

**MANDATORY MALPRACTICE INSURANCE TASK FORCE**

**MEETING MINUTES**

**March 28, 2018**

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

Also present were Doug Ende (WSBA Staff Liaison), Thea Jennings (Office of Disciplinary Counsel Disciplinary Program Administrator), Rachel Konkler (Office of Disciplinary Counsel Legal Administrative Assistant), Jerry Larkin (Attorney Register & Disciplinary Commission Administrator, State Bar of Illinois) (by phone), Gene Leverty (President, State Bar of Nevada), Leslie Levin (Professor, University of Connecticut School of Law) (by phone), Jean McElroy (WSBA Chief Regulatory Counsel), and Sara Niegowski (WSBA Chief Communications and Outreach Officer).

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

**A. WSBA MEMBER FEEDBACK FOR THE TASK FORCE**

There has been no new feedback from the WSBA membership since the Task Force's last meeting in February. The Task Force will continue to generate feedback from the WSBA membership as its work progresses.

**B. MINUTES**

The minutes of the February 21, 2018 meeting were approved by consensus.

**C. RESEARCH AND ANALYSIS BY LESLIE C. LEVIN, PROFESSOR, UNIVERSITY OF CONNECTICUT SCHOOL OF LAW**

Leslie C. Levin, Professor at University of Connecticut School of Law, presented her research from her September 2016 Florida Law Review article *Lawyers Going Bare and Clients Going Blind*, which studies uninsured lawyers, who they are, and why they go uninsured. She found that small firm lawyers are more likely to go uninsured; however, not a lot is known about these lawyers and why they choose to go uninsured, as these lawyers often fly "under the radar." She noted that in Washington, based on voluntary demographic information reported by lawyers in 2017 as part of the annual licensing process, approximately 28% of solo



practitioners reported being uninsured. She predicts the number may be higher given that the reporting is voluntary.

As part of her research, Professor Levin surveyed over 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). Her survey concluded that approximately 15% of private practitioners in New Mexico and 19.6% of private practitioners in Arizona go uninsured. She further found that most uninsured lawyers are solo or small firm practitioners, who were more likely to work at home without any support staff. According to those surveyed, the most common reason for not carrying insurance was cost; in all three surveyed states, insurance costs on average \$3,000 per lawyer. 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.

Of those surveyed in New Mexico who reported that they did not have insurance and did not wish to purchase insurance, many asserted that they could not obtain insurance at a price they could afford; however, 57.5% of respondents indicated that they agreed or strongly agreed that they could afford counsel to defend them against a malpractice claim. Another 41% indicated they had never applied for malpractice insurance, which suggests some respondents may not have known the true cost of insurance. Professor Levin estimates that the number who may truly be unable to afford insurance is somewhere near 20%.

In her research, Professor Levin further found that the bulk of reported malpractice claims are against solo and small firm practitioners. Specifically, in Missouri, the only state requiring insurers to report claims statistics, 66.4% of malpractice claims were against firms with five or fewer lawyers. Statistics also showed that the mean and median amount paid for claims against solos from 1984-2014 was \$52,678 and \$24,351, respectively. For firms of two-to-five lawyers, the mean paid was \$110,994 and the median paid was \$34,034, all of which suggests that annual coverage of \$100,000 per occurrence would likely suffice to cover most claims against solo and small firm lawyers.

In jurisdictions without mandatory malpractice insurance, Professor Levin estimates that annual claims frequency rates for solo and small firms are approximately 3.25 to 4.25 claims per 100 lawyers. She notes some evidence suggests that mandatory insurance may affect claims rates (based on review of rates in Oregon and Canada, where malpractice insurance is mandated). Professor Levin reported that in Oregon lawyers are more willing to report a claim since it will not affect their insurance premiums, with claims rates at 12.4 claims per 100 lawyers, on average. In Canada, there were, on average, 10.3 claims per 100 lawyers in Ontario, 12.3 claims per 100 lawyers in British Columbia, and 11.8 claims per 100 lawyers in Alberta.

Professor Levin also researched the effect of malpractice insurance disclosure requirements across the country. Only anecdotal evidence suggests there was an increase in the purchasing of insurance around the time disclosure requirements went into effect because most jurisdictions did not maintain information regarding how many lawyers were insured prior to

those requirements. Consequently, the effect of those initiatives on acquisition of insurance remains in question.

Finally, Professor Levin addressed the question of whether uninsured lawyers are more likely to commit malpractice. She noted that hard data is not available on this issue, though from the evidence available, the uninsured are mostly solo and small firm lawyers who:

- Are more likely to neglect cases (according to discipline statistics);
- Do not have administrative support (60+%);
- Are less likely to belong to specialty bar associations that expose them to best practices; and
- Do not undergo an annual review of their office practices as insured lawyers do when renewing their malpractice insurance.

