregate.¹⁹⁷ ALPS' average premium per Idaho solo practitioner was \$2,200, an average that included lawyers who had reached "full maturity" and purchased a variety of different limits of liability.¹⁹⁸ According to Diane Minnich, Executive Director of the Idaho State Bar, reported insurance premiums averaged between \$2,000 and \$3,000.¹⁹⁹ From the information available, it does not appear that insurance rates have gone up in Idaho as a result of the malpractice insurance mandate, though Idaho has had only one reporting cycle since the rule's implementation,²⁰⁰ so trends may become more apparent with time. However, consistent with how the market operates, premiums will go up in the next several reporting cycles, especially for first-time insurance purchasers and new lawyers.²⁰¹

¹⁹² *Profile of Legal Malpractice Claims 2012-2015*, *supra* note 61, at 12.

¹⁹³ See Newbold, "Open Market" Mandatory Malpractice Model, at 9.

¹⁹⁴ Newbold, "Open Market" Mandatory Malpractice Model, at 6-7, 9.

¹⁹⁵ Newbold, "Open Market" Mandatory Malpractice Model, at 6.

¹⁹⁶ *June 27, 2018, Task Force Meeting Minutes*, at 2, [https://www.wsba.org/docs/default-source/legal-community/committees/mandatory-malpractice-insurance-task-force/june-27-2018-minutes\(00435102\)7c7a63f2f6d9654cb471ff1f00003f4f.pdf?sfvrsn=7fa306f1_2](https://www.wsba.org/docs/default-source/legal-community/committees/mandatory-malpractice-insurance-task-force/june-27-2018-minutes(00435102)7c7a63f2f6d9654cb471ff1f00003f4f.pdf?sfvrsn=7fa306f1_2).

¹⁹⁷ Email, Newbold to Task Force Member Startzel, Dec. 14, 2018, on file with WSBA.

¹⁹⁸ *Id.*

¹⁹⁹ Interview Notes with Diane Minnich, Dec. 11, 2018, on file with WSBA.

²⁰⁰ Interview Notes with Diane Minnich, Dec. 11, 2018, on file with WSBA; *Nov. 28, 2018, Task Force Meeting Minutes*, https://www.wsba.org/docs/default-source/legal-community/committees/mandatory-malpractice-insurance-task-force/november-28-2018-mmi-task-force-meeting-minutes.pdf?sfvrsn=4aee03f1_0.

²⁰¹ Interview Notes with Diane Minnich, Dec. 11, 2018, on file with WSBA.

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New attorneys can expect their premiums to increase gradually by an average of 15% year-over-year for the first five years after they start practice, and then those premiums level off.

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New lawyers pay noticeably lower malpractice insurance premiums than more experienced lawyers.²⁰² This is because virtually all malpractice insurance policies are written on a “claims made” basis, meaning that if a claim is filed against an insured lawyer today for an event that occurred two years ago, that lawyer’s current insurer covers the claim, whether or not that insurer provided a policy when the claimed event occurred.²⁰³ Insurers set premiums to provide resources to pay claims on incidents that happened in the past.²⁰⁴ A first-year lawyer was not practicing in the past, and thus represents a lower risk to insurers.²⁰⁵ New attorneys can expect their premiums to increase gradually by an average of 15% year-over-year for the first five years after they start practice, and then those premiums level off.²⁰⁶ A previously uninsured lawyer obtaining insurance for the first time will be in the same premium position as the new lawyer because, on claims made policies, insurers provide coverage beginning from the start date of the policy and exclude prior acts.²⁰⁷ The start date is the retroactive date for the life of the policy, which means that as with new lawyers, the more years a lawyer maintains a policy, the more the premium will increase until the end of the maturity process.²⁰⁸

Some malpractice insurance policies include a free extended reporting period for claims, or “tail” coverage for attorneys who have been with a specific insurance provider for a period of consecutive years (usually five) and retire.²⁰⁹ Tail coverage can be expensive (an unlimited tail can be 300% of the expiring premium) for retiring lawyers who do not qualify for a free extended reporting period endorsement or who do not have a relatively long history with a particular carrier.²¹⁰

²⁰² Newbold, “Open Market” Mandatory Malpractice Model at 7-8.

²⁰³ Keith Fichtner, *Ask an Expert: Why Legal Malpractice Insurance Costs Go Up Every Year*, ALPS Blog (Oct. 24, 2017), <https://blog.alpsnet.com/ask-an-expert-why-legal-malpractice-insurance-rates-go-up-every-year>

²⁰⁴ *Id.*

²⁰⁵ Newbold, “Open Market” Mandatory Malpractice Model at 7.

²⁰⁶ *Id.* at 8.

²⁰⁷ Fichtner, *Ask an Expert: Why Legal Malpractice Insurance Costs Go Up Every Year*.

²⁰⁸ *Id.*

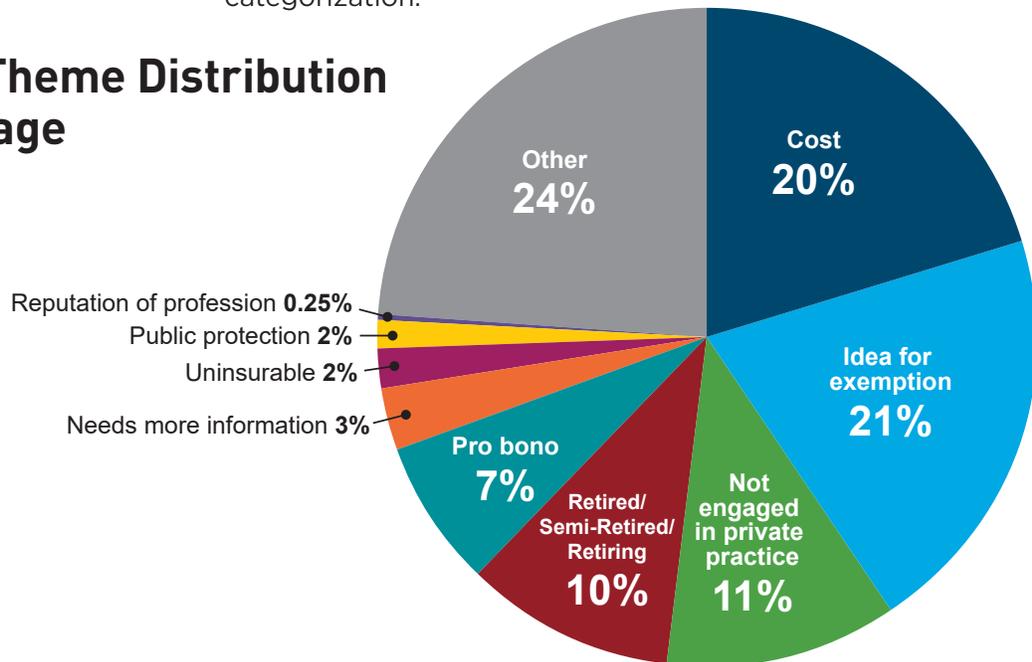
²⁰⁹ Bassingthwaight, *The Ins and Outs of “Tail” Coverage*; Apr. 25, 2018, *Task Force Meeting Minutes*, at 2.

²¹⁰ Bassingthwaight, *The Ins and Outs of “Tail” Coverage*; Apr. 25, 2018, *Task Force Meeting Minutes*, at 2.

C. WSBA MEMBER CONCERNS AND TASK FORCE RESPONSES

During a comment period ending December 1, 2018, the Task Force received over 580 written comments from WSBA members raising a variety of different concerns and/or criticisms of a mandatory malpractice insurance requirement.²¹¹ At the request of the Task Force, staff categorized all of the comments received along common themes and prepared a snapshot summarizing the results of that sorting.²¹² The chart below represents the results of that theme categorization.

Comment Theme Distribution by Percentage



The Task Force concluded that it would be helpful to address many of those general concerns directly, providing additional background on why it decided to make a particular recommendation or chose not to follow a suggested approach.

²¹¹ The Task Force accepted and compiled member comments from its inception in January 2018 through its publicized comment deadline of December 1, 2018. The work of the Task Force and its solicitation of member comment was publicized throughout 2018 by means of informational articles and progress reports appearing in *NWLawyer*, *Take Note*, and through other forms of direct communication with members, such as email communications.

²¹² WSBA Staff, *MMI Task Force Comments Snapshot - Final* (January 2019), https://www.wsba.org/docs/default-source/legal-community/committees/mandatory-malpractice-insurance-task-force/mmi-task-force-comments-snapshot.pdf?sfvrsn=17fe03f1_2 (the Snapshot represented a best effort to categorize comments received, given that the substance of many of the comments was unclear or was subject to interpretation). The full set of comments has been made available to the Board of Governors for its review and is publicly available on the WSBA website at <https://www.wsba.org/Legal-Community/Committees-Boards-and-Other-Groups/mandatory-malpractice-insurance-task-force>.

1. Cost of Malpractice Insurance

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

The Task Force has received input from a variety of industry professionals as to the reasons for a wide range in the cost of malpractice insurance. Premiums are based on a variety of factors, including but not limited to: the nature of the lawyer’s practice; whether the lawyer is working full-time or part-time; years in practice; the practice mix of the firm; an individual lawyer’s history with malpractice claims; and disciplinary history. The Task Force, as a group, is sensitive to the economic impact the cost of malpractice insurance may have on an individual lawyer’s business. The Task Force nevertheless concludes that the professional obligation to protect client interests supersedes the potential financial impact on an individual lawyer’s business. That is, the Task Force members uniformly agreed that, from a client protection standpoint, the client’s interests are paramount.

