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Susan L. Carlson
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P.O. Box 40929
Olympia, WA 98504-0929

RE: Comment in Opposition to Proposed Amendment to Admission and Practice Rule 26 – Insurance Disclosure
Publication Order 25700-A-1281
Amended Deadline Extended to Sept. 30, 2020 by Order 25700-A-1295

Ms. Carlson:

Attached please find a comment in opposition to the Proposed Amendment to APR 26. Thank you.

Barnaby Zall

Encl: Comment

IN THE SUPREME COURT OF THE STATE OF WASHINGTON
In the Matter of Proposed Amendment to APR 26 Requiring Mandatory Malpractice Insurance
Publication Order 25700-A-1281 (Dec. 4, 2019)
Deadline Extended to Sept. 30, 2020 by Order 25700-A-1295

COMMENTS OF BARNABY ZALL
In OPPOSITION to the Proposed Amendment
May 2, 2020

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SUMMARY OF COMMENTS:

Neither the proponent of the Proposed Amendment nor the WSBA's Mandatory Malpractice Insurance Task Force Report met the long-established constitutional standard of review requiring specific evidence sufficient to justify infringing on First Amendment rights of speech and association. Instead, both offered "mere conjecture," unjustified conflation, and exaggeration based on generalizations, incomplete analyses and speculation. Both ignored or discounted compelling contrary evidence that recently led the WSBA's Board of Governors and other state bars to reject proposals for mandatory malpractice insurance coverage.

The available evidence shows that the Proposed Amendment would fail in its stated purpose, instead providing millions in annual windfall revenues to insurers at crushing cost to hundreds of Washington lawyers, while offering little compensation to claimants. Instead of increasing access to justice, the Proposed Amendment would shrink the number of lawyers in Washington overall (particularly in solo and small firms, "legal deserts" and in high-risk and specialty practices), and throttling access to justice across the state.

In addition to the concerns correctly identified by the WSBA BoG, there are three other specific areas of concern not mentioned in the BoG's recent letter to the Court:

A) The MMI Task Force erroneously said that sufficient information was not available to calculate both the scope of its identified problem and the cost of the Proposed Amendment. Specific information was constitutionally required, but both the proponent and the MMI Task Force Report offered only speculation and conclusions, inappropriately conflated self-insurance with risk and claims with injury, and suggested inapt or exaggerated results it simultaneously claimed could not be calculated. Yet the information was available, and reasonably demonstrates that the asserted justifications for the Proposed Amendment are, at best, vastly exaggerated and, more likely, simply unfounded.

B) As explained in more detail below, information made available by the MMI Task Force and the Oregon Professional Liability Insurance Fund reasonably demonstrates that the proposed solution would produce a windfall for insurance companies at crushing cost to lawyers, and is unlikely to provide the predicted benefit to claimants. Under the Proposed Amendment, formerly self-insured lawyers in Washington would pay between $7.5 and $10.3 million per year in new premiums. Insurers of formerly uninsured lawyers in Washington would expect to pay out between $1.8 and $2.8 million in claims and expenses, with only about one-third of payouts going to claimants and claimants' counsel, and the rest to claim expenses. Thus, insurance companies would receive net windfall revenues of between $5.7 and $7.5 million a year.

C) The benefits and costs of the Proposed Amendment are unevenly distributed across the state and the profession. The WSBA BoG and hundreds of lawyers expressed concerns about effects on retired and retiring lawyers and those in specialty practices where affordable insurance is simply not available. The MMI Task Force, however, dismissed negative comments about cost and availability, even if the comments were amply supported, relying instead on private comments from the insurance industry. The Proposed Amendment also exacerbates emerging concerns about access to justice, especially in "legal deserts," rural areas and low-income areas. Legal deserts already have trouble attracting new lawyers as older ones retire (especially because compensation in those areas is far lower than in King County), and if the costs of practice across the state rise, the number of lawyers in those areas will fall even further.

The Court should reject the Proposed Amendment, as the WSBA BoG and several other states did when faced with similar proposals.

I. THE PROPOSED AMENDMENT TO APR 26:

The proposed amendment is essentially the same as the proposal set out in the February, 2019, recommendation[1] of the Washington State Bar Association's Mandatory Malpractice Insurance Task Force.[2] The MMI Task Force Report said, *inter alia*, that it proposed the amendment to Admission and Practice Rule 26 because: "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."[3] The MMI Task Force explained:

> 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 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 proof."[4]

On May 17, 2019, after substantial public and member discussion and hearings, the MMI Task Force's recommendation was rejected by the WSBA Board of Governors.[5] The WSBA BoG, by letter commenting on the Proposed Amendment,[6] said, *inter alia*, that it had voted to reject the recommendation because:

> members overwhelmingly opposed mandating insurance, expressing concerns regarding cost, the likely adverse impact on pro bono services provided by retiring, retired, and

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[1] Washington Courts, "Proposed Changes to APR 26 – Insurance Disclosure," https://www.courts.wa.gov/court_Rules/proposed/2019Dec/APR26.doc, (last visited April 22, 2020); Mandatory Malpractice Insurance Task Force, *Report To WSBA Board Of Governors* ("MMI Task Force Report"), Feb. 2019, https://www.wsba.org/docs/default-source/legal-community/committees/mandatory-malpractice-insurance-task-force/mandatory-malpractice-insurance-task-force-report815766f2f6d9654cb471ff1f00003f4f.pdf?sfvrsn=728e03f1_0, App. E, P. 78, 79-80 (redlined version).

[2] WSBA, "Mandatory Malpractice Insurance Task Force," (updated Feb. 21, 2020), https://www.wsba.org/insurance-task-force.

[3] MMI Task Force Report, at 3.

[4] *Id.*

[5] Lyle Moran, "Washington State Bar Decides Against Malpractice Insurance Mandate," *Above the Law*, May 23, 2019, https://abovethelaw.com/2019/05/washington-state-bar-decides-against-malpractice-insurance-mandate/. The California State Bar also recently decided against a similar proposal. *Id.*; Scott B. Garner, "May 2019 – Mandatory Malpractice Insurance: An Attack on Access to Justice," *Orange County Bar Association*, http://www.ocbar.org/All-News/News-View/ArticleId/3600/May-2019-Ethically-Speaking-Mandatory-Malpractice-Insurance-An-Attack-on-Access-to-Justice.

[6] Letter from WSBA President Rajeev Majumdar to Susan Carlson, Clerk of the Supreme Court, Jan. 26, 2020, http://www.courts.wa.gov/court_Rules/proposed/2019Dec/APR26/Rajeev%20Majumdar%20-%20APR%2026.pdf.

