

Malpractice Insurance Working Group  
Subcommittee Reports and Recommendations  
January 14, 2019

**SUBCOMMITTEE ON MANDATORY MALPRACTICE INSURANCE**

1. A mandatory captive fund for malpractice insurance should not be established
  - a. California is a far more complex insurance market than those in which a captive fund has been established, as evidenced by the following factors:
    - i. Number of licensed attorneys
    - ii. Areas of practice
    - iii. Number of large firms, including national and international firms, headquartered in the state
  - b. Insurance is readily available on the private market
    - i. The private insurance market provides insurance tailored to the specific needs of attorneys and firms
    - ii. A mandatory captive fund would disrupt the private market, which might negatively impact attorneys
      - While a mandatory captive fund might provide reduced premiums for solo attorneys and small firms, total premiums for large firms would likely increase, potentially driving large firms out of California
    - iii. Mandatory captive funds were founded during “hard” insurance markets, to fill a need that does not currently exist in California
  - c. It would be difficult to fund a mandatory captive fund in California
    - i. A significant initial reserve, potentially as high as \$200 million given the number of insured attorneys and claims, would be required
    - ii. A significant staff would be necessary for the operational, finance, claims handling and loss control/risk management functions
      - The captive entity would have to employ a staff, or purchase the relevant services from a private provider, at levels significantly beyond the Oregon program due to the number of California attorneys to be insured
2. Subcommittee did not come to a consensus regarding mandatory malpractice insurance; three separate recommendations are provided
  - a. Malpractice insurance should be required as a condition of licensing for all attorneys that represent private clients (**1 member**)
    - i. Protecting the public is good public policy; any delay in mandating insurance is a delay of good public policy
      - Further study and collection of data would cause an unnecessary delay in instituting this requirement
    - ii. Affected attorneys would be able to select their insurance on the private market
    - iii. Exploration of the development of reasonably priced policies to accommodate low bono and pro bono attorneys, retired attorneys, part-time attorneys, new attorneys, etc.

- iv. Provide funding to subsidize the cost of insurance for attorneys who provide pro bono and low bono services
- b. Mandatory malpractice insurance, as stated in 2.a., should be required as a condition of licensing, but the collection of additional data is necessary prior to implementation of this requirement; interim measures should be imposed (**3 members**)
  - i. Malpractice insurance helps to protect victims of attorney negligence
    - a) Many clients, especially less sophisticated clients who are likely to hire solo practitioners, already believe that malpractice insurance is currently required
    - b) Plaintiff's malpractice attorneys rarely pursue action against uninsured attorneys
      - Even when there is a viable cause of action, barriers to collecting judgments discourage attorneys from filing cases
  - ii. Interim measures should be to be implemented pending implementation of mandatory insurance
    - a) Increased consequences for uninsured attorneys who commit malpractice:
      - i) Statutory amendment to require attorneys to report all malpractice verdicts against them that are not satisfied within one year of a final and non-appealable judgment
      - ii) Disciplinary sanctions for the failure to satisfy a final and non-appealable malpractice judgment
      - iii) Bankruptcy to be dealt with in accordance with bankruptcy law
    - b) Strengthen disclosure requirements regarding the lack of insurance
      - i) State Bar to develop mandatory disclosure language for attorneys who do not carry malpractice insurance, to be provided in a separate notice to client
        - explanation of the claims made nature of the policy
        - explanation that insurance does not guarantee coverage
        - explanation that insurance policies have limits
      - ii) Require written client acknowledgement of notice
      - iii) Notice to be required if attorney is insured at time of retention but becomes uninsured during the course of representation
    - c) Addition of prominent sections on the State Bar Website
      - i) One that educates the public as to what legal malpractice insurance is and why they may want to have their attorney to have such insurance
      - ii) One that educates attorneys as to why a licensed attorney in the State of California should want and have a legal malpractice policy

- d) Require uninsured attorneys to complete a self-assessment aimed at helping lawyers improve how they practice law, similar to the Illinois PMBR program
- iii. Additional data should be collected as follows:
  - a) Annual licensing fee statement to require attorneys to report the following information:
    - i) Firm size
    - ii) Areas of practice
    - iii) Whether they are insured
      - If not, reason for lack of insurance
    - iv) Additional information, to be determined
  - b) A professional survey firm to be retained to survey both attorneys and the public regarding legal malpractice insurance
    - Survey data to be analyzed in conjunction with data obtained from required reporting on annual fee statement
- c. Further study is necessary prior to a final determination of whether malpractice insurance should be required as a condition of licensing (**1 member**)