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**From a client
protection standpoint,
the client’s interests
are paramount.**
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The Task Force also received information regarding Idaho’s experience with mandatory malpractice coverage. Idaho instituted mandatory coverage of \$100K per occurrence/\$300K aggregate beginning in 2018. From the information available, insurance rates in Idaho do not appear to have risen for the lawyer population as a whole as a result of the mandate; however, given the program’s infancy, more information may be available in the future. The average premium for an ALPS Basic policy for \$100K per occurrence/\$300K aggregate issued to a solo practitioner without prior acts coverage was approximately \$1,200. That amount is expected to increase annually by about 15% as the lawyer’s length of exposure grows, until the lawyer’s premium level matures after six years. All things remaining equal, it is likely that the \$1,200 average for an ALPS Basic policy in Idaho will grow after six years to close to \$2,400 per year.

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

Firm A: Solo practitioner located in Seattle. Purchasing a Retroactive Date (Retro Date)²¹³ Inception policy on the Basic form (no First

²¹³ A ‘retroactive date’ is generally the date from which a law firm holds uninterrupted malpractice insurance coverage. The purpose of the retro date is to exclude claims arising from any work undertaken prior to the date shown on the declaration page of the lawyer’s insurance policy. Email, Newbold to Task Force Member Startzel, Dec. 14, 2018, on file with WSBA. The retroactive date is thus the inception date of the policy. Email, Newbold to Task Force Staff, Jan. 23, 2019, on file with the WSBA.

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Dollar Defense (FDD))²¹⁴ with a \$5,000 deductible. All work focused in corporate and business transactions. No claims, bar complaints, or disciplinary history. Firm established date is 1/28/10, operating uninsured.

Premium: \$1,018
Fully matured: \$2,418

Firm B: Solo practitioner located in Kennewick. Purchasing a Retro Date Inception policy on the Basic form (no FDD) with a \$10,000 deductible. Majority government work with small estates exposure. No claims, bar complaints, or disciplinary history. Firm established date is 5/1/09, operating uninsured.

Premium: \$1,082
Fully matured: \$1,250

Firm C: Two-attorney firm located in Spokane. Purchasing a Retro Date Inception policy on the Basic form (no FDD) with a \$5,000 deductible. Generalist firm with areas of practice including defense, personal injury, corporate, estate, and real estate work. No claims, bar complaints, or disciplinary history. Firm established date is 1/1/1961, operating uninsured.

Premium: \$3,117 (or \$1,500 per lawyer)
Fully matured: \$6,235

If the Task Force recommendation for a minimum \$250K per occurrence/\$500K aggregate policy is adopted in Washington, the average premiums will be higher than the 2018 experience in Idaho, as the above illustrations demonstrate. The Task Force cannot guarantee specific premium levels, and there will be variations based upon different factors. The Task Force nevertheless concludes that uninsured lawyers will generally be able to obtain coverage for a reasonable premium on the insurance market in Washington.

2. Insurance Requirements for Retired and Semi-retired Lawyers

The second largest number of comments received from WSBA members—10% of all comments—were from licensed lawyers who noted they were either retired, semi-retired, or planning to retire, and as such should not be required to maintain malpractice insurance.

Fully retired lawyers are not engaged in the “private practice of law,” and therefore, by operation of the proposed rule, would *not* be required to obtain a malpractice insurance policy. Fully retired lawyers would simply need to certify that status, and the insurance requirement would not apply. Apparently, a number of retired

²¹⁴ “First Dollar Defense” is a coverage option offered to certain law firms based upon eligibility that states [that] when a firm is faced with a claim, the deductible will apply to damages only[,]” meaning the insurer pays the ‘first dollar’ to defend the claim. Email, Newbold to Task Force Member Startzel, Dec. 14, 2018, on file with WSBA.

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Part-time, semi-retired lawyers should carry a minimum level of insurance so long as they are engaged in private practice.
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lawyers maintain their licenses either because they believe that they might want to re-enter practice, or because they intend to continue to be licensed until they have reached the fifty-year mark. On the other hand, lawyers who are “retired” but who still practice on a part-time basis are as capable of making mistakes as any other experienced lawyers. The Task Force concludes that in the interest of client protection, those lawyers should carry a minimum level of insurance so long as they are engaged in private practice. It should be noted that malpractice policy premiums for part-time lawyers frequently will be lower than for full-time practitioners because the lower levels of work translate into lower risks of error.

3. Anticipated Adverse Impact on Pro Bono Services

The Task Force received a number of comments from members who are retired and/or semi-retired but continue to provide legal work only on a pro bono basis and/or a low-cost basis. Members were concerned that a mandatory insurance requirement might be cost prohibitive and force some of those members to discontinue providing pro bono and/or low-cost services. The Task Force is extremely sensitive to this concern. Washington does not have a mandatory pro bono requirement, but the Task Force recognizes that RPC 6.1 strongly encourages lawyers to provide “legal services to those unable to pay.” The Task Force does not want to recommend a requirement that might undermine the aspirational recommendation of RPC 6.1 or materially interfere with a lawyer’s purpose to provide legal services to the underserved.

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Emeritus pro bono status is available for those who are retired from the practice of law but wish to provide volunteer legal services through a QLSP.
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The Task Force has determined that many lawyers who desire to provide pro bono services (and are not otherwise engaged in private practice) can become affiliated with Bar-approved QLSPs or VLPs and thereby be covered by a malpractice insurance policy. Emeritus pro bono status is available for licensed legal professionals who are otherwise retired from the practice of law but wish to provide volunteer legal services through a QLSP. See APR 3(g). Further, some pro bono practitioners may choose to carry their own insurance. The Task Force recognizes there could be gaps in pro bono services provided in certain Washington State communities. While the overall impact of a malpractice insurance requirement on pro bono service might not be large, the WSBA should take positive action to reduce the possibility of a material effect on the number of lawyers willing to volunteer to perform pro bono services. The primary goal of a mandatory malpractice requirement is to protect the public, and that need for protection applies with equal force to legal services provided to the disadvantaged.

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4. Concerns about Uninsurability Due to Legal Specialty

Several members raised a concern that they had been historically unable to obtain malpractice insurance coverage due to the unique nature of their practice, such as transactional securities. The Task Force has not been provided with documentary evidence supporting the assertion that any Washington State lawyer has been unable to obtain malpractice insurance due to a unique specialty.

Indeed, the Task Force has been provided information to the contrary. The Idaho State Bar instituted a mandatory malpractice insurance requirement of coverages at a minimum of \$100,000 per occurrence with a \$300,000 annual aggregate, effective January 2018. Diane Minnich, Executive Director of the Idaho State Bar, gave a presentation to the Task Force regarding Idaho's experience with instituting mandatory malpractice insurance coverage. Ms. Minnich was the contact point for all Idaho lawyers that had concerns or questions about the requirement and the availability of insurance. Ms. Minnich confirmed that *no Idaho lawyer*, regardless of specialty, has reported being unable to obtain malpractice insurance coverage based upon the new requirement. Further, in Washington, limited license legal technicians have not reported problems obtaining insurance.

The Task Force received presentations, as noted above, from insurance industry professionals and recognizes that premiums may vary based on a variety of factors. The Task Force understands that lawyers practicing in unique specialties, such as entertainment law, patent law, or transactional law, may be required to obtain coverage through a secondary market. The premium costs in the secondary market may be higher because these insurers view the unique practices as posing a higher risk. However, if a malpractice event occurs involving a lawyer in a unique field, the potential damage to the client could be substantial. The Task Force therefore believes that there is at least equal responsibility for lawyers that practice in specialized fields to obtain malpractice insurance coverage.

5. "Moral Hazard"

A few WSBA members raised a concern that mandatory malpractice insurance will give rise to a "moral hazard" situation. Economists have developed the "moral hazard" theory, which suggests that an individual will be more likely to engage in risky behavior if that person knows that he or she is protected against adverse consequences because another party (e.g., an insurer) will incur the costs.²¹⁵ Applying the moral hazard analysis to legal malpractice, the argument is that some lawyers will provide either risky or

²¹⁵ See, e.g., Shaila Dewan, *Moral Hazard: A Tempest-Tossed Idea*, N.Y. Times, Feb. 25, 2012, at BU1, <https://www.nytimes.com/2012/02/26/business/moral-hazard-as-the-flip-side-of-self-reliance.html>.

incompetent legal services because they know that any adverse consequences will be covered by a malpractice policy. The Task Force rejects this argument. The Task Force simply does not believe that lawyers will abdicate professional responsibilities owed to clients because there is a safety net of malpractice coverage. Insurance is unlikely to encourage attorneys to shirk their obligations under RPC 1.1 to represent the client with “legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”

6. Insurance and Increasing Claims against Lawyers

Several comments from WSBA members argued that a drawback of mandatory insurance is that if all lawyers were covered by malpractice insurance, the number of malpractice claims and associated lawsuits against lawyers would increase. The Task Force agrees that this will likely occur. But that is the point. If more clients who have been injured have potential access to the courts and to a remedy, then the insurance mandate is doing precisely what it is supposed to do: provide access to justice.

7. Adverse Impact on Public Attitude towards Lawyers

The Task Force received a small number of comments to the effect that the public might think less highly of lawyers if it is known that lawyers need insurance because they make mistakes. But the Task Force received information that suggests the contrary. In fact, members of the public widely believe that all lawyers already carry insurance and are surprised when they learn that malpractice insurance is not already mandatory.²¹⁶ Further, the Task Force believes that to the extent there are existing negative public attitudes about lawyers, these will not be materially affected one way or the other by an insurance mandate.

8. Mandatory Insurance Not in Lawyers’ Best Interests

Several impassioned comments were received from lawyers who stated that as an association of lawyers, the WSBA should focus on what is in the best interests of lawyers rather than the interests of the public at large. The Task Force does not agree with this viewpoint. See, e.g., GR 12.1 (“Legal services must be regulated in the public interest.”).

²¹⁶ Levin, *supra* note 15, at 1325-1327.

