WASHINGTON STATE BAR ASSOCIATION

Board of Governors
Rajeev Majumdar, President

January 26, 2020

Susan L. Carlson
Clerk of the Supreme Court
Washington Supreme Court
PO Box 40929
Olympia, WA 98504-0929

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

Dear Madam Clerk:

As President of the Washington State Bar Association (WSBA), I submit the following comment on behalf of the WSBA in opposition to a proposed amendment to Admission and Practice Rule (APR) 26.

The proposed amendment would require all lawyers in private practice, with defined exceptions,[1] to obtain and submit proof of malpractice insurance coverage from the private insurance market as a condition of licensure. Any benefits of the "free market" insurance model would be outweighed by the considerable burdens it would or might impose on the profession and those it serves, including, most significantly, the risk of unintended consequences on retiring/retired/semi-retired lawyers and *pro bono* legal services, the *de facto* ouster of lawyers in high-risk practice areas, the risk that a captive market would increase insurance premiums for all members, and the cost of market-based insurance, which would ultimately be borne by the public in the form of increased legal fees.

With this comment, we hope to provide the Court with context regarding the history of the amendment, the flaws in the proposal, and the steps the WSBA is taking to consider public-protection-oriented alternatives to the proposal.

APR 26 Background

Washington lawyers are not required to have professional liability insurance coverage. They are, however, required to report to WSBA, on a yearly basis, whether they have such coverage. Adopted by the Court in 2007, APR 26 requires this information to be reported annually, which occurs as part of the WSBA's licensing process. All Washington lawyers are required to certify whether they are engaged in the private practice of law and, if so, whether or not they are covered by, and intend to maintain, professional liability insurance. APR 26 requires written notification to WSBA within 30 days if a lawyer's coverage lapses, is no longer in effect, or terminates for any reason. The WSBA does not independently verify the insurance information provided by lawyers. The information submitted under APR 26 is made

[1] Though as drafted, the exception regarding attorneys employed by corporations could become large enough to render the proposal moot.

available to the public on the Legal Directory of the WSBA website. Since 2007, the vast majority of Washington lawyers engaged in private practice have reported that they are covered by professional liability insurance.

Historical Perspective and Recent Initiative to Examine Mandatory Professional Liability Insurance

In the late 1980s, the WSBA considered and rejected a mandatory professional liability insurance proposal. Specifically, in 1986, acting on the recommendation of a task force created to examine the issue, the WSBA Board of Governors ("BOG") considered comprehensively insuring the practicing membership by creating a professional liability fund analogous to the system used in Oregon. The recommended rule would have become part of the former Admission to Practice Rules. In December 1986, by a 7-4 vote, the BOG approved the task force recommendation for submission to the Supreme Court as a suggested rule, subject to the Board's decision being referred for a referendum of the membership. The ensuing membership referendum rejected the Board's action by a vote of 6,971 to 1,693.

In 2016, the BOG decided to revisit the mandatory professional liability insurance issue and convened an *ad hoc* work group to gather information about professional liability insurance as a regulatory requirement in the legal profession. The work group reviewed information from jurisdictions that require professional liability insurance (Oregon, Idaho, and other non-U.S. jurisdictions), investigated a number of insurance-system models, and examined WSBA's APR 26 data about professional liability insurance trends among Washington lawyers. Without formulating a recommendation or proposal, the work group presented this information to the BOG as a generative discussion topic at the May 2017 Board meeting. After consideration of the information presented by the *ad hoc* work group, the BOG decided to examine the topic in greater depth.

Formation and Work of the WSBA Mandatory Malpractice Insurance Task Force

In September 2017, the BOG approved formation of the WSBA Mandatory Malpractice Insurance Task Force to evaluate the characteristics of uninsured lawyers and the consequences for clients when lawyers are uninsured, to examine regulatory systems that require professional liability insurance, and to gather information and comments from WSBA members and others. The Task Force was also charged with determining whether to recommend mandatory malpractice insurance for lawyers in Washington, and, if so, developing a model and a draft rule for consideration by the BOG.

In developing its recommendation, the Task Force considered multiple mandatory insurance models, including the professional liability fund approach (in use in Oregon since 1977) and the "free market" model (in use in Idaho since 2018). Although the Task Force ultimately recommended adoption of a free market model, the Task Force also evaluated other regulatory mechanisms that do not involve mandating insurance, such as enacting a more extensive insurance disclosure requirement that would require disclosure by uninsured lawyers directly to clients and potential clients. The Task Force received and analyzed more than 580 comments from members and others and convened an open forum to hear public and member commentary.[2] While the comments revealed many and various perspectives about

[2] The full set of comments received by the Task Force and the BOG is available at https://www.wsba.org/insurance-task-force .

the idea of mandatory insurance, members overwhelmingly opposed mandating insurance, expressing concerns regarding cost, the likely adverse impact on *pro bono* services provided by retiring, retired, and semi-retired members, un-insurability for some high-risk practitioners and practices, the inappropriate delegation of licensing prerogatives to the insurance industry, the risk of increasing insurance premiums for all lawyers through the creation of a captive market, and the financial burden such a mandate would impose upon individual lawyers and the viability of their practices, especially solo and small firm lawyers.