*Attachment*

Washington State Bar Association Mandatory Malpractice Insurance Task Force Interim Report

## **SUBCOMMITTEE ON AVAILABILITY OF INSURANCE AND RECOMMENDED RANGES OF COVERAGE**

### *Report:*

1. Adequacy and availability of insurance: a review of the California insurance market finds that there is adequate coverage available.
  - a. California is a competitive insurance market; a review of the market found more than 17 admitted carriers and 18 non-admitted carriers that offer legal malpractice insurance.
  - b. Attorneys are able to obtain coverage at levels and with terms commensurate with their needs.
  - c. An open market is essential for ensuring ongoing availability of coverage that meets individual attorneys' needs;
    - Brokers and agents assist attorneys in shopping among competing policy prices and terms;
    - A captive market would impair the competitive process that enhances the adequacy of terms and pricing, and the availability of coverage matched to different practice areas.
2. Affordability of insurance is subjective.
  - a. Insurance premiums in California are higher than in other states because tort liability exposure is higher in California.
  - b. Insurance is available at rates that are commensurate with the coverage provided; it is not overpriced.
  - c. The survey conducted on behalf of the MIWG included questions regarding insurance coverage.
    - i. The following data reflects the responses that were received regarding whether attorneys are insured:
      - 39% of solo practitioners reported that they were not insured;
      - 12% of firms with 2 to 5 attorneys report that they were not insured;
      - Only 4% percent of firms with 6 to 10 attorneys reported that they were not insured, demonstrating affordability for that segment of the market; and
      - 100% of firms with more than 10 attorneys report that they are insured.
    - ii. The following data reflects the reasons provided by uninsured attorneys regarding their lack of insurance (respondents could select more than one answer):
      - 66% responded that they could not afford insurance;
      - 29% responded they did not believe they will be sued; and
      - 18% responded that it is not required for their practice area.
  - d. Many of the public comments submitted to the MIWG included unaffordability of insurance among the reasons for opposing mandatory insurance.
    - i. Some reported very low income from legal work;

- ii. Some stated that the cost of insurance, if required, would preclude them from providing reduced cost and/or pro bono services, or would force them to stop practicing law, with a negative impact on access to justice.
- 3. Research into the following topics is required before further recommendations can be made:
  - a. The real risk to the public posed by attorneys who currently do not carry insurance;
    - i. Absent this information, “affordability” is difficult to gauge because the value of insurance to an attorney varies based on the scope of potential exposure;
    - ii. This information would also inform minimum levels of coverage recommended to protect the public.
  - b. The likelihood that attorneys who currently provide pro bono or low bono services would withdraw from practice if mandatory insurance were imposed:
    - Absent this information, the question of “affordability” is difficult to gauge, because we cannot know how many attorneys could adjust their spending priorities to purchase insurance if required to do so, as opposed to those who could not make that adjustment.
  - c. The availability of insurance through legal aid groups, and the limitations on obtaining insurance by working with such groups;
    - More than 3,000 individuals and organizations in California have been identified that help to provide access to justice; most of them should be eligible for very inexpensive professional liability coverage through NLADA, CNA and other carriers.
  - d. The potential availability of lower cost options to encourage attorneys who do not currently buy insurance to do so;
    - i. Some insurance carriers have indicated that they would consider offering lower cost policies for certain categories of attorneys, such as those whose income from their legal work is below a threshold amount, those in lower risk areas of practice, those in part-time practice, etc.
    - ii. Whether the Department of Insurance could require new entrants to the California insurance markets to provide lower cost policies;
      - Such a requirement could enhance the availability of low-cost insurance products and thus encourage attorneys to voluntarily buy insurance;
      - Such a requirement may negatively impact the availability of insurance.
    - iii. Potential legislative changes to tort liability rules to make insurance more affordable and to encourage attorneys to voluntarily buy insurance (e.g., longer statute of limitations for claims against attorneys who do not purchase insurance, limited ability to enforce fee agreements for attorneys who do not purchase insurance).