D. POTENTIAL APPROACHES CONSIDERED BY THE TASK FORCE

After compiling a considerable amount of data and other information summarized above, and after hearing from researchers, Bar staff, regulators from other states, insurance industry professionals, and Washington lawyers, the Task Force has concluded that the existing disclosure requirement is insufficient to adequately protect most consumers of legal services. **Uninsured lawyers pose, and continue to pose, a distinct risk to their clients.**

While it may be appropriate for lawyers to evaluate and assume personal risks created by lack of malpractice insurance, the Task Force concluded that it is simply not fair to the clients. Clients of uninsured lawyers often have a difficult time obtaining compensation from those lawyers after a malpractice event. Clients of uninsured lawyers have an especially difficult time finding legal representation for legitimate claims against uninsured lawyers because malpractice plaintiffs' lawyers routinely decline to handle those claims. The Washington Supreme Court's Client Protection Fund cannot and does not make payments based on malpractice; if it did, and if it were fully funded through license fees or assessments, Washington would have the equivalent of Oregon's Professional Liability Fund.

In the Task Force's view, there is a distinct problem that directly affects the public interest, and a solution is needed. The Washington Supreme Court as the supervisory authority over the practice of law in this state, regulates the profession to protect the public and maintain the integrity of the legal profession, and it does so by adopting rules for the regulation of the practice of law. GR 12. **Lawyers make mistakes. A license to practice law is a privilege, and no lawyer should be immune from his or her responsibility to clients injured because of those mistakes.**

The Task Force considered a number of possible approaches to more effectively address the risk to clients posed by uninsured Washington lawyers. These approaches are summarized below, followed by a more detailed discussion of the approaches considered and the considerations, pro and con, relevant to each potential solution for dealing with the problem identified. The Report concludes by recommending consideration of a rule to implement a system of malpractice insurance for lawyers as a condition of licensing.

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Lawyers make mistakes. A license to practice law is a privilege, and no lawyer should be immune from his or her responsibility to clients injured because of those mistakes.
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SUMMARY CHART OF POSSIBLE SOLUTIONS

1. Do nothing and maintain the status quo.

- No resource cost or fiscal impact on WSBA
- Does not address the identified problems for clients in any way

2. Implement a Proactive Management-Based Regulation model

(e.g., Illinois “PMBR” model, which increases training requirements for uninsured lawyers, particularly in practice management and bookkeeping).

- Directly addresses issues of competence/practice management but not financial responsibility for professional errors
- Practical effect of PMBR model in Illinois not yet known
- May reduce lawyer errors, but does not provide protection to clients when claims do arise
- May encourage acquisition of insurance, but insufficient evidence at this time

3. Implement more extensive malpractice insurance disclosure requirements

(e.g., South Dakota model, which requires direct disclosure of a lawyer’s lack of malpractice insurance to clients and prospective clients).

- Low cost to administer
- Impact on conduct appears significant in South Dakota, although the potential impact in Washington is unknown
- Appears to encourage acquisition of insurance
- Does not address financial responsibility when professional errors occur
- Noncompliance puts lawyers at risk of permanent record of professional discipline

4. Combine PMBR with more extensive disclosure requirements

(Combine 2 and 3 above, i.e., require uninsured lawyers to both undergo self-assessment and education on risk reduction, practice management, and bookkeeping and directly disclose lack of insurance).

- Double requirement of extra mandatory training courses and vivid disclosure to clients of lack of insurance might cause many uninsured attorneys to purchase coverage
- Does not address financial responsibility when professional errors occur

SUMMARY CHART OF POSSIBLE SOLUTIONS (continued)

5. Implement mandatory malpractice insurance through a free market model (e.g., Idaho model).

- Provides diverse coverage options to members
- Free market allocates risks and costs based on practice character, claims history, and other underwriting standards
- Highly competitive market provides reasonable cost and options for coverage, exclusions, and deductibles (Idaho reports no lawyers unable to obtain insurance)
- Modest operating costs
- Guarantees available coverage for vast majority of client claims
- Adverse reaction by members who feel “forced” to purchase insurance that they don’t want

6. Implement professional liability fund model (e.g., Oregon model, requiring all private practice lawyers with a primary office in Oregon to participate in the Bar-operated Professional Liability Fund, with coverage of all members).

- Coverage available for all members
- Robust practice management, member support, and claims support systems
- Relatively high annual premium (in current market) and high operating costs
- Large staff required to administer and significant fiscal impact to implement
- Choice restricted to single provider
- Spreads risks across all classes of lawyers, with internal “cross-subsidization”

7. Consider other approaches (e.g., allowing letters of credit or surety bonds for uninsured lawyers).

- Client ability to obtain sufficient recovery on surety bonds is unclear
- Letters of credit are as expensive or more expensive than insurance premiums, and would not typically provide defense costs for covered attorneys

1. Do Nothing and Maintain the Status Quo

This “no action” approach would leave things as they are today, with roughly 14% of Washington lawyers in private practice declining to carry malpractice insurance. The insurance coverage disclosure requirement notwithstanding, it is not reasonable to assume that most consumers check the WSBA website to ascertain whether their prospective lawyer has a malpractice insurance policy. On the contrary, anecdotal information received by many Task Force members suggests that most of the general public (and indeed, many lawyers) assume that all lawyers carry malpractice insurance. The Task Force has concluded that the status quo would not address the problem identified: Uninsured lawyers would, like other practicing lawyers, continue to commit errors, clients would be harmed, and those clients would continue to have a very difficult time engaging plaintiffs’ lawyers to represent them in pursuing their claims. Where clients are able to seek compensation, they would continue to encounter problems collecting judgments because of defendant lawyers who shield assets or declare bankruptcy. In other words, this “solution” is no solution at all.

.....
**The Illinois
“PMBR” Model**
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2. Implement a Proactive Management-Based Regulation (“PMBR”) Model

The Proactive Management-Based Regulation approach, described above, requires that uninsured lawyers must, every two years, complete a four-hour interactive, online self-assessment regarding the operation of their law firms. They are then provided with a list of resources to help improve their law practices. The educational programs and resources are “aimed at helping lawyers avoid disciplinary problems before they occur,”²¹⁷ providing uninsured lawyers with information and tools that also might help prevent actions or inaction leading to incidences of malpractice. One highlight of the Illinois approach is its assessment in practice management and bookkeeping. One way of looking at the PMBR program is that it provides lawyers with some of the questions and potential training that insurance companies regularly provide to the lawyers they insure. The Task Force believes that Illinois’ PMBR approach might result in some improved practices among uninsured lawyers in that state, and might reduce incidences of malpractice as well as disciplinary rule violations (PMBR’s primary purpose). In any event, because the program is new, no empirical data is available. The program might also induce some lawyers to obtain insurance in order to avoid spending four hours completing the assessment. (Note, however, that Illinois’ program satisfies four hours of a lawyer’s MCLE obligation.) But the most significant problem with the PMBR model is that training in practice management and record-keeping does not necessarily prevent lawyer errors. After all, lawyers in firms with excellent record-keeping and careful deadline-tracking systems

²¹⁷ Press Release, Sup. Ct of Ill., *supra* note 149.

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**The South
Dakota Model**
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still make mistakes. PMBR does not address the impact on clients when uninsured lawyers commit errors that have severe financial consequences.

**3. Impose More Extensive Insurance
Disclosure Requirements**

This approach would be based on South Dakota’s RPC 1.4(c) requirement that every lawyer without at least \$100,000 in malpractice insurance disclose, on the lawyer’s letterhead and in every written communication to a client, that “This [lawyer][firm] is not covered by professional liability insurance.” As a rule of professional conduct, the potential consequence of noncompliance is professional discipline. South Dakota’s disclosure approach is low-cost from an administrative standpoint and it appears to have reduced the number of uninsured lawyers. At the same time, South Dakota, with a much smaller population and less diverse economy, has a much smaller number of lawyers than Washington. It is difficult to assess whether this type of disclosure approach would be as effective here. Many nonlawyers do not know how to find and engage a lawyer, and nonlawyers are often unskilled at reading engagement letters and even less able to evaluate the risks involved in hiring an uninsured lawyer. Finally, notwithstanding South Dakota’s disclosure requirement, there are still many uninsured lawyers practicing in that state, and when incidences of malpractice occur with damaging consequences, the clients of uninsured lawyers can suffer serious adverse consequences.

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**Two-pronged
Approach**
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**4. Couple Illinois’ PMBR Model with South Dakota’s
Direct Disclosure Requirement**

Washington State could impose a two-pronged approach coupling Illinois’ Proactive Management-Based Regulation with South Dakota’s direct disclosure model. Conceivably, the PMBR portion of the requirement could be strengthened so that the four-hour assessment would be *in addition to* other MCLE requirements, and uninsured lawyers could also be *required* to take a special multi-hour course in practice management, record-keeping and other skills. These additional hours of requirements might encourage some lawyers simply to purchase insurance. A Washington rule might also provide that the PMBR assessment and training be undertaken at the cost of the uninsured lawyer. Obviously, the effectiveness of this approach in encouraging the purchase of malpractice insurance cannot be ascertained in advance. However, like the two possible solutions described immediately above, this approach would never address the impact on those *clients* whose lawyers remain uninsured and commit errors that have severe financial consequences.

FEBRUARY 2019

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The Idaho Model
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5. Implement Mandatory Malpractice Insurance through a Free Market Model

This approach is based on Idaho’s recent mandate that all lawyers in private practice obtain malpractice insurance at minimum specified coverage levels (\$100,000/\$300,000), and that those lawyers obtain their professional policies on the open market. In Idaho, there is no evidence that any lawyers have been unable to obtain insurance policies. The highly competitive character of the existing malpractice insurance market appears to have kept annual premiums at reasonable levels for Idaho lawyers. Although there has been some adverse reaction from Idaho lawyers who would prefer to be without insurance, this approach guarantees that lawyers for most clients will have sufficient coverage in the event of a malpractice incident leading to financial loss to a client. This model could be implemented in Washington with modest administrative costs by enforcing the mandate through lawyer certification made in connection with the annual licensing process. One advantage of the free market approach to most lawyers is that insurance underwriters will set premiums to reflect the expected risks associated with various law practices and the history of individual attorneys. That means that most lawyers will pay relatively low premiums, but some will pay more for insurance. The actual mandated level can be set at a level high enough to cover the vast majority of potential claims, while not at such a high coverage amount as to make insurance unreasonably expensive or unavailable to some practitioners.