In February 2019, the Task Force issued its final report,[3] recommending mandatory professional liability insurance for lawyers engaged in the private practice of law and proposing a draft rule that would establish a "free market" regulatory model akin to the system adopted by the Idaho Supreme Court in 2017. The Task Force cited the regulatory objectives of assuring accessible civil remedies for clients harmed by lawyer mistakes and protection of the public as chief among the reasons for its recommendation.

Board of Governors Review of Task Force Recommendation

The Task Force presented its Report and recommendation at the BOG's March 7, 2019, meeting. At the meeting, members and the public had an opportunity to express opinions and positions on the issue. Given agenda constraints and the number of members who wished to share their concerns, the BOG scheduled a special meeting for April 22, 2019, to hear additional feedback from members and the public. Again, although the comments at the March and April meetings demonstrated various perspectives about the Task Force recommendation, members overwhelmingly opposed mandating insurance for reasons made clear in the record of written public comments received both before and after the Task Force published its report.[4]

Ultimately, at its May 17, 2019, meeting, after consideration of comments received, deliberation about the Task Force report, and public discussion, the BOG voted against adoption of the "free market" mandatory malpractice model. In the wake of the vote, several governors suggested that the BOG consider some of the other models evaluated by the Task Force that might serve to protect the public against the risk of errors committed by uninsured lawyers.

The Current Proposed Amendment

By order dated December 4, 2019, the Supreme Court published for public comment a proposed amendment to APR 26, with a comment deadline of April 30, 2020. The proposed amendment is identical to the "free market" model, which the BOG voted not to submit to the Supreme Court.

The proponent of the current proposed amendment is Equal Justice Washington, a nonexistent entity.

Current Developments at WSBA

[3] The full report and related Task Force materials are available at https://www.wsba.org/insurance-task-force .

[4] A sample of excerpts from member comments submitted to WSBA in opposition to adoption of a mandatory malpractice rule is attached to this letter as an Appendix.

At its January 2020 meeting, following an update relating to publication of the proposed APR 26 amendment, the BOG re-affirmed the WSBA's position on the "free market" model and authorized me to express the WSBA's existing opposition to the proposed amendment to the Court.

The BOG has also approved formation of an *ad hoc* committee to generate ideas about public-protection-oriented alternatives to mandatory malpractice insurance for consideration by the BOG and the Court. I expect this project will include consideration of alternative ideas discussed in the Task Force report. This *ad hoc* committee will be chaired by WSBA President-Elect Sciuchetti and composed primarily of select members of the WSBA Committee on Professional Ethics and the former WSBA Mandatory Malpractice Insurance Task Force, as well as public members; and further it will be supported by the expertise of Doug Ende, the WSBA's Chief Disciplinary Counsel. I have formed the committee and expect that the committee will report its recommendation by the summer of 2020.

Conclusion

The WSBA acknowledges and respects the position set forth in the GR 9 Purpose Statement submitted with the pending proposed amendment to APR 26. Nevertheless, the WSBA adheres to and renews its position that no action should be taken on it.

Contrary to the view of the proponent, the BOG's vote against the Task Force recommendation is neither evidence of an "ethical blind spot" nor taken in disregard of the mandate of GR 12.1 to regulate the profession in the public interest. Rather, the decision not to approve the Task Force recommendation reflects a genuine and firmly held belief that any benefits of the "free market" insurance model would be outweighed by the considerable burdens it would or might impose on the profession and those it serves, including, most significantly, the risk of unintended consequences on retiring/retired/semi-retired lawyers and *pro bono* legal services, the *de facto* ouster of lawyers in high-risk practice areas, the risk that a captive market would increase insurance premiums for all members, and the cost of market-based insurance, which would ultimately be borne by clients in the form of increased legal fees.

The WSBA looks forward this year to exploration of other less precarious and more expedient regulatory requirements that would responsibly serve the public protection purposes articulated by proponent and codified in GR 12.1.

For these reasons, we respectfully urge the Court to reject the proposed amendment to APR 26.

In Service,

Rajeev D. Majumdar
WSBA President

APPENDIX A

EXCERPTED MEMBER COMMENTS OPPOSING MANDATORY MALPRACTICE INSURANCE

- "I searched diligently and filled out numerous applications, but I reached the conclusion that there is no market for malpractice coverage for transactional securities lawyers in solo practice. It appears that from the insurer's perspective, the underwriting costs exceed the expected profits at anything other than prohibitive rates. The last time I looked into this (and that was a number of years ago), every insurer I contacted refused to give me an offer at any price."