*Recommendations:*

1. There is no malpractice insurance crisis or other market condition that would support creation of a captive model such as described at the last full MIWG meeting.
2. If legal malpractice insurance is required, minimum coverage of \$100,000 per occurrence/\$300,000 aggregate per year is reasonably sufficient to protect members of the public who are served by attorneys who currently do not purchase insurance, especially if offered without consuming/burning limits.
  - a. The 2012-2015 ABA Profile of Legal Malpractice Claims reported that 89% of claims had total costs (including expenses and indemnity/settlement) of \$100,000 or less;
    - 76% had total costs of \$10,000 or less; and
    - 15% had total costs between \$10,001 and \$50,000.
  - b. Currently insured attorneys who work in higher risk practices, or who represent clients with potentially greater losses, are likely to continue to maintain adequate insurance.
  - c. A higher minimum with correspondingly higher premiums could harm members of the public by driving qualified attorneys out of the practice of law.
  - d. Professional corporations are required to carry minimum coverage of \$50,000 per claim/\$100,000 annual aggregate per attorney.<sup>1</sup>
  - e. Limited liability partnerships are required to carry minimum coverage of \$1,000,000 for up to five attorneys, plus \$100,000 for each additional attorney.<sup>2</sup>

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<sup>1</sup> State Bar Rule 3.158(A)(1), 3.158(C)

<sup>2</sup> Corporations Code §15956(a)(2)(A)

## SUBCOMMITTEE ON THE ADEQUACY AND EFFICACY OF THE CURRENT DISCLOSURE RULE

### *Recommendations:*

1. Maintain, without change, the disclosure requirements set forth in Rule of Professional Conduct 1.4.1 (previously Rule 3-410);
  - With an appropriate disclosure rule, which can be improved after additional information is collected, clients will have sufficient information to make informed decisions about which lawyer(s) to hire, and there will be no need to implement a mandatory insurance program that could have unintended, negative consequences, and for which there is insufficient data justifying its need;
  - The State Bar to draft suggested disclosure language to be used in retainer agreements:
    - The disclosure is merely that a lawyer does not have legal malpractice insurance;
    - No requirement to disclose that a lawyer has malpractice insurance, or the type of malpractice insurance the lawyer has. We recognize that this all-or-nothing disclosure has limitations. For example, a lawyer may have insurance, but due to other claims during the claim year, money may not be available to a particular client. Nonetheless, we believe anything more complicated than disclosure of the existence or lack of insurance is likely to confuse clients.
  - We note the lack of data indicating that the disclosure rules incentivize lawyers to purchase insurance, so maintaining the rule cannot be justified on this basis. This is despite data from South Dakota – and to a lesser extent from Alaska and Virginia – that the incidence of malpractice insurance purchased by lawyers in those states increased after disclosure rules were implemented. Nonetheless, we believe there is value in disclosure, whether or not it incentivizes lawyers to purchase malpractice insurance.
2. Collect data on uninsured lawyers;
  - Ask lawyers about the insurance they carry, if any, and gather information about the size of the firm, the type of practice, the policy limits, etc;
    - Information about insurance to be required on annual registration forms;
    - This will help the State Bar gather data that it currently lacks, making any future decisions about insurance disclosure requirements, or even mandatory insurance, more data-based;
  - Collect data about the public's perception of legal malpractice insurance, including whether they have any assumptions about the likelihood of a lawyer carrying malpractice insurance, whether that is important to them and why, and what they understand about malpractice insurance:
    - Hire a professional survey company to collect this data;
    - This will provide information about how helpful disclosure actually is, and whether some more fulsome disclosure should be considered in the future.
2. Reevaluate the disclosure rule after data is collected and analyzed.
3. Educate the public and lawyers about legal malpractice insurance by including information and FAQs on the State Bar website;

- Even if a client is told that a lawyer does or does not have insurance, that may not provide enough information. At a minimum, the client could be educated about what questions to ask the lawyer and what the answers may mean to the client;
  - The State Bar to conduct additional educational outreach;
  - Insurance carriers, brokers and trade organizations to be enlisted to assist in the development and dissemination of educational materials for lawyers.
4. Require lawyers without malpractice insurance to certify to the State Bar (either annually or every two or three years) that they have complied with the disclosure requirements;
    - The State Bar to audit compliance.
  5. Require lawyers who are not insured to report any judgments against them for legal malpractice.
  6. Require lawyers to report to the State Bar any unsatisfied legal malpractice judgments against them;
    - This reporting will help the State Bar gather data on the existence and prevalence of unsatisfied judgments;
    - The State Bar also could suspend lawyers with unsatisfied judgments (although doing this would make it less likely lawyers would self-report); and
    - Determine other sources to monitor such judgments.
  7. Require lawyers who are uninsured to complete programs that provide educational tools and self-assessment for practice management and risk reduction.