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**The Oregon
“PLF” Model**
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6. Implement Mandatory Malpractice Insurance through a Centralized Professional Liability Fund (“PLF”) Model

Oregon’s Professional Liability Fund is the model for this approach. Washington could similarly require that all lawyers in private practice participate in a single insurance pool administered by WSBA and funded through an assessment on the participating lawyers.²¹⁸ The advantage of this mechanism is its ability to provide universal lawyer access to insurance. In addition, Oregon’s robust practice management and claims management systems successfully reduce incidences of malpractice while causing prompt notification of potential claims and enabling the PLF to respond swiftly to and manage potential claims.

²¹⁸ In the late 1980s, the WSBA previously considered and rejected such a proposal. Specifically, in 1986, the WSBA Board of Governor’s considered creating a professional liability fund and system for requiring malpractice insurance, which would have been incorporated into the former Admission to Practice Rules. *Status Report on Malpractice Insurance Coverage and Professional Liability Fund Proposal*, Wash. St. B. News, October 1986, at 27. In December 1986, by a 7-4 vote, the BOG approved the proposal for submission to the Supreme Court, subject to submission of the issue to a referendum of the membership. Carole Grayson, *Washington State Bar Newslines: The Board’s Work*, Wash. St. B. News, January 1987, at 29. The membership defeated the referendum by a vote of 6,971 to 1,693. Carole Grayson, *Washington State Bar Newslines: The Board’s Work*, Wash. St. B. News, March 1987, at 16.

The Oregon coverage levels (\$300,000/\$300,000) are sufficient to handle most claims, thus protecting almost all clients in that state. Indeed, Oregon’s PLF staff have been quite effective at promptly addressing and resolving small claims. One disadvantage of the Oregon approach is that it is relatively expensive (\$3,300 per year per lawyer) given the modest coverage levels (\$300,000/\$300,000). This is because of the costs of operating a system that provides robust staff and programmatic support to lawyers, and because the flat universal fee means that costs are spread among all lawyers, *i.e.*, lawyers who represent a low risk profile are essentially subsidizing those whose practices or personal histories might generate higher risk (and higher premiums) on the open market. Setting up and operating a new PLF in Washington State would entail substantial staff time and a significant commitment of financial resources. In addition, the Oregon system does not provide lawyers with any ability to tailor their policies by adjusting coverage amounts or policy terms.

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**Letter of Credit or a
Performance Bond**
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**7. Use the Free Market Model but Permit Lawyers to
Substitute Alternate Financial Guarantee Instruments**

This system would be based on the Idaho “free market” insurance model but would permit lawyers to provide an alternate financial instrument in lieu of a malpractice insurance policy. In order to assure prompt access to amounts necessary to pay a judgment, a bank letter of credit or a performance bond equaling the maximum coverage amount would be provided to a central administrator (presumably at the WSBA). A letter of credit would provide, for example, that the administrator could file a certificate with the provider bank that the lawyer’s former client obtained a final judgment in a malpractice case in a specific amount (up to the required maximum), and then the bank would immediately pay that amount to the administrator. The administrator would remit the amount to the claimant. A performance bond might work similarly.

There are several potential concerns with this approach. First, in contrast with malpractice insurance policies, letters of credit and performance bonds would not cover defense costs for the lawyer against whom a claim is made. More importantly, banks providing letters of credit charge annual fees that typically equal or exceed the cost of normal malpractice insurance premiums. In addition, letter of credit banks require the “account party” for whom the bank issues a letter of credit to post collateral equaling the amount of the highest possible draw. For example, a lawyer providing a letter of credit as a substitute for a \$300,000 insurance requirement would have to post \$300,000 in collateral and pay a letter of credit fee in the range of several thousand dollars. Alternatively, those who work with performance bonds often find that the companies providing those bonds do not make prompt payments, or dispute the amount to be paid (often paying just half of the bond amount). To address that, it might be prudent to require a performance bond equaling twice

the minimum insurance amount. The bottom line is that alternate financial instruments present significant complications and cost concerns.

E. RECOMMENDATIONS

After considering the information and findings described above, listening to the concerns and suggestions of hundreds of WSBA members, and debating a variety of alternate approaches, the WSBA’s Mandatory Malpractice Insurance Task Force makes the recommendations outlined below. It should be emphasized that the Task Force listened *very* carefully to the diverse concerns voiced by commenting lawyers, and adjusted a number of recommendations based on those comments. (The Task Force’s analysis and response to the main categories of comments are provided under “WSBA Member Concerns and Task Force Responses”.)

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

Active Washington-licensed attorneys engaged in the private practice of law, with specified exemptions, should be required to be covered by continuous, uninterrupted malpractice insurance. Attorneys should be required to obtain minimum levels of malpractice insurance in the private marketplace. The required minimum coverage should be \$250,000 per occurrence/\$500,000 total per year (“\$250K/\$500K”). This requirement should be implemented through court rule.

Comment: The absence of malpractice insurance coverage for 14% of Washington lawyers in private practice poses a distinct risk to clients and to the lawyers themselves. It may be appropriate for lawyers to evaluate and assume personal risks created by lack of malpractice insurance. However, that is not fair to clients. As noted above, clients of uninsured lawyers face significant difficulties recovering from those lawyers after a malpractice event, and the Washington Supreme Court’s Client Protection Fund cannot make payments based on malpractice. A license to practice law is a privilege, and every lawyer engaged in the business of providing legal services should be financially responsible for the effects of his or her own mistakes. Lack of malpractice insurance is fundamentally an access-to-justice problem. Individual clients with everyday legal needs are more likely to seek representation from uninsured lawyers than will wealthy people or institutions. Mistakes made by lawyers without malpractice insurance have a disproportionate impact on low and middle income Washingtonians. This is simply unfair, and it is a problem that can be addressed as a regulatory measure.

The Task Force reviewed the range of potential approaches described in the preceding section of this Report. It determined that the Illinois-style PMBR approach might lead to an improvement in practice-management skills but would not provide protection to

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**Required Malpractice
Insurance
(\$250K/\$500K)**
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clients when legitimate malpractice claims arise, as they inevitably do. Further, Illinois' PMBR approach provides no incentives for lawyers to purchase insurance because the required four-hour on-line assessment is free, is a substitute for regular CLE hours, and lawyers are not required to enroll in the subsequent skills programs if the assessment suggests that might be useful. The South Dakota approach of "super-disclosure" is attractive because it is low-cost and has been relatively successful in reducing the percentage of lawyers without insurance in that state. However, disclosure is not the equivalent of coverage, and it does not protect clients who believe they have a legitimate basis to pursue a malpractice claim. Oregon's mandatory Professional Liability Fund has proved quite successful and handles small claims well, but it is expensive, would have significant startup costs, and would require the development of substantial staff capacity. Further, comments received by the Task Force suggest that Oregon's one-size-fits-all approach might not be viewed as compatible with the free market attitude of many Washington lawyers.

After substantial discussion, the Task Force has decided to recommend a free-market model analogous to the system recently implemented in Idaho. Task Force members concluded that this will provide the least expensive and most flexible approach. Further, the WSBA already has designated an endorsed provider (ALPS) through a competitive process, and in Idaho, that same provider has been successful in helping to ensure that every lawyer has access to an affordable insurance policy.

The Task Force considered possible coverage level requirements of \$100K/\$300K, \$250K/\$250K, and \$250K/\$500K. The Task Force recommends mandatory minimum coverage at \$250K/\$500K. Idaho's minimum of \$100K/\$300K appears too low for Washington State practice because, based on the data reviewed, in many instances \$100,000 would not cover the cost of payment to a successful claimant and the costs of representing the lawyer. Upon consideration, the premium cost difference between a \$250K/\$250K and \$250K/\$500K policy would not be substantial, with an estimated one to two hundred dollar difference annually. Because most claims are for less than \$250,000, **the Task Force determined that a policy coverage minimum of \$250,000/\$500,000 will likely be sufficient to cover the large majority of claims.** The insurance requirement can be fulfilled by the lawyer himself/herself, or by his or her law firm.

Coverage Minimum of
\$250,000/\$500,000

The Task Force also discussed tail coverage, deductibles, defense costs, and prior acts (retroactive) coverage. It determined that tail coverage issues will likely be addressed in some individual insurance policies, but that obligatory tail coverage posed significant regulatory impediments. The Task Force has decided not to recommend a deductible size limitation requirement because deductible levels will not affect coverage and because such matters are most effectively decided by the insurer and the insured. The Task Force further noted the impracticality of mandating prior acts coverage, because this

can be very expensive to purchase on the open market. However, the Task Force emphasizes the importance of maintaining **continuous, uninterrupted coverage** in order to ensure legitimate claims are covered.

The malpractice insurance requirement should be implemented by an amendment to the Admission and Practice Rules promulgated by the Washington Supreme Court. **The Task Force’s draft proposed rule appears as Appendix E to this Report.**

2. Exemptions from the Malpractice Insurance Requirement

Only active lawyers engaged in the private practice of law should be subject to the mandatory malpractice insurance requirement. Exemptions should be provided for the substantial number of lawyers whose practices are not of a “private practice” character that calls for insurance requirements. In this context, “private practice” means the provision of legal services to clients other than a lawyer’s employing organization and that organization’s representatives and employees in their organizational capacities. Specific exemptions should include:

1. Employment as a government lawyer;
2. Employment as a judge;
3. Employment by a corporation or business entity, including nonprofits;
4. Employee or independent contractor for a nonprofit legal aid or public defense office that provides insurance to its employees or independent contractors;
5. Mediation or arbitration;
6. Volunteer pro bono service for a qualified legal services provider as defined in APR 1(e)(8) that provides insurance to its volunteers; and
7. Other lawyers either not “actively licensed” or not “engaged in the private practice of law,” including, for example, retired lawyers maintaining their licenses, judicial law clerks, and Rule 9 interns.

