September 28, 2020

Via email to supreme@courts.wa.gov

Susan L. Carlson
Clerk of the Supreme Court
Washington Supreme Court

Re: Comments in Opposition to Proposed Amendment to APR 26 (Supreme Court Publication Order Numbers 25700-A-1281 & 1295)

Dear Madam Clerk:

As a member of the WSBA, I am writing in opposition to the proposed amendment to Admission and Practice Rule 26, which has been submitted to the Court by Kevin Whatley of Equal Justice Washington.

By way of brief background, I am a member of both the California and Washington State bar associations. I live in San Diego, California and practice as a freelance litigation attorney (conducting legal research, reviewing documents, and drafting pleadings, memoranda, motions, etc.). I work as an independent contractor on discrete projects, typically of unpredictable duration.

Although I have been on inactive status in Washington since January of this year, I have been a member of the WSBA since 1996. In anticipation of returning to active status in Washington at some point—and thereupon being subject to APR 26—I submit the following comments regarding the proposed amendment to the Rule.

The Exemption regarding Independent Contractor Attorneys is Inequitable

Among the proposed exemptions to mandatory malpractice insurance set forth in the proposed amendment to APR 26 is the following at section (b)(3): "Employee or **independent contractor** for a **nonprofit** legal aid or public defense office **that provides insurance to its employees or independent contractors**."

Inexplicably, there is no similar exemption proposed for independent contractor attorneys, such as me, who work with private practice law firms that provide malpractice insurance coverage for independent contractor attorneys. Notably, the malpractice insurance policies maintained by law firms I work with include coverage for the activities of freelance attorneys, as the policies include language such as "an Insured is defined as, amongst other persons . . . **any non-employee independent-contractor attorney to the Named Insured**." To require freelance attorneys working with such law firms to personally obtain malpractice insurance would not protect the public, but rather would provide a windfall to insurance carriers that would collect multiple premiums for the same coverage.

Requiring me to obtain malpractice insurance may also put me at a competitive disadvantage because California does not mandate legal malpractice insurance. If forced to purchase insurance in Washington, I would probably need to increase my hourly rates for California clients to cover the cost—a cost not borne by other freelance attorneys in California.

Moreover, my workload varies rather dramatically each year. As a result, it would be very difficult for me to estimate my hours for purposes of purchasing a malpractice policy, and it would be patently unfair for an insurer to collect premiums during my down-times. The option of switching my Washington law license back and forth from "active" to "inactive" during the year is also infeasible because of the time and expense involved in changing status.

If the Court decides to mandate malpractice insurance, I respectfully request that an exemption be included for independent contractors who work with private practice law firms that maintain insurance to cover such attorneys.

Disclosure Alternative to the Proposed Amendment to APR 26

The current version of APR 26 does not require active attorneys to have malpractice insurance. Instead, the rule requires lawyers disclose to the WSBA whether they maintain malpractice insurance, and the Bar Association makes the information available to the public via its website. While some consumers are unlikely to check the website to ascertain whether a prospective lawyer has malpractice insurance, this issue could be easily addressed by adopting a rule similar to California Rule of Professional Conduct 1.4.2 ("Disclosure of Professional Liability Insurance"), which provides in part as follows:

> (a) A lawyer who knows or reasonably should know that the lawyer does not have professional liability insurance shall inform a client in writing, at the time of the client's engagement of the lawyer, that the lawyer does not have professional liability insurance.
>
> (b) If notice under paragraph (a) has not been provided at the time of a client's engagement of the lawyer, the lawyer shall inform the client in writing within thirty days of the date the lawyer knows or reasonably should know that the lawyer no longer has professional liability insurance during the representation of the client.

The approach adopted in California strikes a reasonable balance between protecting the public and permitting individuals to make informed decisions regarding their legal representation.

According to an email I received from the WSBA Board of Governors on September 24, it is my understanding that the Board is submitting to the Court a draft of a Proposed New Washington Rule of Professional Conduct 1.4(c) ("Disclosure of lawyer professional liability insurance status to clients"), which appears to be similar to the California disclosure rule.

I appreciate the Court's consideration of my opposition to the proposed amendment to APR 26, and I am happy to answer any questions.

Regards,
Linda Patterson
WSBA #25947

From:	OFFICE RECEPTIONIST, CLERK
To:	Linford, Tera
Cc:	Tracy, Mary
Subject:	FW: Letter in Opposition to Proposed Amendment to APR 26
Date:	Monday, September 28, 2020 1:07:38 PM
Attachments:	Linda Patterson Letter in Opposition to Proposed Amendment to APR 26 -- 9.28.2020.pdf

---

From: Linda [mailto:ljp22018@gmail.com]
Sent: Monday, September 28, 2020 12:44 PM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Subject: Letter in Opposition to Proposed Amendment to APR 26

Dear Madam Clerk,

Please see my attached letter in opposition to the proposed amendment to APR 26.

Regards,
Linda Patterson
WSBA #25947