**D. PRESENTATION BY JERRY LARKIN, ATTORNEY REGISTER & DISCIPLINARY COMMISSION ADMINISTRATOR, ILLINOIS STATE BAR**

Jerry Larkin, Attorney Register and Disciplinary Commission (ARDC) Administrator for the Illinois State Bar, presented information about proactive management-based regulation (PMBR) in Illinois. PMBR is an alternative approach to lawyer regulation, whereby programs are instituted to promote the ethical practice of law and, as a consequence, avoid the filing of grievances and malpractice claims.

In 2017, Illinois became the first state to adopt PMBR. Mr. Larkin noted that prior to adoption of PMBR in Illinois, Illinois studied PMBR models in other jurisdictions including New South Wales, Australia, and Nova Scotia, Canada. 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.

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.

With the adoption of PMBR, beginning in 2018, 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. The self-assessment is administered by the ARDC, the Illinois Supreme Court agency that regulates Illinois lawyers. Uninsured lawyers who fail to complete the self-assessment cannot register the next year to renew their license and may be administratively suspended.

The self-assessment is confidential, and also provides free CLE credit. The self-assessment covers the following topics: technology; conflicts; fees and billing; client relations; trust accounting; wellness; civility and professionalism; and diversity and inclusion. Of those lawyers who have completed the self-assessment, a large majority have responded positively to the program. Following the self-assessment, the ARDC provides the lawyer with tools to help improve their practice.

**E. PRESENTATION BY GENE LEVERTY, PRESIDENT, STATE BAR OF NEVADA**

Gene Leverty, President of the State Bar of Nevada, described a current process initiated by the State Bar of Nevada to investigate and make recommendations regarding mandatory malpractice insurance in Nevada. Like in Washington, Nevada lawyers must report their insurance coverage status annually. 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. 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.

As part of its work, in 2017, the State Bar of Nevada sent a survey to those members who reported not having malpractice insurance. Survey results showed that more than 73% of those without insurance were solo practitioners and 15% were small firms of two-to-four lawyers. Nearly 80% were in private practice, and more than 55% of the uninsured lawyers had been in practice for 20 years or more. The top reasons lawyers gave for being uninsured were cost, confidence in their practice, and a belief their practice area did not necessitate coverage. A second survey was sent out regarding perceptions about mandatory malpractice insurance. They received 1,001 responses, including approximately 450 written comments, the majority of which were not favorable.

To uphold its mission to govern the legal profession, to serve its members, and to protect the public interest, the State Bar of Nevada intends to implement mandatory malpractice insurance by 2019. They have drafted a petition which they plan to submit to the Supreme Court of Nevada for approval, with anticipated implementation in January 2019. The proposed rule amendment would require every lawyer who is engaged in private practice and represents clients to attest to having professional liability insurance coverage at a minimum limit of \$250,000 per occurrence/\$250,000 annual aggregate. The proposed coverage amount is intended to cover not only expenses but also any claims payment.

**F. PRESENTATION BY JEAN MCELROY, CHIEF REGULATORY COUNSEL, WASHINGTON STATE BAR ASSOCIATION**

Jean McElroy, WSBA Chief Regulatory Counsel, presented an analysis of WSBA's current membership demographic information. She noted that the profession has seen significant and consistent growth since 2004 with 38,540 licensed lawyers in Washington in 2017. In 2017, the median age of licensed Washington lawyers was 50, which is consistent with data from past years. With respect to those lawyers in private practice who reported being uninsured, the

data suggests that as lawyers age, they are more likely to report not having malpractice insurance: with 86.6% of 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. The same trend holds true for the number of years in practice. With respect to voluntary demographic information, the data suggests at least 28% of solo practitioners in private practice are uninsured. (Ms. McElroy's PowerPoint presentation relating to member demographic information will be included in the April 25, 2018 Task Force meeting materials.)

Ms. McElroy also discussed the role of WSBA's Regulatory Service Department in overseeing the financial responsibility requirements for Limited license legal technicians (LLLTs) and limited practice officers (LPOs). These licensees are required to demonstrate financial responsibility in order to obtain their license and to renew it annually. LPOs must show that their employer carries errors and omissions insurance or submit an audited financial statement. LLLTs must carry malpractice insurance or be covered by their employer. WSBA offers a plan through ALPS which costs about \$600 per year for LLLTs, with a \$300,000 aggregate limit. There is currently no similar requirement for lawyers; however, lawyers are surveyed annually about their insurance coverage status. To date, no LLLTs have been administratively suspended for failure to show proof of financial responsibility. Most practitioners elect to go on inactive status until such time as they can submit proof of financial responsibility rather than be subject to administrative suspension.

**G. ADJOURNMENT**

There being no further business, the meeting adjourned at 4:00 p.m.