> semi-retired members, un-insurability for some high-risk practitioners and practices, the inappropriate delegation of licensing prerogatives to the insurance industry, the risk of increasing insurance premiums for all lawyers through the creation of a captive market, and the financial burden such a mandate would impose upon individual lawyers and the viability of their practices, especially solo and small firm lawyers. …[7]
>
> [T]he decision not to approve the Task Force recommendation reflects a genuine and firmly held belief that any benefits of the "free market" insurance model would be outweighed by the considerable burdens it would or might impose on the profession and those it serves, including, most significantly, the risk of unintended consequences on retiring/retired/semi-retired lawyers and pro bono legal services, the *de facto* ouster of lawyers in high-risk practice areas, the risk that a captive market would increase insurance premiums for all members, and the cost of market-based insurance, which would ultimately be borne by clients in the form of increased legal fees.[8]

Only Oregon[9] and Idaho[10] currently have mandatory malpractice insurance, although several other states have considered proposals to require insurance coverage.[11] Oregon established its Professional Liability Insurance Fund in 1977; all licensed lawyers must

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[7] *Id.*, at 3.
[8] *Id.*, at 4.
[9] 2017 Ore.Rev.Stat. § 9.080(2)(a). In *Hass v. Oregon State Bar*, 883 F.2d 1453 (9th Cir. 1989), the Ninth Circuit upheld Oregon's mandatory malpractice insurance requirement against an antitrust challenge because it fell under the traditional bar association "state action" exemption to the Sherman Antitrust Act. *See, Goldfarb v. Virginia State Bar*, 421 U.S. 773, 780-793 (1975). *Hass* is one of several prior cases using the bar association-related antitrust analysis factors established in *Goldfarb*.

The proponent of the Proposed Amendment asserts "antitrust exposure" as his initial rationale for the Proposed Amendment. GR 9 Cover Sheet Draft ("GR 9 Cover Sheet"), "Conflicts Resolved," https://www.courts.wa.gov/court_rules/?fa=court_rules.proposedRuleDisplay&ruleId=4751. Since existing APR 26 is an action of the Washington Supreme Court, a sovereign state agency for antitrust purposes, this assertion has no basis in antitrust law or practice. As *Hass* demonstrates, *Goldfarb* and the "state action" doctrine insulate any APR 26 action taken by the Supreme Court of Washington against antitrust liability. *See* Barnaby Zall, "Comments to Supreme Court Work Group to Review WSBA Structure on Structural Antitrust Issues – or the lack thereof," June 24, 2019, https://www.wsba.org/docs/default-source/legal-community/committees/bar-structure-work-group/comments-to-structure-work-group-on-antitrust-issues.pdf?sfvrsn=40c80df1_0.

Recently, *North Carolina State Board Of Dental Examiners v. Federal Trade Comm'n,* 135 S.Ct. 1101, 1111 (2015), applied the traditional bar association antitrust standards to other non-bar association state boards. Contrary to some assertions to the recent Supreme Court Work Group on Restructuring the WSBA, *No. Carolina Dental* did not define new law applying to bar associations, but rather applied *Goldfarb*'s long-established antitrust law relating to bar associations to other state boards.

[10] Idaho Bar Comm'n Rule 302(a)(5); Annette Strauser, "2018 Malpractice Coverage Requirement – General Information," (Aug. 29, 2017), https://perma.cc/MZ2H-K8CG.

[11] Susan Humiston, Minnesota State Bar Association, *Bench-Bar*, "Practicing Law Without Liability Insurance," October 2, 2019, https://www.mnbar.org/resources/publications/bench-bar/columns/2019/10/02/practicing-law-without-liability-insurance.

participate in the Fund.[12] In 2017, Idaho mandated that every lawyer have malpractice insurance.[13]

About half the states, including Washington[14] and California,[15] have enacted some form of mandatory disclosure requirements to provide notice to the public of whether a lawyer has malpractice insurance, as alternatives to mandatory insurance. "Washington lawyers are not required to have professional liability insurance coverage. However, they are required to report to the Washington State Bar Association, on a yearly basis, whether they have coverage."[16] "The purpose of the insurance disclosure rule is client protection and to permit clients to make informed decisions when deciding whether to retain a particular legal professional."[17] This disclosure about malpractice insurance is available to the public on each lawyer's "Profile" page in the WSBA Legal Directory, along with lay explanations of the implications of listed coverage.[18]

The California Legislature recently required the California State Bar Association to conduct a similar review of mandatory malpractice insurance, and report its findings to the California Supreme Court.[19] Discussion about the California proposal was similar to that in Washington, including concerns about effects on access to justice, pro bono efforts and solo and small firm lawyers.[20] The California State Bar Working Group voted on January 14, 2019, not to recommend mandatory insurance, but to modify language requiring lawyers to disclose to the

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[12] Oregon Prof'l Liability Fund, "About the PLF; Protecting Oregon Lawyers," https://www.osbplf.org/about-plf/overview.html ("About the PLF") (last visited April 21, 2020).
[13] Idaho Bar Comm'n Rule 302(a)(5).
[14] APR 26(a)(2), (3).
[15] Cal. Rules Of Prof'l Conduct Rule 3-410.
[16] WSBA, *Professional Liability Insurance*, https://www.wsba.org/for-legal-professionals/license-renewal/license-renewal-faqs/professional-liability-insurance (last visited, April 21, 2020).
[17] WSBA, *Frequently Asked Questions about Professional Liability Insurance for Lawyers*, https://www.wsba.org/docs/default-source/licensing/frequently-asked-questions-about-professional-liability-insurance-for-lawyers.pdf?sfvrsn=eeaa06f1_4 (last visited, April 21, 2020).
[18] *Id.*; *See, e.g.,* WSBA Legal Profile, "Legal Profile Barnaby Zall," https://www.mywsba.org/PersonifyEbusiness/LegalDirectory/LegalProfile.aspx?Usr_ID=000000050976, scroll down to "Professional Liability Insurance", "Has Insurance" (last visited April 21, 2020).
[19] Cal. Bus. & Prof. Code § 6069.5 (2017). The report was delivered to the California Supreme Court by letter on March 27, 2019. Letter to Supreme Court of California from Leah T. Wilson and Jason P. Lee, March 27, 2019, http://www.calbar.ca.gov/Portals/0/documents/reports/Malpractice-Insurance-Report_Summary_and_Supreme-Court-Cover-Letter.pdf.
[20] Scott B. Garner, "May 2019 – Mandatory Malpractice Insurance: An Attack on Access to Justice," *Orange County Bar Association*, http://www.ocbar.org/All-News/News-View/ArticleId/3600/May-2019-Ethically-Speaking-Mandatory-Malpractice-Insurance-An-Attack-on-Access-to-Justice; James I. Ham, "Will California Have Mandatory Malpractice Insurance for Attorneys and What Will It Look Like?" 25 THE PRACTITIONER Vol. 1 Winter 2019, at 7. https://calawyers.org/wp-content/uploads/2019/06/the-Practitioner_v25-n1-2019-Winter.pdf.

public whether they carry insurance.[21] After reviewing the report of its Working Group review, the California State Bar Board of Trustees unanimously voted to approve the Working Group's decision not to recommend an insurance mandate.[22]

Other states have also recently reviewed proposals for mandatory malpractice insurance. A committee of the State Bar of Georgia has been considering a variety of options regarding mandatory malpractice insurance and disclosure of insurance, but no progress has been reported since January 10, 2020.[23] The Nevada Supreme Court rejected a mandatory insurance proposal on Oct. 11, 2018.[24]

