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April 17, 2020

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

Re. Comment re the Matter of the Proposed Amendment to APR 26—Insurance,  
Publication Order 25700-A-1281

Dear Madam Clerk:

I am a law professor at the University of Connecticut Law School who has studied uninsured lawyers and closely watched as the Washington State Bar Association considered whether to recommend that lawyers be required to maintain lawyer professional liability (LPL) insurance. I am writing in support of the proposed amendment to APR 26 and in response to the WSBA's letter of January 26, 2020, opposing the proposed amendment.

Approximately 14% of Washington lawyers in private practice are uninsured. Most are solo and very small firm lawyers who represent individuals. When uninsured lawyers commit malpractice, their victims have little recourse. These victims usually cannot find a lawyer who will represent them in a malpractice lawsuit against an uninsured lawyer because malpractice lawyers rightly fear that there will be no assets available from which they can be paid. Uninsured lawyers who have assets often move them into a family member's name.<sup>1</sup>

Washington's current LPL insurance disclosure requirements are inadequate to protect the public. The public often 1) assumes lawyers are insured; 2) does not know where to look for lawyers' insurance status; and/or 3) does not understand the implications of lawyers being uninsured. Even in states that require lawyers to directly disclose insurance information to clients, the information is often provided after the client has committed to the representation and the client may believe—as do many members of the public—that lawyers are affluent and can pay for any judgment against them.

The WSBA's letter reflects the concerns of some of its members who have spoken out against an LPL insurance requirement. While the letter states that the members "overwhelmingly" oppose mandating insurance, I do not believe that the WSBA has polled its membership on this issue. Certainly, the concerns of the objecting WSBA members deserve some consideration. They should not, however, outweigh the interests of the public.

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<sup>1</sup> Support for these and many of the other statements in this letter can be found in the WSBA's MANDATORY MALPRACTICE INSURANCE TASK FORCE REPORT (Feb. 2019) ("TASK FORCE REPORT") and in Herbert M. Kritzer & Neil Vidmar, *WHEN LAWYERS SCREW UP, IMPROVING ACCESS TO JUSTICE FOR LEGAL MALPRACTICE VICTIMS* (2018); Leslie C. Levin, *When Lawyers Screw Up*, 32 *GEO. J. LEGAL ETHICS* 109 (2019); Leslie C. Levin, *Lawyers Going Bare and Clients Going Blind*, 68 *FLA. L. REV.* 1281 (2016).

The WSBA essentially makes three arguments against the proposed amendment. First, it claims that if insurance is required, pro bono work will be reduced and legal fees will increase. Yet there is no evidence that a significant number of uninsured Washington lawyers provide pro bono or low bono services to persons of limited needs. A New Mexico survey indicated that less than 18% of uninsured lawyers performed *any* pro bono, and it was unclear how much of it was performed for persons of limited means. Many of these lawyers were at or near retirement age. Washington lawyers who are nearing retirement can take Emeritus status and perform pro bono work through Qualified Legal Services Providers, which often maintain insurance policies that cover the lawyers who volunteer through their programs. There may be a small percentage of uninsured lawyers who perform pro bono or low bono services and are not yet ready to retire, but claims about how they would actually proceed if insurance were required are largely speculative. It seems clear, however, that if they cannot afford LPL insurance (which is tax deductible) these lawyers are also unlikely to be able to compensate clients if they cause them harm.

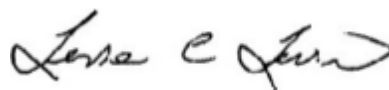
Second, the WSBA claims that some solo lawyers working in high-risk practice areas cannot obtain insurance, and points primarily to a lawyer working in the transactional securities field. The lawyer quoted in the letter had not sought insurance “for a number of years” and presumably does not know whether coverage is now available. As the WSBA Task Force on Mandatory Malpractice Insurance noted, lawyers who work in higher risk areas can obtain insurance from non-admitted carriers. *See* TASK FORCE REPORT 14. Moreover, this lawyer could also presumably affiliate with a firm as “of counsel” to obtain insurance. This problem is extremely rare (if it is a problem at all) and does not justify forcing the public to bear the risk of loss.

Third, the possibility that insurers will raise rates because they have a captive market seems unlikely. There are numerous LPL insurers in Washington that compete for premium dollars. *See* TASK FORCE REPORT Ex. D. If premiums ever rise significantly, the Supreme Court could always revisit the insurance requirement.

I have spoken with the Executive Director of the Idaho State Bar, who was very involved in Idaho’s implementation of the insurance requirement in 2017-2018, and she knew of no lawyer who wished to continue practicing and was unable to obtain insurance. The insurance typically could be purchased by uninsured lawyers for the first few years for well under \$2000 annually. There does not appear to be evidence that LPL insurance premiums have increased in Idaho as a result of the insurance requirement.

The WSBA’s Task Force carefully considered the question of whether LPL insurance should be required and recommended that it should be. The WSBA Board of Governors voted it down because some lawyers objected. The question before the Court is whether these lawyers’ objections to an insurance requirement should trump the interest in public protection. I urge the Court to decide in favor of the public and adopt the proposed amendment to APR 26.

Respectfully yours,



Leslie C. Levin  
Joel Barlow Professor of Law

**From:** [OFFICE RECEPTIONIST, CLERK](#)  
**To:** [Tracy, Mary](#)  
**Subject:** FW: Letter in Support of Proposed Amendment to APR 26—Publication Order 25700- A-1281  
**Date:** Friday, April 17, 2020 9:26:25 AM  
**Attachments:** [Letter to Supreme Court re Proposed Amendment of APR 26.docx](#)

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**From:** Levin, Leslie [mailto:leslie.levin@uconn.edu]  
**Sent:** Friday, April 17, 2020 9:20 AM  
**To:** OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>  
**Subject:** Letter in Support of Proposed Amendment to APR 26—Publication Order 25700- A-1281

Dear Madam Clerk:

Attached please find my letter to the Washington Supreme Court in support of the proposed amendment to APR 26 to require lawyers in private practice to carry professional liability insurance. I am also sending a hard copy of the letter via regular mail.

Respectfully yours,

Leslie C. Levin

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