- "As a rural lawyer on Orcas Island, any added costs will come at a cost to my clients. Most of my clients cannot afford what little I charge now, and mandatory insurance will further reduce rural citizen's access to the legal system. I am opposed to a mandatory system and if the premiums are what they were last time l checked, I would have to restrict my practice to clients that are well funded and end representation of my reduced fee and pro bono clients."

- "As an individual who practices law low bono and as not my primary job I would find required malpractice insurance to be a burden. It is a good year when I pull in enough for the premium, I know because I've applied multiple times and every quote I've ever been given, even when the work I do is very low risk is $3000 for the year. I may make more than that this year, but at the end of the day I would just stop practicing law. As it already costs me money to keep practicing and use my license so I can volunteer."

- "I practice Social Security disability law, which is a practice that is meaningful but not lucrative. I am quite concerned about my ability to afford malpractice insurance. I cannot simply raise my rates to cover the additional overhead for my solo practice. My clients are poor people and my rates are set by the government. I am sure many other lawyers are in a similar situation. If insurance is required, this has a disproportionate affect on solo and small firms whose budgets are tight, on new lawyers, and on lawyers who have chosen their area of practice because of the good it does for the community rather than lining their own pockets."

- "I can guarantee that if I am compelled to purchase malpractice insurance in order to remain an attorney, my hourly rates will be increased to pay for the imposed cost and I will have to seriously reevaluate my availability to pro bono clients because I will have to focus even more on clients who can afford attorneys. It's not a complicated analysis: increase cost of business = increased rates. I fail to see how this does anything to increase 'access to justice.'"

- From my experience, the great bulk of under-represented citizens are moderate income people who cannot afford an attorney yet do not qualify for pro bono representation. . . . I may soon retire from my "day job" but hope to keep providing . . . unpaid service to moderate-income individuals. I am saving for retirement and certainly am not in the position to divert funds to pay for professional liability coverage. If coverage becomes mandatory, I fear I will be required to become an inactive member of the bar and will

no longer be able to serve this under-represented group. I am sure there are many other attorneys in the same situation."

- "Effect: I would close my firm and end my 34 years as a lawyer. I'm already mostly-retired, and aside from a few paying clients, spend my time in pro bono, public education or volunteer projects. Adding the $3,000 likely malpractice insurance premium (my actual malpractice insurance premiums in prior years were higher) would be the straw that breaks the camel's back."

- "I am retired, on fixed income, and only do pro bono work-although I do hundreds of hours of pro bono work every year. However, hundreds of hours, at $0 per hour, is still $0. If I was required to also get malpractice insurance, I could no longer afford to do the pro bono work."

- "I am a 72-year-old practicing lawyer. My primary income is social security; I provide a great deal of pro bono services within my community, including free legal services for our local volunteer hospice, and elders. I have priced malpractice insurance, I cannot afford it. If it is mandated, I will be forced to discontinue providing the services I presently offer. The local pro bono office offers very, very little legal representation to the community. By barring me from practicing law, you will further marginalize the population I serve."

- "If the experience of the national health care paradigm . . . suggests any lesson, reliance on the private insurance industry does not enhance broad affordability of health care nor broad public benefit. In the legal malpractice field, mandatory insurance could just as easily drive up insurance costs for the entire legal profession (presuming, as did the Task Force Report, that those who currently are uninsured (small firms) are the greater risk pool, that claims against them will be greater and that the insurance industry will raise the premiums on all its risk classes in order to cover the greater claims exposure they will have in the small firm sector)."

- "[U]nder mandatory insurance, a competent lawyer could be constructively disbarred because no insurance carrier will write an affordable policy. There is no backstop or appeal process I am aware of identified in the Report should this happen. . . . It is important to highlight that without such review the State's legal profession may be at the mercy of insurance companies once mandatory insurance requirements are enforced."

- "I believe such a requirement is cost prohibitive and that if an attorney can't afford the cost, or if they were for some reason denied coverage under an open market, then the private insurance companies are the ones deciding who gets to practice law instead of the State bar."

From:	OFFICE RECEPTIONIST, CLERK
To:	Tracy, Mary
Subject:	FW: WSBA Comment re the Matter of the Proposed Amendment to APR 26—Insurance; Publication Order 25700-A-1281
Date:	Monday, January 27, 2020 8:34:29 AM
Attachments:	Comment_WSBA to the Court_APR 26 Proposal.pdf

Hi Mary, is this one yours too?

From: Rajeev Majumdar [mailto:rajeev@northwhatcomlaw.com]
Sent: Sunday, January 26, 2020 1:15 PM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Subject: WSBA Comment re the Matter of the Proposed Amendment to APR 26—Insurance; Publication Order 25700-A-1281

Dear Madam Clerk,

Please find attached a courtesy copy of the Washington State Bar Association's Comment re the Matter of the Proposed Amendment to APR 26—Insurance.

A hard copy will be transmitted pursuant to Publication Order 25700-A-1281, as our comment exceeds 1500 words.

Warmly,

Rajeev D. Majumdar, President
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