*Other recommendations considered:*

1. Require disclosure of the lack of insurance on an attorney's State Bar website profile page.
  - The current disclosure rule requires the disclosure to be made at the time the client engages the lawyer's service. There is an argument that this is too late, as the client already has invested time in meeting and deciding on a particular lawyer, without knowing about the lack of insurance. But there is no evidence that this is a problem, or that earlier disclosure would be helpful.
  - Other methods of mandatory disclosure also are possible, including (1) disclosure to the State Bar, with access available to the public only on request; (2) disclosure on the lawyer's website; and (3) disclosure in all written communications with client (*see* South Dakota).
2. Require the disclosure be made in a separate document, and not in the actual engagement agreement.
  - This would ensure that the disclosure does not get lost among the many other disclosures in sometimes lengthy engagement agreements.
  - The State Bar could provide the form of the disclosure based on its finding from the survey of the public.
  - But this elevates the malpractice disclosure above other important disclosures in the engagement agreement, including, for example, disclosures about conflicts of interest.
3. Require lawyers without legal malpractice insurance to take an additional four hours of MCLE on risk management issues:
  - Modeled after the Illinois "proactive management-based regulations" (PMBR)



## **SUBCOMMITTEE ON ENCOURAGING ATTORNEYS OBTAIN AND MAINTAIN INSURANCE COVERAGE**

### *Recommendations:*

1. State Bar should conduct a lawyer education campaign, including the following components:
  - Inform attorneys of the law and requirements regarding (1) mandatory insurance or (2) mandatory disclosure re lack of insurance; and
  - Retain a professional communications firm to develop a strategy to utilize law schools, California Lawyers Association events, and other outlets to:
    - Inform attorneys of the benefits of insurance and potential risks of failure to maintain insurance; and
    - Inform attorneys of the availability and affordability of professional liability insurance.
  - Require all attorneys to complete loss avoidance programs that include educational tools and self-assessment to ensure effective practice management and risk reduction. This requirement acknowledges that protecting the public is best served by preventing harm in the first place. Additionally, insurers might offer programs to meet this obligation to engage in mandatory loss prevention activities that combine with malpractice insurance coverage, thereby expanding the reach of liability coverage even if it is not mandated.

### *Observations:*

1. Measures to encourage attorneys to obtain and maintain insurance are not sufficient to fulfill the State Bar's statutory mandate to protect the public. If legal malpractice insurance is required as a condition of practicing law, the following measures should be implemented:
  - Limited, specified exemptions to this requirement to be provided; and
  - Costs of insurance to be subsidized for those engaged in substantial pro bono and very low bono work that increases access to justice.
2. Mandatory disclosure requirements may be effective in encouraging lawyers to purchase insurance, but it is unlikely to be adequate or effective in protecting the public through education;
  - Clients may not fully understand implications of hiring an uninsured lawyer.
3. Even in the absence of definitive data regarding harm suffered by victims of uninsured attorneys in California, the Bar must adhere to the statutory directive included in Business and Professions Code section 6001.1:

Protection of the public shall be the highest priority for the State Bar of California and the board of trustees in exercising their licensing, regulatory, and disciplinary functions. Whenever the protection of the public is inconsistent with other interests sought to be promoted, the protection of the public shall be paramount.
4. The potential impact on access to justice of mandating malpractice insurance should be the subject of further, separate study.

- The Bar should consider mechanisms for assisting small/solo practitioners with financial assistance to purchase insurance for lawyers providing pro bono and low cost representation;
  - Low income clients should not be left vulnerable to uninsured attorneys.

## **Mandatory Malpractice Insurance Task Force**

### **Interim Report to Board of Governors**

### **July 10, 2018**

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On September 28, 2017, the Board of Governors established the Mandatory Malpractice Insurance Task Force and issued a Charter to guide the Task Force's work. The Charter asked the Task Force to focus on the nature and the consequences of uninsured attorneys, 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 18 members, including attorneys, a federal judge, a limited license legal technician (LLLT), industry professionals, and members of the public. The list of members is attached. We were asked to provide an interim report at the July 2018 Board of Governors meeting, and the Charter directs submittal of a final report by January 2019. The group has met monthly since last January. This Interim Report summarizes:

- Key information acquired by the Task Force thus far,
- Concerns raised by the membership in comments to the Task Force,
- Possible regulatory approaches, including a free market model the Task Force is tentatively considering recommending, and
- The need for certain categories of exemptions.