Comment: The Task Force has considered a large number of proposed exemptions suggested by WSBA members. These have included existing exemptions from the insurance disclosure requirements of APR 26 (e.g., full-time government lawyers) and others that were suggested. Based on the primary goal of protecting clients, the Task Force recommends that *all* actively licensed lawyers engaged in the private practice of law be required to comply with the malpractice insurance requirement, except those recommended exemptions discussed in more detail below.

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Exemptions for those
whose practices are
not of a “private
practice” character.
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FEBRUARY 2019

a) Recommended Exemptions

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

1. Employment as a government lawyer. This category would include lawyers who are employed by:

- The U.S. Government;
- State of Washington;
- A federally-recognized American-Indian tribal government; or
- A county, regional, or city government or any other government body, board or commission.

Governments, as well as private organizations, are often self-insured. In any event, actions by their own employees that might constitute malpractice are treated as acts of the organizations themselves. Therefore, a requirement for outside malpractice insurance is illogical for these lawyers. At the same time, if full-time government lawyers choose to engage in private practice apart from their regular work, they would be required to obtain malpractice insurance (unless they fall within one of the other exemptions, such as performing pro bono work through a QLSP).

2. Employment as a judge. Judges, administrative law judges, and hearing officers will qualify for an exemption if the lawyer certifies that he or she is not actively engaged in the private practice of law. Adjudicators are neutrals and are not “representing” any clients when they are acting in an adjudicative capacity.

3. Employment by a corporation or business entity, including nonprofits. A lawyer who provides legal services, solely as an employee, of a private for-profit or non-profit corporation or business entity would not be “engaged in the private practice of law.” In-house lawyers are typically covered by an employer’s errors and omissions policy or through the employer’s self-insurance. Similar to lawyers employed by government agencies, house counsel’s malpractice is treated as an act of the organization itself, so an insurance requirement is inapposite. At the same time, a lawyer who provides legal services to a private company as an independent contractor (rather than as an employee) would not be entitled to this exemption because the lawyer would be deemed to be engaged in the private practice of law.

4. Employee or independent contractor for a nonprofit legal aid or public defense office that provides insurance to its employees or independent contractors. A lawyer employed to provide public defense services or civil legal aid through an organization that insures its employees or independent contractors would be

insured for the purposes of the malpractice insurance mandate. This exemption anticipates that there may be some circumstances under which lawyers will not be insured when providing indigent service or civil legal aid representation to clients. This exemption makes clear to those lawyers who are not insured through any organization that they must obtain malpractice insurance. If lawyers who qualify for this exemption choose to engage in private practice apart from their work as public defenders or in civil legal aid, they would be required to obtain malpractice insurance (unless they fall within one of the other exemptions, such as performing pro bono work through a QLSP).

- 5. Mediation and arbitration.** A lawyer can qualify for this exemption if the lawyer’s practice is limited exclusively to mediation and arbitration services and therefore, by operation of the rule, the lawyer would not be engaged in the private practice of law. Indeed, mediators, arbitrators, and other adjudicators are not “practicing law” and do not have “clients” as is thought of in the legal representation context.
- 6. Volunteer pro bono service for a qualified legal services provider as defined in APR 1(e)(8) that provides insurance to its volunteers.** Task Force research has confirmed that the various QLSP and/or pro bono clinics across the state provide malpractice insurance coverage for their volunteers. Established low-income legal services organizations such as KCBA’s Pro Bono Services Program, Eastside Legal Assistance Program, and Northwest Justice Project, for example, all provide coverage. If the sponsoring non-profit entity does not provide malpractice coverage itself, or through another QLSP, then this exemption would not apply. Further, the exemption would apply only if and to the extent the lawyer is practicing exclusively with one or more insured QLSPs or covered pro bono clinics, and is not representing private clients or engaging in other activities constituting the private practice of law. The Task Force notes that some small-population counties in the state do not have QLSPs operating in them or providing the opportunity for lawyers to provide pro bono services through them. As discussed in more detail elsewhere in this Report, the Task Force recommends that the WSBA focus on this issue and work to encourage or enable lawyers in every county to do pro bono work that is automatically covered by a QLSP’s insurance policy.
- 7. Catchall Category.** Any other lawyer who is either not “actively licensed” or not “engaged in the private practice of law” will be exempt from the malpractice insurance mandate. Individuals who may fit within this category include, among others, judicial law clerks, Rule 9 interns, inactive members, unemployed lawyers, and fully retired lawyers who do not practice law but choose to maintain their active licenses without engaging in the private practice of law.

b) Exemptions Considered But Not Recommended

The Task Force examined several other potential exemptions but concluded that they would not be appropriate. These included:

- 1. Lawyers practicing solely before federal tribunals.** These lawyers are engaged in the private practice of law, notwithstanding that their work is before federal rather than state courts or agencies. The Task Force concluded that their clients deserve the same protections afforded to clients who happen to be in state adjudicatory or administrative systems, and therefore an insurance mandate is appropriate.
- 2. Family member exemption.** The Task Force received a number of comments from members suggesting a “family member” exemption. The members noted that they provide only limited legal services to “close family” members and this family “benefit” would be eliminated if the members were required to obtain malpractice insurance. The Task Force deliberated about the possible exemption, but the majority voted against creating an exemption for lawyers that assist or advise family members. The primary reasons were that family members are not immune from lawyer malpractice, and further, the Task Force concluded that it was extremely difficult to precisely define those individuals who constitute a “close” family member. Furthermore, while ALPS’ current policies exclude coverage for legal work for family members, many other policies written for Washington lawyers do not have such exclusions, e.g. policies written by the CNA Financial Corporation, Hanover Insurance Group, and Travelers Indemnity Company.²¹⁹
- 3. Lobbying and/or legislative advocacy exemption.** The Task Force evaluated an exemption for lawyers who exclusively participate in lobbying and/or legislative advocacy work. The Task Force recognized that GR 24 defines activities that constitute the private practice of law. GR 24(a). The GR also discusses other conduct that is deemed permissible activity of a lawyer, such as “acting as a legislative lobbyist,” but does not define whether that conduct constitutes the practice of law. GR 24(b)(7). The Task Force concluded that an exemption for lobbying and/or legislative advocacy work was inappropriate because each individual lawyer was in the best position to assess whether the lawyer’s work fell within the definition of the practice of law set forth in GR 24(a) as well as RPC 5.7. If the lawyer’s work satisfies the definition of “practicing law” under GR 24(a) and the lawyer is providing those services to private clients, then the lawyer would be required to obtain malpractice insurance.

²¹⁹ Email, Insurance Industry Professional and Task Force Member Rob Karl to Task Force Chair Hugh Spitzer, Dec. 20, 2018, on file with WSBA.

- 4. Pro bono services provided to a nonprofit organization.** The Task Force also considered an exemption for lawyers who exclusively provide pro bono services to a nonprofit organizations (other than as house counsel), as opposed to providing pro bono services to individuals. The Task Force is sensitive to member concerns that malpractice insurance expenses could potentially limit or impact a member's ability to provide pro bono services to a nonprofit organization. The Task Force nevertheless concluded there is no difference between the actual harm of legal malpractice to an organization, as opposed to an individual pro bono client. That is, a nonprofit organization is just as susceptible to legal malpractice and negative consequences flowing therefrom as any other member of the public.
- 5. Lawyers providing pro bono legal services where the services are not provided through a civil legal aid provider that maintains malpractice insurance for its volunteers.** Because the lawyer would not have coverage, clients would be unprotected. Lawyers may if they choose, transfer their licenses to emeritus status and work through qualified legal service providers to serve pro bono clients.
- 6. Unaffordable insurance.** The Task Force received comments from a number of members regarding concerns that malpractice insurance premiums would be prohibitively expensive and force the lawyer to resign from the Bar and stop the practicing law. The Task Force therefore considered a potential financial hardship exemption. The Task Force understands this same argument was raised in Idaho. The Task Force was provided information, however, that all lawyers in Idaho were able to obtain insurance at a rate the lawyers deemed acceptable. The Task Force received presentations from insurance professionals, including insurance brokers and underwriters, and appreciates that the premium for each individual lawyer may vary based upon a variety of factors, including, but not limited to, the nature of practice; years of practice; claims history; and/or disciplinary history. The Task Force concluded that an affordability exemption could not be drafted with sufficient precision and accuracy given the lack of known parameters and the wide variability in the subjective concept of affordability. The Task Force further noted that evaluation of an affordability exemption would require substantial WSBA administrative resources to review and resolve an individual lawyer's entitlement to such an exemption.

7. Washington-licensed lawyers practicing solely out-of-state or out-of-country. Because it is difficult to define precisely where the “practice of law” occurs and difficult to determine if a lawyer claiming to be “out-of-state” is in fact providing legal services in Washington, the Task Force concluded that if a lawyer has a Washington license, the lawyer should carry insurance so that clients are protected. If a lawyer in private practice is certain that he/she will not practice law in Washington, then that lawyer may wish to reconsider whether it makes sense to maintain an active license in this state. If a lawyer’s entitlement to practice elsewhere is based solely on the possession of a Washington state license, then it is a legitimate regulatory objective to require insurance coverage for the legal services provided to private clients.

3. Annual Certification and Enforcement

Licensed lawyers should report whether they are engaged in the private practice of law, and their malpractice insurance coverage status, through the annual licensing process. Failure to comply with the insurance requirement would lead to administrative suspension of the lawyer’s license pursuant to APR 17.