In January, 2018, the New Jersey State Bar Association, concurring with a recommendation of a New Jersey Supreme Court Ad Hoc Committee on Attorney Malpractice to reject mandatory insurance, recommended that the New Jersey Supreme Court reject a mandatory insurance proposal.[25] The New Jersey Bar said, in part:

> Frankly, there is no evidence that either requirement [insurance or disclosure] is necessary or will resolve any demonstrated problem in connection with the ability of consumers to obtain quality legal services and to have recourse in the event of negligent representation. There is evidence, however, that, if mandated, both requirements will engender more confusion than clarity for the public, and will pose a myriad of problems for attorneys, and those offering legal services in high-risk, consumer-oriented practice areas.[26]

II. THE STANDARD OF REVIEW:

The requirement for malpractice insurance as a condition of practicing law affects constitutional rights, including the right of association. "Courts, too, are bound by the First

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[21] State Bar Of Calif. Working Group, "Report And Recommendation Re Legislatively Mandated Malpractice Insurance" 12-13 (Jan. 14, 2019), available at State Bar of Calif., "Open Session Agenda Item 703 March 2019; Report and Recommendation Re Legislatively Mandated Malpractice Insurance Working Group Report " March 15, 2019, http://board.calbar.ca.gov/docs/agendaItem/Public/agendaitem1000023886.pdf.

[22] State Bar of Calif., *Open Meeting Minutes*, March 15, 2019, at 9; http://board.calbar.ca.gov/docs/agendaitem/public/agendaitem1000024154.pdf.

[23] State Bar of Georgia, *Committees*, "Professional Liability Insurance Committee," https://www.gabar.org/committeesprogramssections/committees/index.cfm, scroll down to Professional Liability Insurance Committee for links to meeting agendas and minutes (last visited April 11, 2020).

[24] Nevada Supreme Court, Order Denying Petition for Amendment to Supreme Court Rule 79, , Nev. ADKT 534 (Filed October 11, 2018), http://caseinfo.nvsupremecourt.us/public/caseView.do?csIID=46470 ("we conclude that the Board of Governors has provided inadequate detail and support demonstrating that the proposed amendment to SCR 79 is appropriate.").

[25] Letter from Robert B. Hille, President N.J. State Bar Ass'n, to Hon. Glenn A. Grant, Acting Admin. Dir. N.J. Court, (Jan. 15, 2018), at 1, http://perma.cc/YDQ9-HWY8.

[26] *Id.*, at 1.

Amendment." *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 326 (2010). Infringements on the right of association "may be justified by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms." *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984).

This "exacting scrutiny" requires specific evidence of both the identified state concern and interest, and the narrowly-tailored proposed solution. A state may not limit the freedom of association based on generalizations or "mere conjecture." *Lair v. Motl*, 873 F.3d 1170, 1178 (9th Cir. 2017), *cert. den, sub nom. Lair v. Mangan*, 139 S.Ct. 916 (mem.) (2019), *quoting, McCutcheon v. Fed. Election Comm'n*, 134 S.Ct. 1434, 1452 (2014)("And – importantly – we 'have never accepted mere conjecture as adequate to carry a First Amendment burden'"); *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 392 (2000). Academic "studies said to indicate" support for a disputed proposition are insufficient to carry this burden.[27]

III. THE PROPOSED AMENDMENT IS NOT IN THE PUBLIC INTEREST:

The proponent and the MMI Task Force have the burden to show that there is both a compelling problem to be remedied and a remedy that is narrowly tailored. They have not done so, and as shown below, they likely could not. Just as the New Jersey Bar and the Nevada Supreme Court found in 2018, and the California State Bar and the WSBA BoG found in 2019, *supra*, there is no evidence that mandatory malpractice insurance is a narrowly-tailored remedy for a problem, and much evidence that mandating it will cause harm.

A. Instead of the Constitutionally-Required Specific Evidence of Compelling Governmental Interest and Narrowly-Tailored Remedy, the Proponent and the MMI Task Force Offered Only Speculation, Conflation and Exaggeration:

The Purpose section of the proponent's GR 9 Cover Sheet for the Proposed Amendment does not quantify or even mention either the incidence of malpractice it intends to cover, nor the costs (financial and in terms of access to justice) of the remedy it proposes. The Purpose section simply says there are uninsured lawyers in Washington and lots of persons "exposed without basic public protection."[28] But simply self-insuring is not itself an injury to anyone.[29]

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[27] *Shrink Missouri Gov't PAC*, 528 U.S. at 394 ("There might, of course, be need for a more extensive evidentiary documentation if respondents had made any showing of their own to cast doubt on the apparent implications of *Buckley*'s evidence and the record here, but the closest respondents come to challenging these conclusions is their invocation of academic studies said to indicate that large contributions to public officials or candidates do not actually result in changes in candidates' positions.").

[28] GR 9 Cover Sheet Draft ("GR 9 Cover Sheet"), "Purpose," https://www.courts.wa.gov/court_rules/?fa=court_rules.proposedRuleDisplay&ruleId=4751 ("To put it into perspective, with so many uninsured attorneys, the sheer number of clients exposed without basic public protection is staggering.").

Constitutionally, a court cannot order a remedy that infringes on First Amendment rights based on "mere conjecture." *McCutcheon*, 134 S.Ct. at 1452.

In the exercise of the Court's legislative function, some minimal basis for acting must be shown. If a proponent asserts that self-insuring alone is a risk, the assertion must define and quantify the risk in order to help the Court calculate the societal burden of lowering or obviating that risk. That was not done here. The proponent merely speculates: "with so many uninsured attorneys, the sheer number of clients exposed without basic public protection is staggering."[30]

Even more surprising, the MMI Task Force did not include this information in its Report, even though the MMI Task Force included representatives of the insurance industry (which relies on precision forecasting for its success) and attorneys who represent insurers and claimants (and thus recognize the need to lay a foundation for a remedy).[31] Indeed, the MMI Task Force said it could not calculate either of these crucial figures: "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."[32]

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[29] "Some lawyers *may make a responsible decision* not to maintain insurance because the lawyer is an in-house or government lawyer, or because the lawyer may choose to be financially responsible (self-insured)." WSBA, *Professional Liability Insurance*, https://www.wsba.org/for-legal-professionals/license-renewal/license-renewal-faqs/professional-liability-insurance (last visited, April 21, 2020), (emphasis added).

