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THREE PINES LAW
& CONSULTING GROUP, INC.

MAY 4, 2020

Susan L. Carlson
Clerk of the Supreme Court
Washington Supreme Court
P.O. Box 40929
Olympia, WA 98504

Provided via email to supreme@courts.wa.gov

Re: Proposed Amendment to Admission and Practice Rule 26

Your Honors,

I write to express my strong opposition to the proposed amendment to Admission and Practice Rule 26 (APR 26) that would make malpractice insurance mandatory. I oppose this amendment for the reasons discussed below (not in order of importance).

Mandatory Insurance in Two States will be Financially Unduly Burdensome

I am a member of the Oregon State Bar (OSB) in addition to the Washington State Bar Association (WSBA). As an OSB member, I am required to purchase its mandatory insurance (unless exemptions apply). Coverage under the OSB Professional Liability Fund will not extend to my practice in Washington State.

I operate a solo practice, requiring me to cover all business expenses for a practice that does not garner significant profit (I practice natural resources law). I will likely be forced to become inactive in Washington if insurance is imposed. I simply cannot afford to pay for insurance in two states, support my business, pay taxes, pay license requirements, fund my retirement, and cover health care costs because I am not in a practice that can support high billing rates.

The Cost to Small Businesses could be Significant

The cost of managing a business is considerable. This amendment will unjustly penalize WSBA lawyers choosing not to practice as employees of large, corporate firms. Solo practitioners pay their own Bar-related expenses (dues, legal education); marketing expenses (travel, meals, materials); office equipment and lease expenses, accounting fees; corporate taxes; etc. Further, we fund our own retirement and health care plans.

The cost of coverage for my type of practice is unknown. Because I do not engage in a typical, well-known practice area, and because my work bridges between legal and consulting services, insurance carriers will likely impose a large premium on my practice to address uncertainties. Adding the potentially exorbitant cost of required insurance may be the tipping point for practitioners who practice in areas unique to the insurance business and who do not garner significant profit margins. Assuming insurance is available for my practice area, I estimate that the cost of insurance alone (combined in Washington and Oregon) may equate to 10% or more of my solo practitioner gross income.

Penalizes Solo Practitioners Operating under Rule of Professional Responsibility 5.7, Responsibilities Regarding Law-related Services

A large portion of attorneys do not practice in a traditional manner. Many of us function as consultants to clients; offering a legal background, but who are not hired as the client's attorney. Under Rule of Professional Responsibility (RPC) 5.7, those in these unique roles bridge the gap between law and technical work. For example, real estate agents, architects, environmental consultants, certified public accounts, etc. may also be members of the WSBA, but are not in any way considered to be hired as attorneys by their clients. In other words, clients are not seeking legal advice from their environmental consultant, and it would be egregious and unnecessary to carry insurance when WSBA members are not holding themselves out to be hired attorneys.

As a key example, I was hired as a consultant by a federal agency to manage an environmental program for compliance with a federal law. I was not hired as an attorney by the agency's General Counsel's office, and all consulting work was vetted through General Counsel before decisions were made by agency management. While I was instrumental in assisting General Counsel and able to communicate with biologists due to my science background, no professional attorney liability attached to my consulting work. I simply could not be sued by the client (e.g., the federal government) for any duties related to management of this particular program because I had no legal decision-making authority.

I request that an exemption be offered for those practicing under RPC 5.7 if mandatory insurance is required.

Insurance Companies will Influence the Legal Profession

Linking the legal profession with the insurance sector is risky. Members will become regulated by their insurance carries just as physicians have become in medical practices. This is a scenario that will negatively affect legal, economic enterprise; small business practices; and ultimately the practice of law by solo, independent attorneys.

Mandatory Malpractice Insurance may Change the Structure of Legal Services made Available to the Public, and would be a Disincentive to Small, Women-owned, and Minority-owned Businesses

Careful consideration should be made about the impact of mandatory insurance on the business structure of the legal profession in Washington State. If solo practitioners or small businesses cannot afford to be covered by liability insurance, they or their employees may likely migrate to corporate firms or simply terminate practices. These scenarios are evidenced by the same economic movement in the medical profession; very few, if any, physicians have independent practices, which is solely a function of insurance mandates. Is this the limited business structure Washington State wants to support?

Those of us uninterested in working for other attorneys, or who are physically precluded from this option because we live in another state, will simply stop practicing in Washington State due to the expense of managing a business. This would be an unfortunate outcome and contrary to Washington State economic policies that promote small business enterprise, including women-owned and minority-owned businesses who will most likely be negatively impacted by this requirement.

Mandatory Malpractice Insurance would Disproportionally Disadvantage one Class of WSBA Members

Similarly, the proposed amendment favors deep pockets and the financially advantaged while penalizing small firms with less income and narrow profit margins to absorb the cost of insurance premiums. Related to other comments about the unfairness of this amendment on solo practitioners, this requirement would disproportionately disadvantage a class of practitioners who likely make considerably less income than those who would not be financially affected by the requirement. Those working for large firms garner higher wages and benefits than solo practitioners (who have no paid benefits); additionally, their malpractice insurance would be paid by their firms.