Comment: The Task Force recommends that the malpractice insurance coverage requirement be managed through the existing annual licensing process. This would involve only a minimal allocation of WSBA staff resources given existing processes for administering insurance disclosure under APR 26. Every lawyer would be required to certify annually that he or she is covered by a malpractice insurance policy consistent with the minimum limits described above. Alternatively, the lawyer could certify that he or she qualifies for a recognized exemption. Lawyers who are required to maintain insurance would be required to provide to the WSBA, upon request, specific information such as the name of the insurance carrier, policy number, coverage limits in the specific policy, and dates of coverage. This information provided upon request would not be public. Lawyers would also be obligated to notify the WSBA if at any time they do not renew insurance coverage or if their insurance lapses.

The Task Force recommends that a lawyer’s failure to obtain malpractice coverage by the annual licensing deadline would constitute noncompliance with the licensing requirements in the APR. The Task Force understands that the WSBA Regulatory Services Department would engage in enforcement efforts consistent with the applicable APR for failure to comply with licensing requirements.

.....
**Malpractice insurance
coverage managed
through the annual
licensing process.**
.....

WSBA should work to
implement a robust
pro bono insurance
program statewide.

4. Increasing Insurance Availability for Pro Bono Representation

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

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

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

III. CONCLUSION

With this Report, the Task Force recommends to the WSBA Board of Governors that all actively licensed lawyers in private practice be required to maintain malpractice insurance as a condition of licensure.

Consistent with the directive in its Charter, the Task Force has drafted a rule designed to implement its recommendation. See draft revised APR 26 as [Appendix E](#). The Rule incorporates the Task Force's recommended mandatory minimums and exemptions. The Task Force submits this draft rule for the Board's consideration and any further action the Board deems appropriate.

APPENDIX A

Mandatory Malpractice Insurance Task Force Charter

MANDATORY MALPRACTICE
INSURANCE TASK FORCE REPORT

FEBRUARY 2019



MANDATORY MALPRACTICE INSURANCE TASK FORCE

(Adopted by the WSBA Board of Governors on September 28, 2017)

CHARTER

Background

Admission and Practice Rule (APR) 26 requires annual reporting of whether a lawyer is covered by professional liability insurance. Washington State does not, as a condition of licensing, require that lawyers have such insurance. By contrast, Washington's two other licenses to practice law (limited practice officers and limited license legal technicians) are, by court rule, obligated to show proof of insurance coverage or demonstrate financial responsibility in order to obtain and maintain their licenses to practice. In 2016, the Board of Governors (BOG) convened a Mandatory Malpractice Insurance Work Group to gather information about jurisdictions that require lawyers to have professional liability insurance and the systems used to implement such requirements. The Work Group gathered information from Oregon, Idaho, and other non-U.S. jurisdictions, investigated a number of system models, examined data collected from APR 26 insurance disclosure records, and reviewed historical documentation about a 1986 WSBA initiative to adopt a mandatory malpractice rule. Without formulating a recommendation or proposal, the Work Group presented this information to the Board of Governors as a generative discussion topic at the May 2017 Board meeting. After consideration of the information presented, the BOG decided to form a Task Force to review the topic in greater depth, receive member input, and present a recommendation about whether to proceed with a mandatory malpractice insurance proposal.

Task Force Purpose

1. Solicit and collect input from WSBA members and others about whether to recommend a system of mandatory malpractice insurance for lawyers in Washington State.
2. Review information gathered by Mandatory Malpractice Insurance Work Group and gather any additional information needed for a comprehensive analysis of the topic, including alternative options.
3. Consider oral presentations and/or written materials regarding mandatory malpractice insurance systems used in the U.S. and elsewhere, together with other potential system models, and evaluate the feasibility, suitability, and practicality of such a regulatory requirement in Washington.

4. Determine whether to recommend adoption of a mandatory malpractice insurance requirement in Washington.
5. If a regulatory requirement is recommended, determine the most suitable contours of such a system, including development of a model that addresses the means of providing or procuring coverage, as well as issues of scope, exemptions, and enforcement.
6. After considering relevant materials and input, submit a final report to the BOG, including, as appropriate, draft rules to implement a system of mandatory malpractice insurance for Washington lawyers, and including any minority report(s).

Timeline

- Begin meeting no more than six weeks after appointments are completed;
- Complete work and submit a final report not later than the January 2019 BOG meeting, unless the timeline for completion is extended by the BOG;
- If the task force recommends adoption of a mandatory malpractice system, prepare a BOG-approved set of suggested rule amendments for submission to the Supreme Court before the first GR 9 deadline after the draft amendments are approved by the BOG;
- Provide updates on the work of the task force as requested by the BOG.

Task Force Membership

The task force shall consist of the following voting members:

- A WSBA member who shall be appointed to serve as Chair;
- Three current or former members or officers of the BOG;
- Not fewer than ten at-large members of the WSBA, including
 - at least one lawyer member with substantial experience in insurance coverage law;
 - at least one lawyer member who is also an active member of the Oregon State Bar and who participates in Oregon's Professional Liability Fund;
 - at least one limited practice officer or limited license legal technician member;
- A full-time superior court, district court, municipal court, or court of appeals judge;
- An individual with professional experience in the insurance/risk management industry;
- Two community representatives who are not licensed to practice law.

The Executive Director will designate a WSBA staff liaison.

In accordance with WSBA Bylaws Art. IX(B)(2)(e) and (f), the members and the Chair of the task force will be appointed by the WSBA President subject to being accepted or rejected by the BOG. Such appointment and approval shall be completed by no later than the BOG's November 2017 meeting.

APPENDIX A

Addendum:

Extension of Charter Reporting Deadline

At its November 16, 2018, meeting, the WSBA Board of Governors extended the Mandatory Malpractice Insurance Task Force Charter to March 2019. Attached to the Task Force Charter is an excerpt of the approved November 16, 2018, Board minutes reflecting that extension.

MANDATORY MALPRACTICE
INSURANCE TASK FORCE REPORT

FEBRUARY 2019

WASHINGTON STATE BAR ASSOCIATION

BOARD OF GOVERNORS MEETING

Public Session Minutes

Seattle, WA

November 16, 2018

The Public Session of the Board of Governors of the Washington State Bar Association (WSBA) was called to order by President Bill Pickett on Friday, November 16, 2018, at 11:50 a.m. at the WSBA Conference Center, Seattle, Washington. Governors in attendance were:

Dan W. Bridges
 Michael John Cherry
 Daniel D. Clark
 Peter J. Grabicki
 Carla Higginson
 Jean Y. Kang
 Russell Knight
 Christina A. Meserve
 Athan P. Papailiou
 Kyle D. Sciuchetti
 Alec Stephens
 Paul Swegle
 Judge Brian Tollefson (ret.)

Also in attendance were President-elect Rajeev Majumdar, Executive Director Paula Littlewood, General Counsel Julie Shankland, Chief Disciplinary Counsel Doug Ende, Chief Regulatory Counsel Jean McElroy, Director of Advancement/Chief Development Officer Terra Nevitt, Chief Communications and Outreach Officer Sara Niegowski, and Executive Assistant Margaret Shane. Governor Hunter was not present for the Public Session meeting.

...

MANDATORY MALPRACTICE INSURANCE TASK FORCE CHARTER EXTENSION

Governor Grabicki moved to approve the extension of the Mandatory Malpractice Insurance Task Force Charter as contained in the meeting materials to authorize the Task Force to report to the Board at the March 7, 2019, Board meeting. Motion passed 11-2.

...

APPENDIX B

Mandatory Malpractice Insurance Task Force

MEMBERS

MANDATORY MALPRACTICE
INSURANCE TASK FORCE REPORT

FEBRUARY 2019

FEBRUARY 2019

MANDATORY MALPRACTICE INSURANCE TASK FORCE	
Member/Liaison	Member Type and Charter-Mandated Position
Hugh D. Spitzer University of Washington School of Law Professor of Law	Chair
John Bachofner Jordan Ramis, PC	Member (Oregon Lawyer)
Stan Bastian United States Courthouse	Judge
Dan Bridges McGaughey Bridges Dunlap PLLC	Current/Former BOG Member
Christy Carpenter Myllt.Com, A Legal Technician Firm, PLLC	Member (LPO/LLLT)
Gretchen Gale Attorney at Law	Member
P.J. Grabicki Randall Danskin PS	Member
Lucy Isaki Retired Attorney	Current/Former BOG Member
Mark Johnson Johnson Flora Sprangers PLLC	Current/Former BOG Member
Rob Karl Sprague Israel Giles, Inc.	Insurance Industry Professional
Kara Masters Masters Law Group	Member (Insurance Experience)
Evan McCauley Jeffers, Danielson Sonn & Aylward PS	Member
Brad Ogura	Public Member
Suzanne Pierce Davis Rothwell Earle & Xochihua	Member
Brooke Pinkham Seattle University School of Law Center for Indian Law and Policy	Member
Todd Startzel Kirkpatrick & Startzel PS	Member
Stephanie Wilson Seattle University School of Law Reference Services	Public Member
Annie Yu Pierce County Prosecuting Attorney's Office	Member

FEBRUARY 2019

MANDATORY MALPRACTICE INSURANCE TASK FORCE	
WSBA Staff Liaisons	
Douglas J. Ende	Chief Disciplinary Counsel
Thea Jennings	
Rachel Konkler	

Mandatory Malpractice Insurance Task Force

MEMBER BIOS

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

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

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

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

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

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

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

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

Mark Johnson is an elected Fellow in the American College of Trial Lawyers. He has been listed in every edition of The Best Lawyers in America since 1995 and Best Lawyers Publishing has named him Seattle's Plaintiffs' Legal Malpractice Lawyer of the Year three times. In 2008-2009 he was President of the Washington State Bar Association. He is a past president of LAW Fund, a nonprofit corporation that raises money from lawyers and judges to support Washington's civil legal aid organizations. He is currently a trustee on the board of The Legal Foundation of Washington. In 2018 he received the WSBA's Professionalism award. Mark is a partner at Johnson Flora Sprangers PLLC in Seattle. He limits his practice to the representation of plaintiffs in serious injury and medical and legal negligence cases, ethics consultations for lawyers and law firms, and mediation of personal injury and professional liability claims.