[30] GR 9 Cover Sheet, n. 28 *supra.*

[31] This omission of constitutionally-required information from the MMI Task Force Report was likely not a knowing violation of RPC 3.3(a) (duty of candor to a tribunal). RPC 3.3(a)(2) says that a lawyer may not fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client; there was no "client" here nor a criminal or fraudulent act. RPC 3.3(a)(4) says that a lawyer shall not knowingly offer evidence that the lawyer knows to be false. Although a lawyer in an adversary proceeding is not required to present an impartial exposition of the law or to vouch for the evidence submitted in a cause, the lawyer must not allow the tribunal to be misled by false statements of law or fact or evidence that the lawyer knows to be false. Washington Revision to Comment 3 says an advocate is responsible for pleadings and other documents prepared for litigation, but is usually not required to have personal knowledge of matters asserted therein. An assertion may be made after a reasonably diligent inquiry; the MMI Task Force, which included both lawyers and non-lawyers, consulted with a variety of sources and persons, some of whom, as noted *ante*, erroneously opined that these calculations could not be made. Washington Revision to Comment 8 provides that the prohibition on offering false evidence only applies if the lawyer knows that the evidence is false. Here, the MMI Task Force gathered evidence from which a reasonable person could calculate the omitted costs and benefits and made that evidence available on its WSBA web page. Nor was the Task Force Report actually presented to a tribunal, but to the WSBA BoG, which ultimately did not rely on the omitted information. Further, as noted at fn. 60, *ante*, I and others presented the omitted information and calculations derived therefrom to the Task Force and the WSBA BoG, and those comments were included in the MMI Task Force's supplementary materials to its report to the BoG. Finally, the remedy for failure to satisfy the constitutional requirement for specific evidence is only to reject the proposal, which the BoG ultimately did.

[32] MMI Task Force Report, at 7.

The MMITF apparently did consult with one expert in mandatory malpractice insurance coverage: Professor Leslie C. Levin of the University of Connecticut Law School.[33] Prof. Levin has written a law review article on the scope of the problem of lack of insurance coverage.[34]

That expert, however, was unable to quantify or even identify the risks from uninsured lawyers. In her presentation to the MMI Task Force and in her writings, Prof. Levin suggested that little is known about uninsured lawyers.[35]

Nor did Prof. Levin or the MMI Task Force know much about the incidence of malpractice by uninsured lawyers or injuries caused by these lawyers.[36] "It is exceedingly difficult to quantify the damage these uninsured lawyers cause as a result of malpractice. It is not even known how much LPL insurers pay annually in indemnity payments to resolve malpractice claims against insured solo and small firm lawyers."[37]

Prof. Levin has conceded, fairly directly, that she doesn't know how to obtain the constitutionally-required evidence: "In truth, it is exceedingly difficult to determine how much legal malpractice occurs, even among insured lawyers. It is impossible to know how much harm uninsured lawyers actually cause. There is little evidence these lawyers are more likely to commit malpractice than insured lawyers, but there is also no evidence they are less likely to commit malpractice."[38]

The MMI Task Force also cited a 2018 book[39] for the proposition that two other law professors "know of no way to estimate how much harm caused by uninsured lawyers goes uncompensated."[40] But the professors also speculate, and the MMI Task Force Report asserts,

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[33] *Id.*, at 9.
[34] Leslie C. Levin, *Lawyers Going Bare and Clients Going Blind*, 68 FLA. L.REV. 1281 (2016), https://scholarship.law.ufl.edu/cgi/viewcontent.cgi?article=1326&context=flr.
[35] "[S]o much about the true incidence of legal malpractice is not known." *Id.*, at 1283, *citing*, Manuel R. Ramos, *Legal Malpractice: No Lawyer or Client Is Safe*, 47 FLA. L.REV. 1, 5, 9 (1995) (stating that "scholars will never be able to present a complete and accurate picture of legal malpractice").
[36] MMI Task Force Report, at 9.
[37] Levin, *supra*, at 1311.
[38] *Id.*, at 1309. *See, also*, Susan S. Fortney, *Mandatory Legal Malpractice Insurance: Exposing Lawyers' Blind Spots*, 9 ST. MARY'S J. ON LEGAL MALPRACTICE & ETHICS 190, 214 (2019), https://scholarship.law.tamu.edu/facscholar/1336 ("The argument that there is no proof of harm refers to the lack of 'statistics' demonstrating that the existence of uninsured attorneys results in uncompensated claims."). To counter "statistics," Prof. Fortney cites Prof. Levin's "it is impossible to know how much harm" concession quoted here. Thus, despite the proponent of the Proposed Amendment including Prof. Fortney's analysis as an argument in favor of the Proposed Amendment, her article adds little to bolster a claim that not having "statistics" satisfies the constitutional demand for evidence as opposed to being prohibited "mere speculation."
[39] Herbert M. Kritzer & Neil Vidmar, WHEN LAWYERS SCREW UP: IMPROVING ACCESS TO JUSTICE FOR LEGAL MALPRACTICE VICTIMS, 40-41 (University Press of Kansas) (2018).
[40] MMI Task Force Report, at 22.

"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."[41] In the absence of at least some reasonable supporting evidence, however, "suggestions" – even "blockbuster"[42] ones like "hundreds of millions of dollars each year" – are "mere conjecture."

This failure to provide a non-speculative basis for adopting the Proposed Amendment is unjustified. Prof. Levin's own article, for example, provides specific evidence that uninsured lawyers are less likely to receive threats of malpractice claims.[43] Professor Levin surveyed members of the Arizona Bar, finding that 36% of insured lawyers "reported that they or a lawyer in their firm had been threatened with a malpractice action, but only 22% of the uninsured lawyers reported receiving threats."[44] Those findings indicate that insurance coverage increases malpractice claims, instead of preventing or reducing them.

The MMI Task Force itself believed that the Proposed Amendment will increase the number of malpractice claims: "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."[45]

Earlier, however, the MMI Task Force asserted that "the point" of the Proposed Amendment is either to provide access to justice or to provide compensation for actual incidents of malpractice.[46] The MMI Task Force consistently and erroneously conflates "claims" with access to justice or with compensation. Yet the vast majority of claims are unfounded and claimants and their legal counsel go unpaid.[47]

One reason for this deluge of unfounded claims is that "claims" are artificially inflated by insurance industry practices. Prof. Levin speculates that her survey results are:

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[41] *Id.*, (emphasis added).
[42] In the First Amendment right of association context (which most often arises in campaign finance law questions), there is a current debate over whether "blockbuster" allegations alone are sufficient for the Federal Election Commission to find "reason to believe" sufficient to open an official investigation, or whether specific evidence is required in a complaint based solely on media coverage. Barnaby Zall, "What Enforcement Philosophy Guides the Most Dangerous Federal Agency?" *Vox PPLI*, Mar. 24, 2020, https://publicpolicylegal.com/2020/03/24/what-enforcement-philosophy-guides-the-most-dangerous-federal-agency/. *See, also, Lair v. Mangan*, *supra*, P. 7.
[43] Levin, *supra*, at 1309.
[44] *Id.*, at 1310.
[45] MMI Task Force Report, at 37.
[46] *Id.*, at 3.
[47] *See, e.g.*, "About the PLF," *supra*, n. 12 (67% of claims result in no payment or processing expenses (which are generally costs of representation)).

> not clear whether the uninsured Arizona lawyers actually received fewer threats of malpractice actions than the insured lawyers. Insured lawyers may be more sensitive to client communications that imply such threats, because they must report possible claims to their insurers in order to preserve coverage. Insured attorneys may also be more likely to remember such threats because they communicated with insurers about them.[48]

That speculation is well-founded, since the definition of "claims" is not the same as the definition of "the risk of injury to the public that arises from uninsured lawyers."[49] Under a "claims made" policy, the lawyer's current insurer has the obligation to defend only claims filed during the current year, even if the act which generated the claim occurred long before.[50] To trigger coverage, lawyers with "claims made" policies must notify their insurers if they have any information which might potentially give rise to a claim, even if a claim is unfounded or never filed. So lawyers themselves self-protectively file "claims" with their insurers to trigger coverage, even if there was no actual injury or threat of a claim, and those "claims" affect the lawyers' premium calculations for many years. Claims are only a loose proxy for incidents of actual malpractice, and a remedy tied to ambiguous and unmoored speculation about claims is not narrowly tailored to the identified problem.