Members of the Task Force started with open minds but widely divergent ideas about mandating malpractice insurance for lawyers in Washington. But as the group deliberated carefully over its potential recommendation and reached a tentative consensus, Task Force members expressed a belief that we should move boldly and not to shy away from a difficult recommendation. Task Force participants stressed that the WSBA has a duty to protect the public and maintain the integrity of the profession. Consequently, the Task Force is focusing on the risk of injury to the *public* that arises from uninsured lawyers, who constitute a small percentage of Washington attorneys. A license to practice law is a privilege, and no lawyer is immune from mistakes. The members emphasized that a key goal of this project is to recommend effective ways to ensure that clients are compensated when attorneys make mistakes. The Task Force members expressed that malpractice insurance (or lack thereof) has a



significant impact on clients, and that it is appropriate for lawyers to ensure their own financial accountability.

This Interim Report describes the Task Force's tentative conclusion that:

- Malpractice insurance should be mandated for Washington-licensed lawyers, with specified exemptions;
- Several categories of attorneys should be exempt. In Oregon, for example, exempt groups include, among others: government attorneys; in-house private company lawyers; attorneys providing services through non-profit entities, including pro bono services; retired attorneys; full-time arbitrators; and judges and law clerks;
- Minimum coverage levels should be mandated, *e.g.*, \$100K/\$300K, \$250K/\$250K, \$250K/\$500K, or \$500K/\$500K;
- Attorneys should be required to obtain minimum levels of professional liability insurance in the private marketplace, rather than establishing a "captive" single-carrier system. And the basic requirements should be simple and straightforward, avoiding multiple requirements that would interfere with the insurance market's ability to offer flexible and affordable policies.

The balance of this interim report describes our findings thus far, the concerns we have heard from WSBA members, a description of the options we considered, and more detail on where the Task Force is headed. With an approach tentatively identified, the next steps for the Task Force include developing the details of a practicable free market approach for Washington State and exploring in detail what potential limits, coverage levels, other requirements and exemptions should be included—keeping in mind the concerns raised by WSBA membership. We continue to receive useful technical assistance from ALPS, the WSBA's endorsed professional liability insurance provider, as well as from mandatory program administrators in Oregon and Idaho.

The Task Force will continue to meet in the coming months to discuss modeling and to draft its proposal, including any necessary rule changes, for the Board's consideration. We expect to publish an article in the September issue of *NWLawyer* updating the membership on our work and our preliminary recommendations, with the intent of soliciting additional member comments. After considering member suggestions, the Task Force will finalize its proposal for submission to the Board by January 2019.

If the Board of Governors desires further information on the specifics of the Task Force's work, the Board is encouraged to review the Task Force's detailed meeting minutes and meeting materials available at <https://www.wsba.org/insurance-task-force>.

## **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 professional liability 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 attorneys, their practice areas, how they practice (*e.g.*, solo/small firm/large firm/in-house), malpractice insurance levels, WSBA 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, and Nevada and California are considering doing so);
- 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, 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.

## **KEY FINDINGS**

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

1. Approximately 32,000 lawyers have active Washington licenses to practice law.
2. Over the last three reporting years, 14% of Washington lawyers in private practice have consistently reported being uninsured. The vast majority of Washington attorneys representing private clients carry malpractice insurance. (This excludes the 39% of licensed Washington lawyers who annually report that they are not in private practice. This excludes, for example, lawyers who work in public sector positions or in-house counsel jobs—attorneys who typically do not carry professional liability insurance.)
3. Lawyers 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.

