

Erik Marks

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March 31, 2020

Washington Supreme Court
via email to supreme@courts.wa.gov

Re: Mandatory Malpractice Insurance - Proposed Amendment to APR 26

Your Honors,

I write to express my strong opposition to the proposed amendment to APR 26 that would make malpractice insurance mandatory. My opposition is based primarily on two factors:

- (1) I have been practicing law for nearly 30 years, without any claims of malpractice or discipline. And yet, due to the nature of my work, **it is for all practical purposes impossible for me to purchase malpractice insurance.** The new rule would force me to abandon my bar license, or drastically change my career.
- (2) The new rule is **so glaringly vague, that it would be impossible to implement.**

Some Excellent Lawyers Can't Buy Malpractice Insurance.

I am a second generation attorney, and I hold the career and profession in high esteem.

After 10 years as a commercial real estate attorney, I wanted more perspective and experience in my career, and so I diversified beyond practicing law alone. Today I describe myself as a commercial real estate professional. I practice law within my area of expertise, which is commercial real estate. I also hold and employ a real estate broker's license. And I buy, sell, and develop commercial real estate for my own account. I keep bright lines between the areas of work, so as to avoid disputes or ethical violations. I believe I succeed in this effort, as I have no disciplinary history, and my clients tend to stick around over the years.

Yet, **I cannot buy attorney malpractice coverage because my professional efforts include material areas of work beyond practicing law.** When I inquired about malpractice coverage from insurers, I was either told that the insurance was unavailable, or would have a cost in the range of \$20,000 per year.

My inability to purchase insurance is not uncommon. For me, it arises because my work is diversified beyond only the practice of law. Other attorneys cannot purchase malpractice insurance because of the very nature of their law practice - in particular this is true for attorneys in small firms practicing

entertainment, IP or patent law. Among the letters to the WSBA mandatory-insurance task force were a significant number that spoke to the attorney's inability to obtain coverage because they were IP or patent attorneys practicing outside the large firm environment.

What would I or these other attorneys do if you implemented a mandatory coverage rule? It seems that we would have to either hand in our bar license, or go join a large law firm. I can assure you that either outcome would be huge disappointment to ourselves, and also to our clients who work with us precisely because of our unique and not-another-large-firm style of practicing law.

The Proposed Rule is Tragically Vague.

The proposed rule would require attorneys to carry "professional liability insurance at a minimum limit of \$250,000 per occurrence." What does this actually mean? As you are well aware, the details are in the fine print; and that is true twenty-fold when it comes to insurance policies.

If a litigator carries a professional liability insurance policy with a limit of \$250,000 per occurrence, but with an exclusion for litigation practice, will it satisfy the requirement? Or what of the environmental attorney who buys a policy that covers her for practicing in the area of environmental law, but then represents a client in a commercial dispute? Would that environmental attorney be subject to losing her license because she practiced in an area for which her malpractice policy did not provide coverage?

There are no easy answers to these questions. But the questions must be asked, and answered, before any rules about mandatory malpractice insurance are put in place.

The concerns that underlie the current proposals for malpractice insurance are valid. But the proposed solution of adopting a mandatory malpractice insurance requirement is both unfair and impracticable. That is why the WSBA soundly rejected the proposal last year, and that is why I urge you to again reject the proposal to amend APR 26 as proposed.

Sincerely,



Erik Marks
WSBA #23458

From: [OFFICE RECEPTIONIST, CLERK](#)
To: [Tracy, Mary](#)
Subject: FW: Comment to Proposed Amendment to APR 26
Date: Tuesday, March 31, 2020 11:32:11 AM
Attachments: [Letter to of Supreme Court re mandatory malpractice insurance proposal.pdf](#)

From: Erik Marks [mailto:erik@egmrealestate.com]
Sent: Tuesday, March 31, 2020 11:31 AM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Subject: Comment to Proposed Amendment to APR 26

Please see attached letter.

Thank you,
Erik

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