Similarly, average compensation paid for malpractice claims is far below the "suggested" level of "hundreds of millions of dollars each year" asserted by the MMI Task Force.[51] The evidence shows that insurers' payments of claims and expenses bear no resemblance to the "hundreds of millions of dollars each year" in injury compensation payouts asserted by the MMI Task Force Report.[52] The reason, again, is that the vast majority of "claims" are unfounded.

The Oregon Professional Liability Fund's 2017 Report noted that 67% of claims resulted in no payment or processing expenses (which are generally costs of representation).[53] And as recorded in the MMI Task Force Interim Report, ALPS, a malpractice insurer in Washington,

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[48] Levin, *supra*, at 1311.
[49] *See, id.*, at 1310 ("Insurance companies include in their definition of "claims" matters that lawyers report as possible claims so if an actual dispute arises, the matter will be covered under a "claims made" policy.").
[50] MMI Task Force Report, at 31.
[51] Where the MMI Task Force Report speculates about "hundreds of millions of dollars each year" in payouts to claimants, the Oregon Professional Liability Fund says its " average claim payment (including claims for which no payment was made) is approximately $9,600. Roughly 40% of claim files are closed without payment of any claims expense, while 60% involve some claims expense. The average claims expense paid on a claim (including claims with no claims expense) is approximately $11,400." "About the PLF," *supra*, n. 12. *See, also*, MMI Task Force Report, at 17 ("Nationally, 89.1% of malpractice claims are resolved for less than $100,000 (including claims payments and expenses).").
[52] MMI Task Force Report, at 19.
[53] "About the PLF," *supra*, n. 12.

found that half of all claims over the prior ten years were resolved without a loss payment or expense, presumably because they were unfounded.[54]

But that very lack of precision about whether there is an injury or just a "claim" also precludes a finding that the proposed remedy is narrowly tailored, as required by the constitutional standard of review. What would be required is specific evidence of an actual injury and a remedy tailored narrowly to that actual injury; in this case, the available evidence of actual insurer payouts demonstrates only that the proposed remedy reaches beyond any possible injury by a factor of at least two or three.

Further, and despite a lack of evidence, the proponent's Purpose clause claims that "Solo and small firm practitioners represent the largest group, with an astonishing 28% of solo practitioners choosing not to carry malpractice insurance, and yet they pose the greatest risk to the public, the legal system and access to justice."[55] The MMI Task Force similarly says that 65% of malpractice claims come from lawyers in firms of less than five lawyers, and calls this "a **disproportionate** share of malpractice claims."[56] The fact that most malpractice claims involve solo or small firm practitioners, however, doesn't imply additional risk to the public, since the vast majority of lawyers practice solo or in small firms. As the American Bar Association reported in 2015, 76% of lawyers nationwide were in firms of less than five lawyers, meaning that the share of malpractice claims from solo and small firm lawyers is actually less than might be expected proportionately.[57] Even the MMI Task Force Report itself noted: "as a whole, the evidence suggests that [small firm lawyers] are underrepresented as a source of malpractice claims."[58]

This lack of evidence does not meet the constitutional standard for the Court to legislate in this area. To the extent that there is a policy step to be taken, it should be justified solely on the ground of the actual risk, not mere speculation. Neither the proponent's rhetoric nor the MMI Task Force Report supports the claim that there is a "risk" to the public solely from a lack of malpractice insurance. Any risk is from a "malpractice event," not from the lack of insurance. Any policy action should be directed toward reducing the incidence of malpractice claims, and the proposed mandatory insurance requirement is not narrowly tailored to that end.

The Court should reject the Proposed Amendment.

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[54] MMI Task Force Report, at 17.
[55] GR 9 Cover Sheet, *supra*, "Purpose".
[56] MMI Task Force Report, at 15 (emphasis added).
[57] Above the Law, *Small Law Is Huge*, Sept. 18, 2015, https://abovethelaw.com/2015/09/stat-of-the-week-small-law-is-huge/.
[58] MMI Task Force Report, at 15.

B. Instead of Compensating Malpractice Claimants, The Proposed Amendment Would Produce Huge Costs for Lawyers, Windfall Profits for Insurers, and Negligible Benefits for Claimants:

To its credit, the MMI Task Force itself did gather sufficient information, coupled with information available from the Oregon Professional Liability Fund and other readily available sites, to allow an observer to calculate to a fair degree of confidence the likely costs and benefits of the Proposed Amendment. Those calculations are not difficult, requiring only lawyer-level mathematics and an understanding of simple probability.[59]

I provided a detailed recitation of those calculations to the MMI Task Force and the WSBA BoG prior to the conclusion of their respective analyses.[60] Calculated from the MMI Task Force material made available to WSBA members,[61] under the Proposed Amendment, insurers would reap windfall net revenue resulting from the governmental mandate of between $5.7 and $7.5 million a year.[62]

To fund these revenues, Washington self-insured lawyers required to buy malpractice insurance under the Proposed Amendment would pay between $7.5 and $10.3 million per year in premiums.[63] Their insurers would expect to pay out between $1.8 and $2.8 million in claims and

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[59] I am not the only one to make these calculations. *See, e.g.*, WSBA, *Mandatory Malpractice Insurance Task Force*, "Comments for the Board of Governors Through May 3, 2019," https://www.wsba.org/docs/default-source/legal-community/committees/mandatory-malpractice-insurance-task-force/comments-for-the-board-of-governors-through-may-3-2019(00513021).pdf?sfvrsn=6a7802f1_7 (last visited April 21, 2020), at 33-37 (Comments of James H. Davenport), 36 ("On the other hand, if all 2,752 of Washington's uninsured practitioners were mandated to purchase insurance, at $2,500 to $3,000 per year (Report, pp. 10, 30), the economic cost would be $6,880,000 to $8,256,000. It would take a minimum of 226 to 272 successful claims per year to recover the total costs. The economic benefits (public benefits) simply do not justify the costs.").

[60] Barnaby Zall, "Comments on Mandatory Malpractice Insurance Task Force," Oct. 11, 2018, available at WSBA, *Mandatory Malpractice Insurance Task Force*, "Task Force Comments Received on or before December 1, 2018", https://www.wsba.org/docs/default-source/legal-community/committees/mandatory-malpractice-insurance-task-force/comments-received-by-the-task-force866366f2f6d9654cb471ff1f00003f4f.pdf?sfvrsn=89ba03f1_0 ("Comments to the MMI Task Force"), Pp. 484/487 – 497/500 (duplicative page numbers in original) (detailed explanation of financial and risk calculations and Task Force omissions) (last visited April 21, 2020). My calculations were also circulated by some legal lists and blogs. *See, e.g.*, https://www.whatcomlocallaw.com/wp-content/uploads/2018/10/Oct-2018-note-to-MMITF.pdf (last visited April 21, 2020).

