From:	OFFICE RECEPTIONIST, CLERK
To:	Tracy, Mary
Subject:	FW: Proposed Amendment to APR 26
Date:	Tuesday, March 31, 2020 2:03:21 PM
Attachments:	Forty-Eight State Bar Associations Can"t Be Wrong.pdf

From: ken@pedersenadr.com [mailto:ken@pedersenadr.com]
Sent: Tuesday, March 31, 2020 1:01 PM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Subject: Proposed Amendment to APR 26

Honorable Justices of the Supreme Court,

I write to oppose the proposed amendment to Admission and Practice Rule 26 submitted by "Equal Justice Washington."

My reasons are set out in my opinion piece, "Forty-Eight State Bar Associations Can't Be Wrong," published in the December 2018 edition of the NWLawyer magazine, attached. At the time of publication, the WSBA Mandatory Malpractice Task Force had recommended that the WSBA Board of Governors adopt the so-called "Idaho Model" for mandatory insurance, which was enacted by the Idaho Bar and made effective in 2018. The so-called "free market" Idaho approach exists nowhere else in the United States and unfairly grants a windfall to the insurance industry at the expense of Washington lawyers and their clients.

I respectfully request that the Court reject the suggested amendment.

Sincerely,

Kenneth J. Pedersen
Arbitrator, Attorney at Law
P.O. Box 15164
Seattle, WA 98115-9998
WSBA #11150

FORTY-EIGHT STATE BAR ASSOCIATIONS CAN'T BE WRONG

By Ken Pedersen

The Mandatory Malpractice Insurance Task Force's recommendations are a costly solution in search of a problem. Forty-eight other bar associations have not seen fit to impose an individual insurance mandate on their members, and the Board of Governors should reject the proposal.

THE EXISTING CLIENT NOTIFICATION SYSTEM UNDER APR 26 IS SUFFICIENT

The Mandatory Malpractice Insurance Task Force's interim report[1] neglects to mention that for many years the Washington Supreme Court has required active lawyer members of the Bar Association to annually certify whether they are "engaged in the private practice of law" and, if so, to state whether they are "currently covered by professional liability insurance." Admission and Practice Rule (APR) 26. The rule authorizes the Bar to make this information available to the public by any means it deems appropriate, "which may include publication on the website maintained by the Bar."

Clients seeking to retain an attorney can readily determine whether their lawyer is or is not covered by insurance by accessing WSBA's online legal directory, and can then make an informed decision whether to retain that lawyer. To go further than this, and to make expensive professional liability insurance mandatory, reflects a paternalistic attitude toward clients and their lawyers. As lawyers will inevitably pass the cost of insurance on to the client, the measure will increase attorney fees to all clients, the great majority of whom will never need professional liability protection.

ABSENT STATUTORY AUTHORIZATION AND A MEMBERSHIP VOTE, AN INDIVIDUAL INSURANCE MANDATE IS UNDEMOCRATIC

The interim report repeatedly references Idaho and Oregon, the only two bar associations in the United States that impose an individual insurance mandate on their members. The fact that only 4 percent of state bar associations have taken this action ought to give us pause. The Oregon Professional Liability Fund is a quasi-subdivision of the state Bar created in 1977 in response to "skyrocketing malpractice insurance premiums" in the commercial insurance market.[2] Lawyers in Oregon currently pay $3,500 per year for coverage. The Task Force rejects the 40-year-old Oregon system in favor of what it terms the "Idaho model," newly implemented in 2018. Idaho leaves the matter of obtaining malpractice insurance to what the Task Force optimistically terms the "highly competitive" "free market" system of commercial malpractice insurance.[3] There is no firm estimate of the per-attorney cost of the "Idaho model."[4]

Nor does the report plainly identify what is broken in the current system. If there has been an explosion of uncompensated malpractice claims in Washington state, I am unaware of it. Certainly, there should be greater proof of need than the anecdotal testimony of an anonymous "legal malpractice plaintiff's lawyer" and self-interested "insurance industry professionals."[5]

As far as procedure, it is noteworthy that the Oregon State Bar Board of Governors was authorized by statute to create the professional liability fund. Or. Rev. Stat. § 9.080(2)(a)(A). I am aware of no similar statute in Washington authorizing the WSBA to impose an individual insurance mandate on Washington attorneys. The Washington Legislature should have the opportunity to determine whether all professional associations in Washington, including doctors, dentists, and accountants, should be authorized to require their members to obtain professional liability insurance, as this is fundamentally a legislative decision.

In addition to the statutory authorization, before imposing an insurance mandate on members of the Oregon Bar, its Board of Governors conducted a secret ballot vote of the membership. Similarly, members of the Idaho Bar were allowed to vote on their insurance mandate before it was implemented by the Idaho Supreme Court.

The Task Force's interim report does not discuss the mechanism for imposing its recommended individual insurance mandate. The WSBA should seek legislation authorizing it to put such a mandate in place and should additionally establish a procedure for a secret ballot vote of the membership after notice and the opportunity for the entire membership to be heard. Assuming the resolution passed, it might then be submitted to the Supreme Court.

