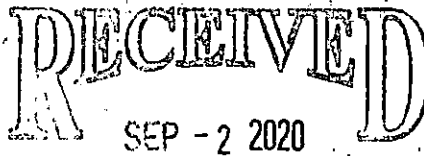


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August 29, 2020

Washington State
Supreme Court

Justices of the Supreme Court
P.O. Box 40929
Olympia WA 98504-0929

Re: Second Comment on the Proposed Amendment to APR 26—Mandatory Malpractice Insurance

Dear Justices,

Please accept this second comment as an extension of my first comment filed 2/25/20. This second comment revises the original comment and adds additional legal analysis.

I oppose the adoption of this amendment because the U.S. Supreme Court case of *NFIB v Sebelius* established that mandatory insurance is a tax and only a legislature can enact a tax. I also oppose it on the basis of jurisdiction and costs. Let me explain:

If required by a court, such an act is unconstitutional.

In *National Federation of Independent Business v. Sebelius*, 567 U.S. 519 (2012) the petitioners challenged the constitutionality of the Affordable Care Act. The ACA's "individual mandate" required Americans to obtain a minimum amount of insurance coverage. If individuals chose not to obtain such coverage, a penalty was imposed. The U.S. Supreme Court decided that mandating the purchase of insurance was a tax and affirmed the power of the legislature to "lay and collect taxes."

By ruling that mandatory insurance is a tax, *NFIB* states that requiring mandatory insurance is a *legislative act*. So if done by the judiciary, our Supreme Court, it would be unconstitutional as a violation of the doctrine of Separation of Powers. The doctrine states the three branches of government (executive, legislative, and judicial) exercise separate, independent powers and no branch is allowed to exercise the powers of the other branches. The judiciary cannot legislate. So *NFIB* shows us that the Supreme Court does not have the legislative power to require insurance.

If the Supreme Court assumes legislative powers and requires malpractice insurance then the acts constitutionality can be challenged as a federal question in Federal District Court on the basis of the doctrine of Separation of Powers. That case may reasonably end up at the U.S. Supreme Court.

Requiring insurance also appears to be outside of the Court's jurisdiction to exercise its plenary authority to regulate the practice of law and judiciary.

There are limits to the Supreme Courts plenary power over attorneys. It does not extend to aspects of the attorney that have no effect on the judiciary or the practice of law. For example, the court cannot require attorneys to drive a certain brand of car. That jurisdiction does not extend to requiring insurance because insurance is for after-the-fact claims. Insurance doesn't prevent mistakes. It doesn't appear to

have anything to do with actually practicing law or the workings of the judiciary, other than tax it, because insurance is concerned with what happens after the practice is over, not how the practice is carried out. It has nothing to do with how the judicial system functions. A claim that the Court lacks jurisdiction under its plenary power might be paired with the constitutional claim as this appears to be a federal question as well.

The legislature cannot require insurance.

If the Supreme Court was to ask the legislature to require malpractice insurance as a tax per *NFIB* then that would likely be unsuccessful as well. Once again the doctrine of Separation of Powers prevents this. The legislative branch cannot tax the judicial branch in this way. Attorneys are a necessary part of the judicial branch, without which it cannot function. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819) said the power to tax is the power to destroy. Certainly our system of checks and balances does not allow any branch a power to destroy another.

The cost-is-extreme in dollars and unmet legal needs.

The other reason I oppose this requirement is that it's cumulative cost over time is 1.25 billion dollars levied against the smaller firms. Each attorney would pay \$280,000 over the course of his or her practice. Let me explain:

The WSBA Task Force told us that of the 32,000 Washington lawyers who have active licenses 14% of those in private practice consistently report being uninsured. If insurance is mandated the majority of these 4,480 lawyers would have a "fully matured" 6 year experience and the insurance company would be responsible immediately on these "claims made" policies so the cost would start at \$2,775 per year. Using a 5% per year increase, if the average attorney practices just 35 years that would cost each attorney over \$280,000 during his/her time in practice including a 6 year insurance tail. When an attorney quits the practice he/she may still be liable up to a 6 year statute of limitations so you add on the half price 6 year insurance tail that starts after the 35 years in practice, extending this to 41 years and that adds, because of inflation, roughly another \$135,000,000 more for these attorneys to pay. The total cost, with yearly increases, for that many attorneys is \$1,123,000,000. That's 1.1 billion dollars.

This proposal will also cause widespread damage to our legal system and the public. Many commenters indicate that requiring insurance will cause them and an army of pro bono and low cost semi-retired attorneys to quit. I am one of them. These are the most experienced and knowledgeable attorneys who will leave the bar. It seems evident that if they quit then our justice system will be damaged and the public's unmet needs for affordable legal services will increase. The unseen, unmet legal needs of people with lesser means will likely increase in an amount we will not be able to measure and will have no ability to resolve. How many thousands of the bar's most experienced, semi-retired, and retired attorneys are expected give up their licenses because of this and will never again, on a pro bono basis help anyone, impoverished or otherwise, solve their legal problems? And this would not be a one time event. Successive generations of attorneys will likely come to the same conclusion.

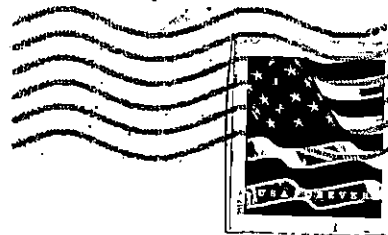
Respectfully submitted,



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