[61] WSBA, *Mandatory Malpractice Insurance Task Force*, https://www.wsba.org/Legal-Community/Committees-Boards-and-Other-Groups/mandatory-malpractice-insurance-task-force (last visited, April 21, 2020).

[62] *See, e.g., Amerada Hess Corp. v. Director, Div. of Taxation, New Jersey Dept. of the Treasury*, 490 U.S. 66, 77 (1989) ("the windfall profit tax was intended to reach only the excess income derived from oil production as a result of decontrol.").

[63] The range stems from three estimates of average likely annual premiums: ALPS, the WSBA's preferred provider, estimated that premiums would be $2,516, Prof. Levin, without citing a source, estimated average premiums of $2,324, and the Oregon Professional Liability Fund's actual premiums for 2017 of $3,500.

expenses from between 23 and 35 new "claims" per year.[64] Depending on whether figures from the Oregon Professional Liability Fund or private insurer ALPS were used, successful average payouts to claimants and expenses could be either $21,000 each or $80,000 each, respectively.[65]

Note that most "claims" do not result in payouts to claimants. Many insurers' payments are for lawyers or other expenses. For example, the Oregon Professional Liability Fund reports[66] that:

> Based on recent data, roughly 67% of claim files are closed without payment of any settlement or judgment, while 33% involve some payment to a claimant. The average claim payment (including claims for which no payment was made) is approximately $9,600. Roughly 40% of claim files are closed without payment of any claims expense, while 60% involve some claims expense. The average claims expense paid on a claim (including claims with no claims expense) is approximately $11,400.

Average premiums of $7.5 to $10.3 million, less claims and expenses payouts of $1.8 to $2.8 million leaves between $5.7 to $7.5 million net for the insurers. The ALPS cost and payout figures[67] are far larger than those reported by the Oregon Professional Liability Fund;[68] consequently, the costs to Washington insurers calculated using the Oregon experience could be substantially lower and the windfall revenues commensurately much higher.

This information was available to the proponent of the Proposed Amendment and to the MMI Task Force from the materials already gathered by the MMI Task Force. Neither chose to inform the Court or the WSBA of the actual expected cost to lawyers of the Proposed Amendment, the very low amount of actual payments to "claimants" expected under their Proposed Amendment, and the very high amount of windfall revenues expected to go to the insurance industry under their Proposed Amendment. Instead, as noted above, the MMI Task Force claimed alternately that it could not calculate the figures or that action was necessary to avoid "hundreds of millions of dollars" of losses from uninsured lawyers.

Once calculated, these figures indicate that the costs of mitigating the supposed "risks" of having uninsured lawyers in Washington are very high, with very little of the levies being provided to the supposed victims of legal malpractice. The benefit of mandatory malpractice insurance, by the numbers, goes overwhelmingly to insurers, who can increase costs to their

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[64] The higher figures were calculated using a 0.77% to 1.2% claims ratio and $80,000 in average loss payments and expenses projected from the ALPS reports to the MMI Task Force. MMI Task Force Report, at 17.
[65] *Id.*; "About the PLF," *supra*, n. 12.
[66] *Id.*
[67] MMI Task Force Report, at 17.
[68] "About the PLF," *supra*, n. 12.

captive clients essentially at will. The costs, as expressed by comments to the MMI Task Force from the lawyers who provide needed services in Washington, will be overwhelming in many cases.

Absent any better explanation of costs and benefits than presented either by the proponent of the Proposed Amendment or the MMI Task Force, the Court has little reason to adopt the Proposed Amendment, and many reasons to reject it. Mere speculation is not sufficient, especially when the speculation is not truly on point, and available information strongly suggests that the proposed remedy may be worse than the claimed problem needing resolution.

The Court should reject the Proposed Amendment.

C. Instead of Increasing Access to Justice, The Proposed Amendment Would Reduce Access to Justice Across Washington, Especially Among Highly-Skilled Specialties and in Under-served "Legal Deserts":

The expressed intent of the Proposed Amendment is access to justice.[69] Yet the majority of comments in opposition to the MMI Task Force Report indicated that the net result of the Proposed Amendment would be fewer lawyers serving fewer needs. This was also a major concern of the WSBA BoG, the New Jersey State Bar, lawyers who reviewed the unsuccessful California Bar proposal, and others who opposed this and similar proposals across the country. As one California commentator put it:

> Many would argue that the biggest problem California—and, in fact, the entire nation—has with its legal system is that so many individuals cannot afford to participate in that system. And the biggest cost barrier to participation is the cost of hiring a lawyer. The reality is that many of us could not even afford to hire ourselves. Thus, any solution to the problem identified above—that is, clients left without redress for the negligent acts of their attorneys—should not exacerbate the more urgent problem of people not being able to afford lawyers. ...
>
> The reality is that many lawyers practice on a very tight profit margin, for myriad reasons. Some simply do not have enough clients. Some practice part time. Some choose to serve underserved and underprivileged client populations at below market rates (sometimes referred to as "low bono"). Some practice heavily in the pro bono space. Some are mostly retired but still desire to maintain their license. For these lawyers, taking

[69] GR 9 Cover Sheet, "What we know ...", ("Lack of malpractice insurance is, fundamentally, an access-to-justice issue"); MMI Task Force Report, at 37 (" ... then the insurance mandate is doing precisely what it is supposed to do: provide access to justice").

> on the extra cost of malpractice insurance—likely to be at least $3,000-$3,800 per year in what is thought to be a fairly open insurance market, and potentially significantly more if the market tightens—simply is not possible. Faced with the expense of mandatory malpractice insurance, at least some of these lawyers will choose (or will have no choice but) to close up shop and stop servicing their clients. Other lawyers may continue practicing, but will cut back on their pro bono or low bono practices in order to make enough money to pay for insurance. The supply of lawyers will go down, and fewer clients will be served. It is simple economics.[70]

Just as legal services are not uniformly spread across Washington, the impact of the Proposed Amendment would be unevenly spread across Washington, and, based on the comments of practicing lawyers who will be harmed (the only evidence in the record), the likely greatest impacts would be in areas that are already underserved. "It is simple economics",[71] and inevitable absent major structural changes in the legal world.

The MMI Task Force attempted to minimize these lawyers' comments by offering a pie chart with characterizations of the comments; these characterizations were significantly misguided. For example, my description of the windfall profit cost-benefit analysis summarized in the prior section of this Comment was characterized as "Not Indicated/Unclear," because it did not expressly say that it was in opposition to the MMI Task Force recommendation.[72] The comment, as solicited by the MMI Task Force, was designed to suggest improvements and suggestions to the Task Force's Interim Report, rather than just to indicate support or opposition, but it is difficult to see how it could have been characterized as "unknown" by anyone who read the numbers and the conclusions summarized in the prior section of this Comment.