Pro Bono Work by Solo Practitioners may be Reduced

Due the increased cost of maintaining a private practice that would now include malpractice insurance at unknown, but likely high costs, solo practitioners will need to bill more hours to compensate for this business expense. The focus on billable hours will result in less hours devoted to pro bono work.

Task Force Conclusions were Flawed; Mandatory Malpractice Insurance would Penalize the Majority of Solo Practitioners who are Responsible, Diligent Professionals with no History of Malpractice Claims

Responsible solo practitioners with no history of malpractice claims or proven malpractice view this amendment as an unjust penalty for operating our businesses independent of corporate firms. Absent foundational evidence that the solo sector is specifically harming the Washington State public, we do not believe solo practitioners are a significant threat to public legal representation.

While I support the policy of public protection, I question the validity of any assumption that a *significant* portion of solo practitioners are offenders of improper legal practice in Washington State. This is an unproven premise brought forth by the WSBA Insurance Task Force, and subsequently used as the foundation of Mr. Whatley's APR 26 proposal to the Court (Equal Justice Washington, GR 9 Cover Sheet Draft, Suggested Amendment).

In my formal comments to the WSBA Board of Governors, I describe in detail why its Task Force data are misleading, and its findings inaccurately reported (note that other WSBA members presented the same comments and concerns). I present that detailed, statistical discussion below as an amendment to this comment for your consideration. In summary, it is difficult to believe the conclusions supported by the Task Force, Mr. Whatley, and relied upon by other commenters to the Court (see Levin letter, April 17, 2020 basing comments on these statistics) because the data were merely anecdotal. Conclusions proport that:

(1) 28 percent of solo practitioners in Washington State do not carry malpractice insurance, and that

(2) solo practitioners "pose the greatest risk to the public, the legal system, and access to justice" (Id.) (they forgot to mention we are reckless drivers and do not pay taxes…).

The Court should not rely on these unproven conclusions forming the basis of the amendment proposal absent reliable, valid statistics **specific to solo practices in Washington State**. The Task Force committee did not include members with knowledge of statistical analyses (this question was asked and answered during the April 22, 2019 public hearing). Absent this necessary ability, it did not survey all attorneys in the state, and did not employ an independent third party to conduct a statistical analysis that would render valid conclusions linking insurance coverage to harm or potential harm specific to the Washington public.

The issue of "significance" should not be overlooked. Assuming the Task Force statistic that 14 percent of attorneys in private practice are uninsured is accurate, this is statistically insignificant as compared to 100 percent of all attorneys in private practice. Consequently, their conclusion that 14 percent of solo practitioners pose the greatest risk to the public, the

legal system, and access to justice, is an inflated and irrational assertion. How can 14 percent of private practice attorneys pose "the greatest risk" to the public?

Further, assuming the 14 percent to be true, this small percentage of uninsured attorneys in Washington State in no way supports Mr. Whatley's assertion that "…with so many uninsured attorneys, the sheer number of clients exposed without basic public protection is staggering" (Id.). To be "staggering,"

(1) the percent of uninsured attorneys must be statistically significant,

(2) the significant percentage of uninsured attorneys must then represent a significant number of clients, and

(3) these uninsured attorneys must be in a practice with the potential for malpractice (see comments above about my practice and its negligible potential for claims or proven harm and those practicing under Rule 5.7 as examples).

Finally, the Court should not be persuaded by Mr. Whatley's argument because "exposure without basic public protection" is not the same as "harm." There is no proof that, if this exposure were statistically significant – by both the number of uninsured attorneys and the number of clients represented by these attorney -, it results in significant levels of harm to the public. Exposure is not harm. This is merely an inflammatory statement made by the amendment proponent to persuade the Court without foundational evidence. Specifically, Mr. Whatley relies on statements made by the "Office of Dispensary Council (ODC)" but does not provide a citation to reference these organizational conclusions, and I could not find this organization on various online search attempts. Is the ODC a Washington State organization such that its conclusions are valid for the Washington legal system? How were its conclusions derived to support statistical reliability (i.e., what methodology did it use to study malpractice complaints)?

In summary, the Court should not render its decision on conclusions made by the Task Force and statements made by the proponent that cannot be supported by valid, reliable, statistically-based evidence. *I urge the Court to request an independent, third party statistical survey of conditions specific to Washington State to support an informed decision about this amendment.*

Please see the amended information below.

Other Options Exist to Protect the Public

While our profession carries a duty to the public, I am not convinced attorneys should assume sole responsibility for informed decision-making by clients. The public has a duty to be informed about personal protections when hiring an attorney. As with any endeavor or contractual arrangement, such as retaining a real estate agent, opening a bank account, purchasing a car, or signing tax returns prepared by a hired accountant, consumers should be self-informed about their protections. Prospective clients can easily obtain information on whether their attorney has insurance coverage by contacting the WSBA or by merely asking their prospective attorney. Armed with this information, the client can retain or not retain any particular attorney; *they are not required* to hire an attorney that does not carry malpractice insurance.