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

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

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

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

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

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

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

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

Annie Yu serves as a deputy prosecuting attorney with the Pierce County Prosecutor's Office. She currently represents the Washington Department of Child Support in child support enforcement actions. She attended Seattle Pacific University and Gonzaga University School of Law.

APPENDIX C

WSBA Member Licensing Counts and WSBA Member Demographics Report

as of February 1, 2019

**MANDATORY MALPRACTICE
INSURANCE TASK FORCE REPORT**

FEBRUARY 2019

WSBA MEMBER* LICENSING COUNTS – 2/1/19

BY DISTRICT	ALL	ACTIVE
0	3,389	2,519
1	2,975	2,473
2	2,060	1,640
3	2,122	1,789
4	1,385	1,166
5	3,206	2,587
6	3,279	2,752
7N	5,174	4,409
7S	6,734	5,584
8	2,213	1,873
9	4,818	4,070
10	2,888	2,412
TOTAL	40,243	33,274

BY WA COUNTY	
Adams	15
Asotin	24
Benton	368
Chelan	244
Clallam	153
Clark	793
Columbia	7
Cowlitz	140
Douglas	30
Ferry	14
Franklin	50
Garfield	2
Grant	110
Grays Harbor	104
Island	138
Jefferson	93
King	15,340
Kitsap	742
Kittitas	84
Klickitat	23
Lewis	95
Lincoln	13
Mason	98
Okanogan	97
Pacific	27
Pend Oreille	18
Pierce	2,147
San Juan	70
Skagit	277
Skamania	20
Snohomish	1,496
Spokane	1,709
Stevens	45
Thurston	1,464
Wahkiakum	8
Walla Walla	109
Whatcom	557
Whitman	72
Yakima	422

MEMBER TYPE	IN WA STATE	ALL
Attorney - Active	26,060	32,427
Attorney - Emeritus	102	107
Attorney - Honorary	365	412
Attorney - Inactive	2,478	5,633
Judicial	629	656
LLLT - Active	36	36
LLLT - Inactive	3	3
LPO - Active	799	811
LPO - Inactive	146	158
TOTAL	30,618	40,243

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

WSBA MEMBER LICENSING COUNTS – 2/1/19

BY STATE AND PROVINCE			
Alabama	29	Montana	166
Alaska	201	Nebraska	17
Alberta	9	Nevada	140
Arizona	349	New Hampshire	9
Arkansas	16	New Jersey	65
Armed Forces Americas	4	New Mexico	64
Armed Forces Europe, Middle East	25	New York	243
Armed Forces Pacific	18	North Carolina	75
British Columbia	100	North Dakota	9
California	1,732	Northern Mariana Islands	6
Colorado	235	Nova Scotia	1
Connecticut	50	Ohio	69
Delaware	6	Oklahoma	25
District of Columbia	328	Ontario	15
Florida	241	Oregon	2,643
Georgia	89	Pennsylvania	70
Guam	15	Puerto Rico	2
Hawaii	143	Quebec	1
Idaho	417	Rhode Island	15
Illinois	154	Saskatchewan	1
Indiana	37	South Carolina	27
Iowa	27	South Dakota	7
Kansas	27	Tennessee	55
Kentucky	22	Texas	352
Louisiana	51	Utah	179
Maine	13	Vermont	20
Maryland	116	Virginia	274
Massachusetts	86	Virgin Islands	1
Michigan	70	Washington	30,619
Minnesota	94	West Virginia	7
Mississippi	6	Wisconsin	41
Missouri	71	Wyoming	19

WSBA MEMBER LICENSING COUNTS – 2/1/19

BY ADMIT YR			
1940	3	1981	534
1941	2	1982	510
1942	1	1983	548
1944	1	1984	627
1945	1	1985	450
1946	2	1986	690
1947	6	1987	604
1948	8	1988	576
1949	16	1989	614
1950	16	1990	748
1951	27	1991	744
1952	27	1992	738
1953	25	1993	779
1954	27	1994	804
1955	20	1995	811
1956	40	1996	759
1957	31	1997	852
1958	39	1998	805
1959	38	1999	842
1960	30	2000	856
1961	29	2001	917
1962	35	2002	996
1963	33	2003	1,019
1964	40	2004	1,037
1965	56	2005	1,063
1966	61	2006	1,094
1967	61	2007	1,168
1968	92	2008	1,085
1969	102	2009	994
1970	109	2010	1,083
1971	114	2011	1,053
1972	178	2012	1,097
1973	273	2013	1,229
1974	268	2014	1,354
1975	331	2015	1,614
1976	399	2016	1,307
1977	398	2017	1,386
1978	447	2018	1,299
1979	486	2019	178
1980	497		

MISC COUNTS	
All License Types **	40,556
All WSBA Members	40,243
Members in Washington	30,618
Members in western Washington	23,762
Members in King County	15,340
Members in eastern Washington	3,455
Active Attorneys in western Washington	20,173
Active Attorneys in King County	13,422
Active Attorneys in eastern Washington	2,835
New/Young Lawyers	6,367
MCLE Reporting Group 1	10,524
MCLE Reporting Group 2	10,833
MCLE Reporting Group 3	11,487
Foreign Law Consultant	19
House Counsel	284
Indigent Representative	10

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

WSBA MEMBER LICENSING COUNTS – 2/1/19

BY SECTION ***	ALL	PREVIOUS YEAR
Administrative Law Section	192	277
Alternative Dispute Resolution Section	271	357
Animal Law Section	73	102
Antitrust, Consumer Protection and Unfair Business Practice	179	221
Business Law Section	1,112	1,287
Cannabis Law Section	71	66
Civil Rights Law Section	132	168
Construction Law Section	442	512
Corporate Counsel Section	961	1,115
Creditor Debtor Rights Section	407	507
Criminal Law Section	334	441
Elder Law Section	542	654
Environmental and Land Use Law Section	669	797
Family Law Section	822	1,150
Health Law Section	325	387
Indian Law Section	292	316
Intellectual Property Section	763	899
International Practice Section	197	241
Juvenile Law Section	133	186
Labor and Employment Law Section	879	1,002
Legal Assistance to Military Personnel Section	66	92
Lesbian, Gay, Bisexual, Transgender (LGBT) Law Section	89	110
Litigation Section	885	1,058
Low Bono Section	51	101
Real Property Probate and Trust Section	1,972	2,363
Senior Lawyers Section	202	256
Solo and Small Practice Section	738	987
Taxation Section	523	660
World Peace Through Law Section	94	98

*** The values in the All column are reset to zero at the beginning of the WSBA fiscal year (Oct 1). The Previous Year column is the total from the last day of the fiscal year (Sep 30).

WSBA staff with complimentary membership are not included in the counts.

WSBA MEMBER* DEMOGRAPHICS REPORT – 2/1/19

BY AGE	ALL	ACTIVE
21 to 30	1,979	1,895
31 to 40	9,181	8,191
41 to 50	9,749	8,019
51 to 60	8,694	6,857
61 to 70	7,680	5,758
71 to 80	2,392	1,583
Over 80	568	124
TOTAL:	40,243	32,427

BY DISABILITY	
Yes	1,055
No	19,553
Respondents	20,608
No Response	10,878
All Member Types	40,243

BY GENDER	
Female	12,227
Male	17,129
Selected Mult Gend	9
Respondents	29,365
No Response	10,878
All Member Types	40,243

BY SEXUAL ORIENTATION	
Asexual	10
Gay, Lesbian, Bisexual, Pansexual, or Queer	203
Heterosexual	1,955
Not Listed	34
Selected multiple orientations	12
Two-spirit	1
Respondents	2,215
No Response	38,028
All Member Types	40,243

BY YEARS LICENSED	
Under 6	8,520
6 to 10	5,432
11 to 15	5,641
16 to 20	4,568
21 to 25	4,110
26 to 30	3,544
31 to 35	3,000
36 to 40	2,483
41 and Over	2,945
TOTAL:	40,243

BY ETHNICITY	
American Indian / Native America	249
Asian-Central Asian	18
Asian-East Asian	96
Asian-South Asian	26
Asian-Southeast Asian	28
Asian—unspecified	1,275
Black / African American / African	641
Hispanic / Latinx	678
Middle Eastern Descent	9
Multi Racial / Bi Racial	883
Not Listed	193
Pacific Islander / Native Hawaiian	60
White / European Descent	23,891
Respondents	28,047
No Response	12,196
All Member Types	40,243

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

WSBA MEMBER DEMOGRAPHICS REPORT – 2/1/19

BY PRACTICE AREA			
Administrative-regulator	2,008	Immigration-naturaliza	860
Agricultural	204	Indian	530
Animal Law	93	Insurance	1,464
Antitrust	253	Intellectual Property	1,785
Appellate	1,391	International	772
Aviation	142	Judicial Officer	389
Banking	387	Juvenile	826
Bankruptcy	904	Labor	996
Business-commercial	4,373	Landlord-tenant	1,168
Cannabis	23	Land Use	721
Civil Litigation	4,425	Legal Ethics	272
Civil Rights	918	Legal Research-writing	623
Collections	518	Legislation	359
Communications	201	LGBTQ	26
Constitutional	536	Litigation	3,924
Construction	1,142	Lobbying	165
Consumer	677	Malpractice	694
Contracts	3,590	Maritime	266
Corporate	2,942	Military	316
Criminal	3,296	Municipal	825
Debtor-creditor	863	Non-profit-tax Exempt	530
Disability	607	Not Actively Practicing	1,811
Dispute Resolution	1,226	Oil-gas-energy	185
Education	439	Patent-trademark-copyr	1,019
Elder	851	Personal Injury	2,888
Employment	2,447	Privacy And Data Securit	70
Entertainment	264	Real Property	2,150
Environmental	1,139	Real Property-land Use	2,058
Estate Planning-probate	3,068	Securities	650
Family	2,577	Sports	138
Foreclosure	481	Subrogation	87
Forfeiture	89	Tax	1,067
General	2,647	Torts	1,809
Government	2,492	Traffic Offenses	600
Housing	292	Workers Compensation	651
Human Rights	277		