When it did respond to comments, the MMI Task Force responded dismissively, as when, faced with objections about lawyers leaving the profession or ending their public service, the MMI Task Force responded with four pages of commentary essentially rejecting the concerns.[73] For example, John Myer, a solo practitioner specializing in transactional securities with an MBA equivalent from MIT and training at one of America's premier corporate practices, commented that he had tried in vain for years to obtain coverage for his "high-risk" practice.[74]

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[70] Scott B. Garner, "May 2019 – Mandatory Malpractice Insurance: An Attack on Access to Justice," *Orange County Bar Association*, http://www.ocbar.org/All-News/News-View/ArticleId/3600/May-2019-Ethically-Speaking-Mandatory-Malpractice-Insurance-An-Attack-on-Access-to-Justice (emphasis added).
[71] *Id.*
[72] "Comments to the MMI Task Force," *supra*, n. 60, at 7, Comment #:315.
[73] MMI Task Force Report, at 33-36.
[74] WSBA, *Mandatory Malpractice Insurance Task Force,* "Comments Received after Dec. 1, 2018, and through Jan. 30, 2019," https://www.wsba.org/docs/default-source/legal-community/committees/mandatory-malpractice-insurance-task-force/comments-received-past-december-1-

> Recently, in response to the activities of the Mandatory Malpractice Insurance Task Force, I resumed my search. Today I spoke to Julie Patterson at ALPS who flatly told me that they do not cover lawyers who work on EB-5 offerings (please see: http://www.myercorplaw.com/eb5)[75] I reached out to ALPS because the WSBA on its website states that "ALPS is the WSBA endorsed professional liability provider, offering discounts and services specially designed for members like you."[76]

The MMI Task Force responded to Mr. Myer's specific assertions by saying that "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" (emphasis added), and referred to all practitioners in Idaho being able to obtain coverage.[77] This is a peculiar statement, in light of Mr. Myer's Dec. 18, 2018, email to Prof. Hugh Spitzer, Chair of the MMI Task Force, which included an Attachment A with names of companies, dates of refusal, and other information, and a copy of a Nov. 2017 letter to the *NWLawyer* magazine.[78] Prof. Spitzer responded to Mr. Myer's email within 90 minutes of its dispatch with: "Thanks very much, John. I may follow up with some additional questions."[79]

Prof. Spitzer did follow up with Mr. Myer, saying that: "The insurance broker on our task force has expressed skepticism about lawyers being unable to find insurance, and suggests that the issue always boils down to the premium cost. Have you reached out to various insurers and then found that the cost of insurance is just too doggone expensive?"[80] Mr. Myer assured Prof. Spitzer that he had reached out unsuccessfully, and again pointed to specific examples:[81]

> In the months prior to September 2011, I filed applications with Zurich Insurance (https://www.zurichna.com/en/prodsols/zpm/professional/lawyers) and with Synergy Professional Associates (http://www.synergy-ins.com/about.aspx), a broker. I filed the application with Zurich because they had covered me in 2003 and 2004 when I was a

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2018a66366f2f6d9654cb471ff1f00003f4f.pdf?sfvrsn=a9ba03f1_2 (last visited April 21, 2020), at 38 (comments of John Myer); *see, also*, Comments to the MMI Task Force, *supra*, n. 60, at 277-283 (comments of John Myer and Mark R. Beatty) (transactional lawyers), and at 284 (comments of Brian Lewis on behalf of the firm of Rosen Lewis PLLC) (transactional entertainment lawyers).

[75] The EB-5 program grants immigrant visas to aliens who invest a significant amount in an American business and create a certain number of American jobs. "Congress created the EB-5 Program in 1990 to stimulate the U.S. economy through job creation and capital investment by foreign investors." U.S. Citizenship and Immigration Services, "EB-5 Immigrant Investor Program," https://www.uscis.gov/eb-5 (last visited, April 21, 2020.)

[76] "Comments of John Myer," *supra*, n.74, at 38.

[77] MMI Task Force Report, at 36.

[78] "Comments of John Myer," *supra*, n. 74, at 40, 41.

[79] *Id.*, at 42. The same attachments were sent to the MMI Task Force on Sept. 27, 2018 by Mark Beatty, *supra*, n. 74, at 282.

[80] *Id.*, at 43-49.

[81] *Id.* at 40. This is the same Attachment A sent to the MMI Task Force by Mark Beatty on Sept. 27, 2018.

> partner at Friedbauer & Myer LLC in Miami, Florida. I filed the application with Synergy because the sales agent there assured me that they could find a carrier who would underwrite my practice.
>
> Zurich declined to bid. Synergy was unable to find a carrier that would bid. In addition, Mainstreet Legal Malpractice Insurance was unable to find a carrier to replace Professionals Direct Insurance Company. Thereafter I spoke with numerous sales agents all of whom urged me to apply but none of whom were able to describe a realistic path forward. I have practiced without insurance to this day.[82]

Mr. Myer also noted that insurance was, in fact, too "doggone" expensive in his specialty and for high-risk, non-standard policies, and that the problem would only grow worse: "my practice is relatively small and it wouldn't make sense to buy nonstandard policies. While the quote for the first year might not be prohibitive, in subsequent years as the coverage period extends further back, the price would keep increasing."[83]

The MMI Task Force Report accepted its insurance broker member's skepticism and dismissed Mr. Myer's, Mr. Beatty's and Mr. Lewis's comments and other concerns about the availability of insurance to any Washington lawyer.[84] Unlike in California and New Jersey, "simple economics" apparently did not apply in the MMI Task Force, where lawyers would be expected to just absorb massive increases in costs.[85]

The cost-benefit analysis summarized in the prior section found that there might be an additional three dozen "claims" triggered by the Proposed Amendment. In contrast, as best can be determined by the MMI Task Force's coding and reporting of comments, there were approximately 400 commenting lawyers who said they would be harmed by the Proposed Amendment, and many of those said they would stop providing legal services.

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[82] While Mr. Myer's exchanges with Prof. Spitzer were in December 2018, the date on this Attachment A was Sept. 27, 2018. *Id.*

[83] *Id.*, at 44.

[84] MMI Task Force Report, at 36 ("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.").

[85] Among the comments submitted to the WSBA BoG was a specific example of a lawyer who handles automobile "lemon law" cases and "was sued for malicious prosecution several years ago after she lost a case at trial. The malicious prosecution claim was dismissed on the merits. However, her malpractice insurance carrier cancelled her policy. She was required to obtain insurance through Lloyd's of London. Thereafter, she paid $18,000 a year for malpractice insurance." WSBA, "Comments for the Board of Governors through May 3, 2019," https://www.wsba.org/docs/default-source/legal-community/committees/mandatory-malpractice-insurance-task-force/comments-for-the-board-of-governors-through-may-3-2019(00513021).pdf?sfvrsn=6a7802f1_7 (last visited April 21, 2020), at 43 (Comments of Martin W. Anderson).

I am one of those lawyers. For decades, I have provided hundreds of hours of pro bono services each year, all in specialty legal fields and activities to improve the law, the legal system, or the legal profession.[86] My pro bono efforts involve highly-technical and complex areas of the law applicable to the activities of millions of Americans. For example, ten years ago I co-founded and still actively participate in the First Tuesday Lunch Group, a nationwide, nonpartisan monthly discussion group of 120 lawyers, government officials, and others practicing in campaign finance and tax-exempt organization law.[87] In addition, I file detailed technical comments on proposed federal rules that affect both agency practices and First Amendment rights of association and petition.[88] I also participate in WSBA activities, including serving on the Addition of New Governors Work Group, for which I wrote a 51-page report from the Miscellaneous Public Member Issues Sub-Group, and, as noted in fn. 9 *supra*, commenting on the application of antitrust law to bar associations for this Court's Structure Work Group.