I fully support any method to make attorney practice information transparent to potential clients, including acknowledgements of malpractice insurance coverage. We need to implement proper measures if we are not adequately informing clients of their risks in hiring an attorney without coverage. I support any amendment that mandates malpractice insurance coverage disclosure.

Thank you for considering my comments as you deliberate this important change in the practice of law in Washington State.

Sincerely,

Kate M. Hawe

Enclosure (1)

Amended Information

Comments Sent to the WSBA Insurance Task Force
December 17, 2018

1. **<u>The task force has not supported its interim findings with valid or reliable statistics</u>.**

Additional information on statistics used to support the conclusion that malpractice insurance should be mandated primarily because of solo and small firm practitioner liability is required before a proposal recommendation can be made in good faith. As presented in the Interim Report Key Findings, your statistics are highly misleading.

Key Findings #2 and #3 - The task force reports that only 14% in private practice are uninsured. From Key Finding #3, you then state that 28% of solo practitioners are uninsured. How do these two statistics correlate? Is one statistic incorrect? Of, do we interpret your findings as 28% of the 14% are uninsured? If so, this conclusion would be *<u>highly statistically insignificant</u>* and cannot support any recommendation for mandatory insurance based on the public risk posed by uninsured solo practitioners. More information is needed to link these two statistical findings. Alternatively, 14% *or* 28% of all solo practitioners are both insignificant percentages of uninsured attorneys.

Key Finding #3 - Similarly, the statistic that 28% of solo practitioners do not carry malpractice insurance is completely irrelevant. So what? This information has no meaning unless it is compared to a statistic describing what percentage of this 28% group has had claims requiring the expense of a defense.

In other words, if only 1% of the 28% of uninsured solo practitioners (or 1% of 14%, whichever statistic is correct) have had claims brought against them, then, again, the data are statistically insignificant and *cannot possibly support the conclusion that solo practitioners pose the greatest risk to protecting the public*. On the other hand, if 90% of the 28% of uninsured solo practitioners have had claims brought against them, then the data are more statistically important, but maybe not enough to warrant mandatory insurance since 28% overall is only 1/4 of all WSBA members.

Finally, a conclusion that "solo practitioners pose the greatest risk to protecting the public" is not valid unless comparable statistics are presented demonstrating the percentage of non-solo practitioners who have claims brought against them and who do not carry malpractice insurance. How do we know that non-solo attorneys are not also a significant risk to the public?

Key Finding #4 – The task force concludes that solo and small firm practitioners represent a disproportionate share of malpractice claims, *but you provide NO evidence that this statement is true for members of the WSBA*. Your conclusions are supported by national data only. Key Finding #4 is supported only by dollar expenditures in Oregon suggesting that solo firms are the costliest in terms of claim defense. This key finding is completely irrelevant because it is not related to the total percentage of all solo practitioners in Oregon. For example, was $6.5 million expended on only 10% of all the solo practitioners in Oregon in 2015? 1%? 15%? If so, these are, again, statistically insignificant percentages. Further, and most importantly, *how do Oregon Bar expenditures relate to WSBA expenditures for solo practitioners*?

Key Finding #6 - The task force concludes that "most attorney misconduct grievances and disciplinary actions involve solo and small firm practitioners." Why? Likely it is because clients can easily target their solo attorney and are less likely to take on the "deep pocket" of a large firm. The task force has a duty to determine why solo practitioners receive the most malpractice claims before it recommends penalizing all solo practitioners with an expensive license requirement. The cause should be addressed before a penalty is implemented.

More importantly, this is another misleading conclusion because, even if true, it means nothing without supporting data indicating what percent of solo and small firm practitioners in the WSBA have had to defend claims of misconduct.

Summary Regarding Statistical Information used to Support the Task Force Interim Report

If the task force intends to recommend penalizing the majority of solo practitioners who are practicing responsibly with a substantial, mandatory fee, the task force then has a heightened duty to support its rationale for doing so with reliable and valid statistics *applicable specifically to WSBA conditions and to the Washington State public*. None of the key findings provide such data, rather they present data in a misleading manner because, on their face, they seem significant and inflammatory, but they are merely single data points with no relevance since they lack comparative data with WSBA statistics, and therefore, cannot be correlated as presented.

From:	OFFICE RECEPTIONIST, CLERK
To:	Tracy, Mary
Subject:	FW: Amendment to APR 26 - Comment Letter
Date:	Monday, May 4, 2020 8:21:58 AM
Attachments:	Amend APR26 Comments - HAWE 5-4-20.pdf

From: Three Pines Law [mailto:threepineslaw@gmail.com]
Sent: Sunday, May 3, 2020 6:22 PM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Subject: Amendment to APR 26 - Comment Letter

Ms. Carlson:

Please ask the Court to review the attached file, and include this comment letter into the record regarding mandatory malpractice insurance under the proposed amendment to Admission and Practice Rule 26.

Thank you for your consideration,
Kate Hawe

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Providing legal and regulatory consulting services to the natural resources client
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