WSBA MEMBER DEMOGRAPHICS REPORT – 2/1/19

BY LANGUAGES SPOKEN					
Afrikaans	6	Haitian Creole	2	Polish	32
Akan /twi	4	Hebrew	38	Portuguese	122
Albanian	2	Hindi	90	Portuguese Creole	1
American Sign Language	16	Hmong	1	Punjabi	58
Amharic	17	Hungarian	15	Romanian	19
Arabic	53	Ibo	4	Russian	233
Armenian	8	Icelandic	2	Samoan	9
Bengali	11	Ilocano	9	Serbian	20
Bosnian	11	Indonesian	13	Serbo-croatian	11
Bulgarian	13	Italian	156	Sign Language	23
Burmese	2	Japanese	217	Singhalese	2
Cambodian	7	Javanese	1	Slovak	2
Cantonese	99	Kannada/canares	4	Somali	1
Cebuano	4	Kapampangan	1	Spanish	1,820
Chamorro	5	Khmer	1	Spanish Creole	9
Chaozhou/chiu Chow	1	Kongo/kikongo	1	Swahili	4
Chin	3	Korean	239	Swedish	53
Croatian	22	Lao	6	Tagalog	70
Czech	6	Latvian	6	Taishanese	2
Danish	19	Lithuanian	5	Taiwanese	21
Dari	4	Malay	4	Tamil	11
Dutch	24	Malayalam	9	Telugu	3
Egyptian	2	Mandarin	358	Thai	14
Farsi/persian	63	Marathi	6	Tigrinya	3
Fijian	1	Mongolian	2	Tongan	1
Finnish	7	Navajo	1	Turkish	14
French	717	Nepali	4	Ukrainian	40
French Creole	3	Norwegian	38	Urdu	39
Fukienese	5	Not listed	36	Vietnamese	91
Ga/kwa	2	Oromo	3	Yoruba	10
German	428	Other	23	Yugoslavian	4
Greek	28	Pashto	1		
Gujarati	15	Persian	22		

WSBA MEMBER DEMOGRAPHICS REPORT – 2/1/19

MEMBERS IN FIRM TYPE	
Bank	5
Escrow Company	9
Government/ Public Secto	4,440
House Counsel	2,552
Non-profit	108
Title Company	26
Solo	5,228
Solo In Shared Office Or	1,571
2-5 Members in Firm	4,266
6-10 Members in Firm	1,810
11-20 Members in Firm	1,283
21-35 Members in Firm	805
36-50 Members In Firm	584
51-100 Members in Firm	587
100+ Members in Firm	1,837
Not Actively Practicing	620
Respondents	25,731
No Response	14,512
All Member Types	40,243

APPENDIX D

ABA List of Admitted and Non-Admitted Carriers in Washington

as of February 6, 2019

Data based on *LPL Insurance Directory - Washington*,
ABA Standing Comm. on Law. Prof. Liability (A.B.A.),

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

MANDATORY MALPRACTICE
INSURANCE TASK FORCE REPORT

FEBRUARY 2019

ADMITTED CARRIERS

Allianz
Allied World Assurance Company
Aon Attorneys Advantage
Chartis Lawyers Professional Liability Program
Chubb - Executive Risk
CNA
Hanover Professionals
Hartford Specialty
Lawyer's Protector Plan®
Navigators Insurance Company
Noetic Specialty Insurance Co.
Old Republic Insurance Company (Chicago Underwriting Group)
ProAssurance
Protecture Lawyers
RPS Plus Companies, Markel Insurance
State National Insurance Company
Swiss Re Corporate Solutions (Underwritten by Westport Insurance Corp. and First Specialty Insurance Corporation)
Travelers
Wesco Insurance Company (Synergy Professional Associates, Inc.)
XL Catlin Insurance
Zurich

NON-ADMITTED CARRIERS

Admiral Insurance Company
Arch Insurance Group
Liberty Surplus Insurance Corporation
Lloyd's of London - Attorney Select
Medmarc Casualty Insurance Co. (LawyerCare)
Underwriters at Lloyds (Synergy Professional Associates, Inc.)

APPENDIX E

Draft Revised APR 26

**MANDATORY MALPRACTICE
INSURANCE TASK FORCE REPORT**

FEBRUARY 2019

FEBRUARY 2019

Redlined Version

APR 26. ~~INSURANCE DISCLOSURE~~

- (a) Unless exempted under section (b) of this rule, Each active lawyer member of the Bar who is to any extent engaged in the private practice of law shall must certify annually in a form and manner approved by the Bar by the date specified by the Bar ~~(1) whether that the lawyer is covered by engaged in the private practice of law; (2) if engaged in the private practice of law, whether the lawyer is currently covered by professional liability insurance at a minimum limit of \$250,000 per occurrence/\$500,000 annual aggregate; and (3) whether the lawyer intends to maintain insurance during the period of time the lawyer is on active status in the current licensing period engaged in the practice of law; and (4) whether the lawyer is engaged in the practice of law as a full-time government lawyer or is counsel employed by an organizational client and does not represent clients outside that capacity;.~~
- (b) A lawyer is exempt from the coverage requirement of section (a) of this rule if the lawyer certifies to the Bar in a form and manner approved by the Bar that the lawyer is not engaged in the practice of law or the lawyer's practice consists exclusively of any one or more of the following categories and that the lawyer does not represent any clients outside of that service or employment:
- (1) Employment as a government lawyer or judge;
 - (2) Employment by a corporation or business entity, including nonprofits;
 - (3) Employee or independent contractor for a nonprofit legal aid or public defense office that provides insurance to its employees or independent contractors;
 - (4) Mediation or arbitration; and
 - (5) Volunteer pro bono service for a qualified legal services provider as defined in APR 1(e)(8) that provides insurance to its volunteers.
- (c) Each active lawyer who certifies coverage under section (a) of this rule must, reports being covered by professional liability insurance shall certify in a form and manner prescribed by the Bar, notify the Bar in writing within 3010 days if the insurance policy providing coverage lapses, is no longer in effect, or terminates for any reason.
- ~~(b)~~ (d) The information submitted pursuant to this rule as to the existence of coverage will be made available to the public by such means as may be designated by the Bar, which may include publication on the website maintained by the Bar.

- ~~(e)~~ (e) Any active lawyer of law who is required to certify coverage under section (a) of this rule who fails to comply with this rule by the date specified by the Bar or fails to maintain the coverage required throughout the licensing period, the lawyer may be ordered suspended from the practice of law by the Supreme Court until such time as the lawyer complies; and the Court orders the lawyer's reinstatement to active status.
- (f) A lawyer who has certified the existence of professional liability insurance coverage under section (a) of this rule must provide proof to the Bar, upon request, of the existence of the certified coverage, including a copy of any applicable insurance policy and other relevant information. A lawyer who has not complied with a request under this section for more than 30 days may be ordered suspended from the practice of law by the Supreme Court until such time as the lawyer complies with the request and the Court orders the lawyer's reinstatement to active status.
- (g) Supplying false information in a certification under section (a) or (e) of this rule or in response to a request for information under section (f) of this rule, or failure to provide timely notice under section (c) of this rule, may~~shall~~ subject the lawyer to appropriate disciplinary action.

Clean Version

FEBRUARY 2019

APR 26. INSURANCE

- (a) Unless exempted under section (b) of this rule, each active lawyer member of the Bar who is to any extent engaged in the private practice of law must certify annually in a form and manner approved by the Bar by the date specified by the Bar that the lawyer is covered by professional liability insurance at a minimum limit of \$250,000 per occurrence/\$500,000 annual aggregate and intends to maintain insurance during the period of time the lawyer is on active status in the current licensing period.
- (b) A lawyer is exempt from the coverage requirement of section (a) of this rule if the lawyer certifies to the Bar in a form and manner approved by the Bar that the lawyer is not engaged in the practice of law or the lawyer's practice consists exclusively of any one or more of the following categories and that the lawyer does not represent any clients outside of that service or employment:
- (1) Employment as a government lawyer or judge;
 - (2) Employment by a corporation or business entity, including nonprofits;
 - (3) Employee or independent contractor for a nonprofit legal aid or public defense office that provides insurance to its employees or independent contractors;
 - (4) Mediation or arbitration; and
 - (5) Volunteer pro bono service for a qualified legal services provider as defined in APR 1(e)(8) that provides insurance to its volunteers.
- (c) Each lawyer who certifies coverage under section (a) of this rule must, in a form and manner prescribed by the Bar, notify the Bar in writing within 10 days if the insurance policy providing coverage lapses, is no longer in effect, or terminates for any reason.
- (d) The information submitted pursuant to this rule as to the existence of coverage will be made available to the public by such means as may be designated by the Bar, which may include publication on the website maintained by the Bar.
- (e) If a lawyer who is required to certify coverage under section (a) of this rule fails to comply with this rule by the date specified by the Bar or fails to maintain the coverage required throughout the licensing period, the lawyer may be ordered suspended from the practice of law by the Supreme Court until such time as the lawyer complies and the Court orders the lawyer's reinstatement to active status.

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- (f) A lawyer who has certified the existence of professional liability insurance coverage under section (a) of this rule must provide proof to the Bar, upon request, of the existence of the certified coverage, including a copy of any applicable insurance policy and other relevant information. A lawyer who has not complied with a request under this section for more than 30 days may be ordered suspended from the practice of law by the Supreme Court until such time as the lawyer complies with the request and the Court orders the lawyer's reinstatement to active status.
- (g) Supplying false information in a certification under section (a) or (e) of this rule or in response to a request for information under section (f) of this rule, or failure to provide timely notice under section (c) of this rule, may subject the lawyer to appropriate disciplinary action.
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