The Proposed Amendment fails to exempt lawyers' pro bono efforts from its mandatory malpractice insurance requirements unless they are provided to low-income persons or organizations serving the low-income community. My pro bono efforts are not provided to low-income persons specifically, but do help protect millions of Americans, including those in Washington. If malpractice insurance is mandated as required by the Proposed Amendment, I will no longer provide those services and will fully retire from legal practice.

In addition, an increasing WSBA concern about access to justice is the presence in Washington of "legal deserts:" areas, often poor and rural, where there are simply too few lawyers available.[89] Research suggests that rural lawyers tend to provide far more pro and low

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[86] Unlike the Proposed Amendment's limited definition of pro bono services exempt from mandatory malpractice insurance, other states define "pro bono" to include free or low-cost legal services to improve the law and the legal system, not just services provided to low-income persons. *See, e.g.*, State Bar of California, *Pro Bono FAQ*, "What legal work qualifies as pro bono," (http://www.calbar.ca.gov/Access-to-Justice/Pro-Bono/Pro-Bono-FAQ (last visited April 21, 2020) ("not-for-profit organizations with a purpose of improving the law and the legal system"); Maryland Rules of Prof'l Conduct 19-306.1(b)(1)(C) (services provided to protect civil rights), (b)(2) (services provided to improve the law, legal system or legal profession).

[87] *See, e.g.*, Alex Gangitano, "Election experts urge Trump, congressional leaders to end stalemate at FEC," *The Hill*, Jan. 6, 2020, https://thehill.com/campaign-issues/476940-election-experts-urge-trump-congressional-leaders-to-end-stalemate-at-fec.

[88] *See, e.g.*, Public Policy Legal Institute, "Comments of the Public Policy Legal Institute, On 'Guidance Under [Internal Revenue Code] Section 6033 Regarding the Reporting Requirements of Exempt Organizations,' REG-102508-16, 84 FED. REG. 47447 (Sept. 10, 2019)," December 6, 2019, https://publicpolicylegal.files.wordpress.com/2019/12/sched-b-donor-disclosure-comments-final-1.pdf (explaining how history of provision in Internal Revenue Code should be applied to proposed regulations governing the disclosure of donors to tax-exempt organizations).

[89] *See, e.g.*, Pruitt, et al., "Legal Deserts: A Multi-State Perspective on Rural Access to Justice," 13 HARV. L. & POL. J 15 (2018); Calif. Comm. on Access to Justice, "California's Legal Deserts: Access to Justice Implications of the Rural Lawyer Shortage," July 2019, http://www.calbar.ca.gov/Portals/0/documents/accessJustice/Attorney-Desert-Policy-Brief.pdf.

bono services than their urban counterparts;[90] rural areas are also where compensation levels are low and the impact of $3,000 per year insurance premiums will hit hardest.[91] In light of the "simple economics" arguments described above, there is no realistic prospect of avoiding loss of legal experience and expertise in these areas as a result of the Proposed Amendment.

The Proposed Amendment is not an access to justice initiative; it would reduce access to justice across Washington. At best, it is a compensation effort, with indirect or negative effect on both malpractice incidents and injured clients.

Both the proponent of the Proposed Amendment and the MMI Task Force believed there was a problem facing some Washingtonians: some lawyers make mistakes and do not carry malpractice insurance. Like many states, Washington allows lawyers to self-insure against mistakes, because it has chosen to require disclosure of whether lawyers carry insurance and because it trusts that its people are intelligent and self-interested enough to make appropriate use of the disclosed information. But the proponent and the MMI Task Force believe, bolstered by some academic articles and in the face of contrary evidence, that the true costs and benefits of self-insurance simply can't be known and thus the people should not be trusted to make their own decisions.

These are not unique dilemmas. Competent reviews in California, New Jersey, Nevada and by the WSBA BoG resulted in informed decisions not to adopt mandatory malpractice insurance. As the New Jersey Bar noted:

> Frankly, there is no evidence that either requirement [insurance or disclosure] is necessary or will resolve any demonstrated problem in connection with the ability of consumers to obtain quality legal services and to have recourse in the event of negligent representation. There is evidence, however, that, if mandated, both requirements will engender more confusion than clarity for the public, and will pose a myriad of problems

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[90] Pruitt, *supra*, at 140-141 ("Interestingly, rural attorneys typically outperform their urban counterparts on provision of both pro bono and reduced fee (or 'low bono') services. According to a 2016 American Bar Association survey of attorneys in twenty-four states, rural attorneys provided more hours of pro bono work annually on average (44.6 hours) than attorneys in towns (36.5), suburbs (30.3), or urban areas (38.8)." *citing*, A.B.A. Standing Committee On Pro Bono And Public Service, *Supporting Justice: A Report on the* Pro Bono *Work of American Lawyers*, (2018), 36, https://perma.cc/XH6ZR8EP.

[91] *See, e.g.*, WSBA, *Mandatory Malpractice Insurance Task Force,* "Comments Received after Dec. 1, 2018, and through Jan. 30, 2019," https://www.wsba.org/docs/default-source/legal-community/committees/mandatory-malpractice-insurance-task-force/comments-received-past-december-1-2018a66366f2f6d9654cb471ff1f00003f4f.pdf?sfvrsn=a9ba03f1_2 (last visited April 21, 2020), at 51, 54 (comments from Kate M. Hawe, a Washington practitioner from Bend, Oregon).

for attorneys, and those offering legal services in high-risk, consumer-oriented practice areas.[92]

But instead the proponent and MMI Task Force chose to guess about the costs and benefits of their chosen approach – "mere conjecture" – not understanding or caring that the benefits would accrue disproportionately to insurance companies, and that all the costs would fall on lawyers, the judicial system, and those Washingtonians in "legal deserts" and elsewhere in need of legal services that would be lost or made unaffordable under the Proposed Amendment. This is not sufficient under the First Amendment.

Absent compelling evidence that the solution offered by the Proposed Amendment will provide sufficient benefits to the public to offset the loss of legal access, the Court should reject the Proposed Amendment.

IV. INTEREST OF THE COMMENTER:

These comments are submitted by Barnaby Zall, WSBA #50976, a solo practitioner from Friday Harbor, Washington. I have been in practice since 1983, mostly in the Washington, D.C. area. In recent years, I have limited my practice to appearances before the Supreme Court of the United States (generally in the areas of freedom of speech, petition, and association) and representing tax-exempt organizations (particularly those involved in public advocacy and political activity). I do not carry malpractice insurance.

[92] Letter from Robert B. Hille, President N.J. State Bar Ass'n, to Hon. Glenn A. Grant, Acting Admin. Dir. N.J. Court, (Jan. 15, 2018), at 1, http://perma.cc/YDQ9-HWY8.