4. Solo and small firm practitioners represent a disproportionate share of the malpractice claims. According to the *2015 ABA Profile on Legal Malpractice Claims (2015 ABA Profile)*, claims against lawyers in firms of five or fewer lawyers represented over 65% of claims during the period of 2012-2015. In Oregon, that 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).
5. According to the *2015 ABA Profile* and information received from ALPS, the practice areas of personal injury, real estate, family law, estate planning, certain corporate practices, and collection/bankruptcy have the highest incidences of malpractice claims. Not surprisingly, insurance premiums tend to be higher in those practice areas.
6. Most attorney misconduct grievances and disciplinary actions involve solo and small firm practitioners.
7. Malpractice plaintiffs' lawyers report numerous instances of worthy claims that they must reject for representation because the defendant lawyer is uninsured, making a recovery much less likely.
8. Over the last five years, WSBA Client Protection Fund application statistics indicate that 11% of applications were denied because they described instances of malpractice rather than theft or dishonest conduct. (The Client Protection Fund compensates clients only for lawyer theft or dishonest activities.)
9. According to an ABA study, 89.1% of national malpractice claims are resolved for less than \$100,000 (including claims payments and expenses). 95.2% of malpractice claims are resolved for less than \$250,000. ALPS reports that based on its experience, over the past 10 years in Washington State, 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; where payments were made, its average loss payment was \$60,000, and average loss expenses were about \$20,000.
10. Malpractice insurance premiums vary significantly based on many factors, including among others: years in practice, area of practice, size and practice mix of a firm, attorney history with malpractice claims and disciplinary actions, state characteristics, and whether lawyers are practicing full-time or part-time.
11. In Idaho, where mandatory malpractice began this year (2018), the average premium was approximately \$1,200 for ALPS policies newly issued to solo practitioners (the primary demographic of uninsured lawyers). That amount will likely increase annually by about 15% as the lawyer's length of exposure grows year-over-year until they are fully matured after 6 years. Average premium number, however, can vary broadly based on the firm's principal area(s) of practice.
12. New lawyers pay noticeably lower malpractice insurance premiums than more experienced lawyers. 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

attorney today for an event that occurred two years ago, that lawyer's *current* insurer covers the claim, whether or not that insurer provided a policy when the claimed event occurred. Insurers set premiums to provide resources to pay claims on incidents that happened in the past. A first-year lawyer was not practicing in the past, and thus represents a lower risk to insurers. New attorneys can expect their premiums to gradually increase by an average of 15% year-over-year for the first five years after they start practice, and then those premiums level off.

13. 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. Tail coverage can be expensive (an unlimited tail can be up to 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.
14. In Washington State, approximately 56% of lawyers connect with their pro bono clients through legal assistance providers, other non-profit organizations, or bar groups. Organized *pro bono* programs provided through nonprofit organizations frequently provide malpractice insurance for participating attorneys.
15. There is a disparity in Washington's regulatory/financial responsibility requirements for different legal license types (LLTs/LPOs/lawyers). Court rules require that LLTs and LPOs demonstrate financial responsibility in order to be licensed, but lawyers do not have a similar requirement.
16. Virtually all physicians carry malpractice insurance because it is widely required by hospitals as a condition of admitting privileges.
17. On average, lawyers are practicing longer, and once lawyers reach the age of 71, the number in private practice who carry malpractice insurance drops precipitously.
18. Oregon-licensed lawyers with offices in that state must belong to the Oregon State Bar's Professional Liability Fund, paying a flat assessment (premium) of \$3,500 per year for coverage of \$300K/\$300K with a \$50,000 claims expense allowance and no deductible. The Oregon program was established in 1977, when lawyers were having difficulties obtaining malpractice insurance. The Oregon program provides a number of robust loss prevention programs and continues to be viewed favorably among attorneys in that state.
19. Idaho's malpractice insurance mandate began in 2018, based on a free-market model and requiring minimum coverage of \$100K/\$300K. Thus far, no Idaho attorneys have reported an inability to obtain the required insurance.
20. The State Bar of Nevada last month submitted a proposal to that state's supreme court recommending that Nevada attorneys be required to obtain \$250K/\$250K in coverage on the private market.
21. 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.

For example, 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).

### **EXPRESSED CONCERNS FROM MEMBERSHIP**

A number of concerns have been expressed by some WSBA members regarding the concept of requiring attorney malpractice insurance. The Task Force compiled comments primarily provided through letters and emails to the Task Force and letters to *NWLawyer*. As of June, 2018, 69 comments were received. The bulk of the comments expressed one or another of the following:

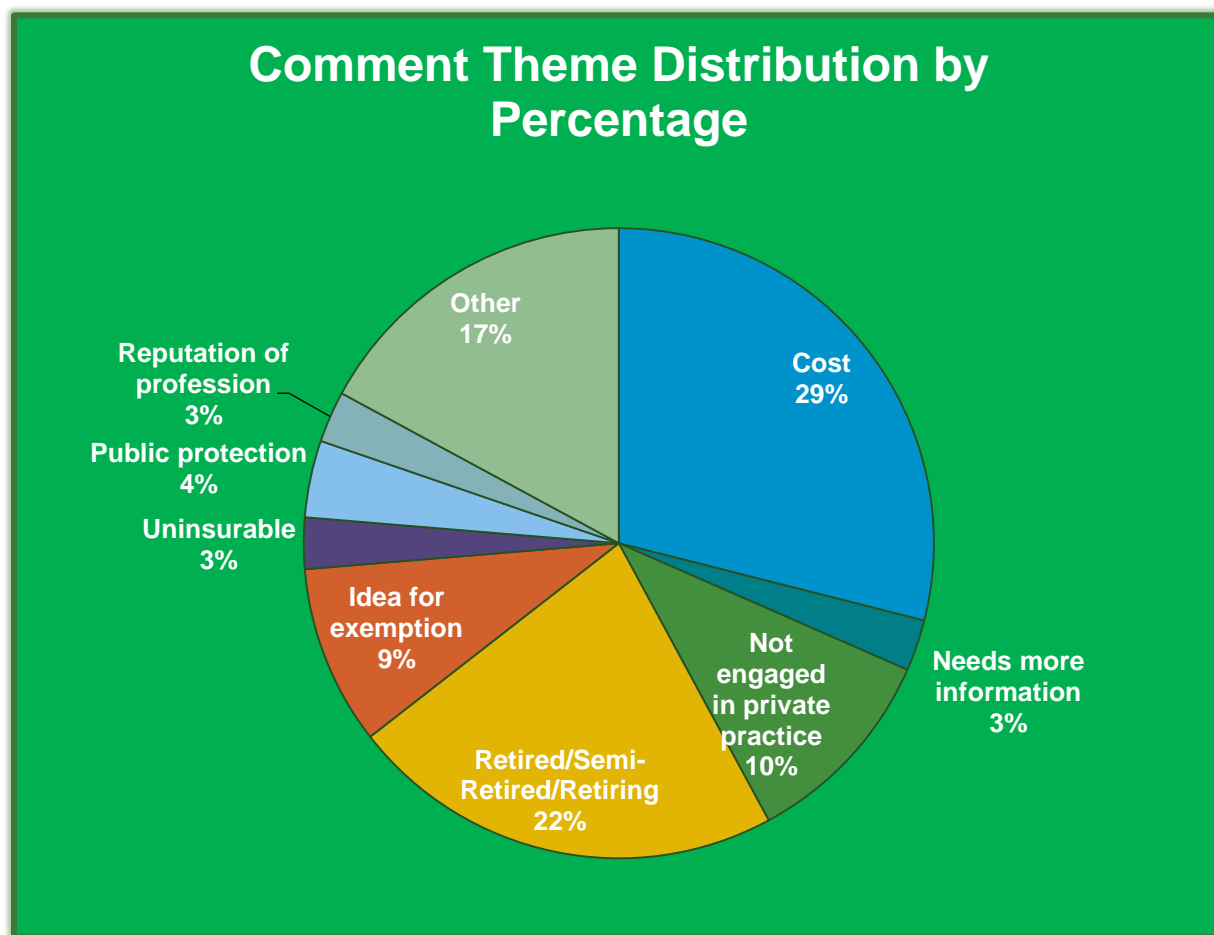
1. A concern about perceived prohibitive costs for insurance;
2. Concerns that retired/semi-retired/retiring attorneys will no longer be able to practice;
3. The desire to make malpractice insurance requirements inapplicable to lawyers not engaged in private practice (*e.g.*, government lawyers, in-house counsel, non-profit legal assistance or defense counsel);
4. Possible unfairness of requiring malpractice insurance for lawyers (often retired/semi-retired/retiring lawyers) who provide mainly pro bono services;
5. The perception of uninsurability (at reasonable cost) of attorneys in certain specialties, or attorneys who practice solely before specialized non-Washington State courts.
6. Ideas for exemption – commentator suggested one or more specific exemptions;
7. Needs more information – commentator expressed a need for more information;
8. Licensed but not actively practicing – commentator suggested insurance not necessary;
9. Public protection – commenter raised issues of public protection;
10. Reputation of the profession – commentator noted possible impact of imposing malpractice insurance on the public's perception of the profession;
11. Retired/semi-retired/retiring – commentator noted possible impact of imposing malpractice insurance on retirees;
12. Uninsurable – commentator indicated he or she is unable to obtain insurance;
13. Malpractice insurance increases meritless claims against lawyers;
14. Malpractice insurance encourages sloppy practice because it reduces risk; and
15. The WSBA should primarily serve lawyers, not the public.

