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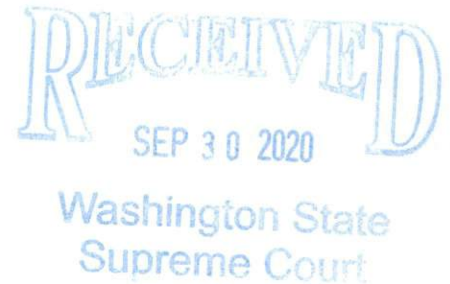


September 23, 2020

Justices of the Supreme Court
PO Box 40929
Olympia, WA 98504

Re: Proposed APR26

Dear Justices:

I write this letter to address the proposed amendment to APR26, which I oppose. These comments will be divided into two sections: (1) deficiencies in the proposal, and (2) the negative effect on clients. For purposes of brevity, this will be descriptive, not expositive.

I. Deficiencies in the APR26 Amendment

A. Where is the data demonstrating need? I have seen no studies, statistics or analysis of same, or even anecdotal evidence, evincing a need for mandatory malpractice insurance. How many victims whose claims would be covered go uncompensated every year? What is the dollar amount due the victims? How are such statistics gathered, and how do we know the data is reliable? Who decides if a claim would be covered, be successful, or its value? The absence of evidence of a genuine problem suggests no rule change is needed.

B. The main source of claims against attorneys, as I understand it, is trust account misconduct. Liability insurance generally won't cover this, as it is an intentional act. And, WSBA already assesses an annual fee to compensate victims.

C. This proposal amounts to an admission of failure by WSBA and the Washington State Supreme Court, it's overseer. It is likely that perhaps 1% of the lawyers cause over 90% of the claims (again, where are the studies?). Mandatory insurance would be unnecessary if all lawyers practiced competently. Most do, a few don't. Apparently, pre-admission screening, disclipline and CLE requirements do not guarantee competency standards, but insurance is no substitute for those standards. The focus should be on maintaining standards and removing bad apples, not shifting economic burdens around. If malpractice is such a problem, perhaps the CLE experiment is a failure and should be scrapped.

D. This is overregulation. Insurance status is already disclosed on the WSBA website, though it is reasonable to think that many potential clients don't visit it. You could require that insurance status be disclosed at the time of engagement. I already follow the California practice of disclosure in retainer agreements and letters of engagement. Let the client decide what s/he wants to pay for. In addition, it might be worth considering creating a registry of claims made against a lawyer, as this information is the other side of the insurance question.

E. The loss of old heads. Some of my classmates, with whom I have consulted after their retirement from full-time practice, have gone inactive rather than pay dues and put in CLE time just to work pro bono. Not a few of these lawyers are very experienced people with deep institutional knowledge of Washington practice -- resources not to be lightly tossed aside. Requiring insurance to remain "active" compounds the likelihood of semi-retired lawyers departing the bar, and taking their knowledge with them.

II. Negative Effect on Clients

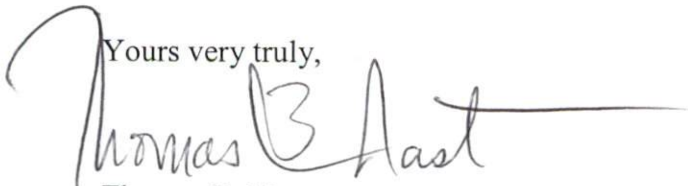
A. The cost of insurance will be added to fees. Many already find attorneys' fees exhorbitant. Perhaps clients are intelligent enough to decide if they want to pay higher fees for insured lawyers – I'd like to think so. What's wrong with informed choice?

B. Less competition. There are many semi-retired and part-time lawyers who simply cannot pay for liability insurance and practice law. I know a fair number of lawyers in this situation, and they mostly help family, friends and friends of friends – people who very often cannot afford to pay "retail." Not only may these people go unserved, but the absence of competition will allow the insured lawyers to charge even more than they do now. Unless the laws of supply and demand have been represaled, this result is unavoidable.

C. Independent pro bono lawyers will be put out of business. This is personal. Although "retired," from time to time I do get involved in cases. Usually, these are unpaid or pro bono. These are matters of my selection, where something is going or has gone very wrong and needs fixing, but fixing is unaffordable to the aggrieved. These matters have ranged from criminal prosecution to probates going sideways to representing a rape victim. I have not done any bar-sponsored pro bono activity, and a major reason why is that it requires malpractice coverage. It is hard to justify spending thousands of dollars a year to give one's time away -- this is more altruism than a retiree can afford! I'm sure I'll have a lot of company in furling the flag if it is economically unfeasible to lend a hand.

In conclusion, the revisions to APR26 seem to be a solution in search of a problem. There is no proof that the lack of professional liability insurance is causing widespread losses. The APR26 amendments are a one-size-fits-all approach that doesn't suit the many different circumstances of bar members or their clients. Finally, the unintended consequences will outweigh any theoretical benefits from mandatory insurance, not least by making legal assistance more expensive and unavailable than it already is.

Yours very truly,



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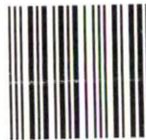

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