THE MEMBERS WHO WOULD BE MOST AFFECTED BY THE MANDATE ARE NOT FAIRLY REPRESENTED ON THE TASK FORCE

According to the Solo and Small Practice Section of the WSBA, "[s]olo and small practice firms comprise more than 60 percent of practicing lawyers in Washington."[6] Yet the Task Force doesn't include a representative sampling of lawyers working as solo practitioners. In fact, most members of the Task Force would not be affected by its recommendations.

The report identifies categories of attorneys exempt from the individual mandate in Oregon, including "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." At least nine of the 18 members of the Task Force fall within

Continued on page 14

one or more of these exempt categories or are exempt from the individual mandate as not currently engaged in private practice, or are non-attorneys.

Further, there doesn't appear to be a single attorney actively engaged in solo private practice on the Task Force. This is significant, as the interim report is critical of those engaged in solo practice who choose to self-insure rather than pay premiums to an insurance broker.[7] The report includes the regrettably condescending statement that the Task Force reached "a consensus that uninsured lawyers pose a distinct risk to their clients *and themselves*."

The report includes a "key finding" that "[m]ost attorney misconduct grievances and disciplinary actions involve solo and small firm practitioners" without explaining the relevance of that observation, nor the relationship between Bar disciplinary actions and professional liability insurance. In any event if, as earlier noted, more than 60 percent of Washington lawyers practice solo or in small firms, the "key finding" is unremarkable.

CONCLUSION

The Task Force failed to consider the utility of the existing system for notifying clients of lawyers' insured status. It doesn't discuss the fact that Idaho and Oregon, which it holds up as avatars, allowed the Bar membership to vote on the proposals and that an Oregon statute expressly allows creation of the Oregon Professional Liability Fund. There is no similar statute in Washington state. Recommendations as significant as imposing an individual insurance mandate on the more than 26,000 active lawyers in this state should be made with input from as broad a sampling of the WSBA membership as possible. Finally, by not including a representative percentage of small-firm and solo lawyers, the Task Force has undermined its recommendations. The Board of Governors should reject the proposed malpractice insurance mandate.

Ken Pedersen has worked as a full-time arbitrator since 2012. Before that he practiced for 30 years as an advocate for labor organizations and individual workers in the Pacific Northwest. As an arbitrator, he'd be exempt from the Task Force's proposed malpractice insurance mandate. He can be reached at ken@pedersenadr.com.

NOTES

1. The July 10, 2018 Mandatory Malpractice Insurance Task Force Interim Report to the Board of Governors is available at www.wsba.org/insurance-task-force.
2. "State by state, mandatory malpractice disclosure gathers steam," (ABA, Oct. 26, 2012) https://www.americanbar.org/groups/bar_services/publications/bar_leader/2003_04/2804/malpractice/.
3. A market is not free if the malpractice insurance sellers are armed with the threat of Bar discipline should the lawyer choose not to buy.
4. Any solo practitioner with recent experience in procuring health insurance in the individual marketplace will be justifiably suspicious of sanguine claims about affordability in the "free market" for insurance.
5. Interim Report, at 3.
6. https://www.wsba.org/legal-community/sections/solo-and-small-practice-section.
7. The task force appears to think that large firms are more responsible than small or solo firms because their lawyers are more likely to be insured through a commercial brokerage. But the fact is that most lawyers practicing in large firms carry liability insurance to protect themselves from the negligence of their partners, not to protect the public at large. Lawyers in solo practice don't need protections from their partners because they have none. Yet the task force consistently refers to such solo attorneys as "uninsured" when it is equally likely that they choose to be self-insured.

ONE SIZE FITS ALL?

OK for pajamas, not so OK for malpractice insurance

By Inez Petersen

MANDATORY malpractice insurance is a one-size-fits-all, ONE-SIDED SOLUTION to a problem we don't know really exists—namely (1) how often are legal malpractice judgments uncollectible because of lawyers who will not pay, and (2) how many additional meritorious legal malpractice complaints would there be if all lawyers had malpractice insurance.

CORE QUESTIONS REMAIN UNANSWERED

The Mandatory Malpractice Insurance Task Force has presented no facts or data to answer these two questions, nor were there any reliable facts and data to tell us how many attorneys would be impacted by mandatory insurance and in what manner. How just is that?

ANECDOTES ARE INADEQUATE

The Mandatory Malpractice Insurance Task Force in its Interim Report under Key Findings stated: "Malpractice plaintiffs' lawyers report numerous instances of worthy claims that they must reject for representation because the defendant lawyer is uninsured, making recovery less likely."

As the little old lady in the Wendy's commercial asked, "Where's the beef?" Information on these "numerous instances of worthy claims" should have been gathered. How often are uninsured attorneys really without assets, "making recovery less likely"?

MANDATORY MALPRACTICE INSURANCE: GOOD INTENTIONS CARRIED TOO FAR

The Task Force stated that 15 percent of the active private practice attor-