The vast majority of comments came from solo practitioners and small firm practitioners, many of whom do not currently carry professional liability insurance. 47% of the comments thus far



expressed opposition to an insurance mandate. 45% did not indicate support or opposition, and many of those suggested exemption categories, such as exemptions for government or corporate lawyers, exemptions for *pro bono* activities, or exemptions for semi-retired lawyers who engage in a limited private practice for family and friends. 8% of responders expressed support for mandating insurance.

The following chart displays the variety of concerns expressed.



### **TENTATIVE CONCLUSIONS AND POTENTIAL APPROACHES**

After accumulating a considerable amount of data and other information, and after hearing from other states, from bar regulators, from industry professionals, and from attorneys, the Task Force reached a consensus that uninsured lawyers pose a distinct risk to their clients and themselves.

While it may be appropriate for attorneys to evaluate and assume personal risks created by lack of professional liability insurance, we concluded that it is simply not fair for the clients. Clients of uninsured lawyers often have a difficult time obtaining compensation from those attorneys after a malpractice event, and an even more difficult time finding legal representation for quite

legitimate claims against those uninsured lawyers—malpractice plaintiff lawyers simply cannot afford to handle those claims, and the WSBA’s Client Protection Fund is precluded from making payments based on malpractice.

In the Task Force’s view, the WSBA has a duty to protect the public and maintain the integrity of the profession. Lawyers make mistakes. A license to practice law is a privilege, and no lawyer should be immune from those mistakes.

The Task Force considered a number of possible regulatory approaches for possible recommendation to the WSBA Board of Governors. These are listed below, together with a short list of considerations relevant to each approach.

**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 attorney 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 large-print notice of lack of malpractice insurance on every uninsured lawyer’s stationery).

- 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

**4. Combine PMBR with more extensive disclosure requirements**

(Combine 2 and 3 above, *i.e.*, require uninsured lawyers to both take annual courses on risk reduction, practice management and bookkeeping and disclose lack of insurance).

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

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

- Provides diverse coverage options to members
- Free market allocates risks and costs based on practice character, claims history, and other underwriting standards
- Highly competitive market provides reasonable cost and different 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

As noted at the beginning of this Interim Report, the Task Force has tentatively concluded that it should recommend the following program to the Board of Governors:

- Malpractice insurance should be mandated for Washington-licensed lawyers, with certain exceptions. All attorneys subject to the requirement would be required to annually certify that they carry, and will continue to carry, professional liability insurance at or above the required minimum level.
- Minimum coverage levels should be mandated, *e.g.*, \$100K/\$300K, \$250K/\$250K, \$250K/\$500K, or \$500K/\$500K;
- Coverage should be “continuing,” meaning continued coverage from the initial coverage date, and policies should not be permitted that exclude attorney acts prior to the current year. However, because of expense constraints, lawyers obtaining malpractice insurance policies for the first time should not be required to obtain insurance that covers their acts prior to the coverage date.
- Attorneys should be required to obtain minimum levels of professional liability insurance in the private marketplace, rather than establishing a “captive” single-carrier system. And the basic requirements should be simple and straightforward, avoiding multiple requirements that would interfere with the insurance market’s ability to offer flexible and affordable policies.
- Several categories of attorneys should be exempt. In Oregon, for example, exempt groups include, among others: government attorneys, in-house private company lawyers, attorneys providing services through nonprofit entities, including pro bono services, retired attorneys, full-time arbitrators, and judges and law clerks.

#### **NEXT STEPS FOR THE MANDATORY MALPRACTICE INSURANCE TASK FORCE**

The Task Force consensus described above is tentative, and based on the information we have obtained thus far and the Task Force’s consideration of that information. In the coming months, the Task Force will focus its efforts on:

- Considering feedback from the Board of Governors;
- Ramping up information efforts among WSBA members, and obtaining and considering additional comments received;
- Detailing the recommended malpractice insurance mandate, including the specific required coverage minimums;
- Identifying in detail the recommended exemptions from the professional liability insurance requirement; and
- Drafting a proposed Court Rule for the Board of Governor’s consideration

The Task Force has every expectation that it will be able to provide a final report to the Board of Governors by January 2019, as specified in the Charter. We look forward the Board’s questions and comments regarding this interim report.

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