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April 25, 2020

by e-mail

Clerk, Supreme Court of Washington
Re: Proposed Amendment to APR 26 (Insurance Disclosure)

According to the minutes of its October 24, 2018 meeting, the WSBA's Mandatory Malpractice Insurance Task Force rejected an exception to its proposed rule requiring lawyers to carry malpractice insurance, a rule identical to the rule proposed here. That exception would have allowed government lawyers to provide advice to family members. The Task Force rejected the exception on two grounds: that providing legal services to family members posed a "high risk" of malpractice "in certain situations," and that it would be "too difficult" to define who is a family member for the purposes of such an exemption.

While I join in the concerns about the current proposal raised by WSBA President Majumdar and others about imposing a mandatory insurance rule in Washington, I write separately to invite the Court to revisit an exception for otherwise exempt lawyers providing advice to family. Were the Court inclined to adopt the proposed amendment, I would suggest the Court permit government lawyers (like me) and other exempt lawyers to provide legal help in low-risk situations to related persons as defined in RPC 1.8(c). In my job as a lawyer for the federal government, I often say that half the law I practice is the "Law of Unintended Consequences"; I write to point out to the Court what that the Task Force (and the proponent of the current proposal) might have been missed.

All views expressed in this comment are my own and not my employer's.

For the families of exempt lawyers, the proposed rule will cause more harm than it proposes to avoid: By not excepting low-risk situations, the proposed rule creates a universe of matters in which a lawyer's parent, spouse, or child would benefit from the advice of a person trained in the law on matter in which the lawyer might see an obvious, easily rectified

problem, but APR 26 would prevent that lawyer from keeping his or her loved ones out of trouble. A lawyer might have to tell a parent (who might have paid for the lawyer to go to law school) to hire a lawyer at considerable expense to draft a deed transferring the family home to a sibling. A lawyer might have to tell a sibling in need of a domestic violence protective order that the lawyer's hands are tied, or tell a child facing eviction that he will have to face a judge without any advice help from his lawyer parent. These all fall within the GR 24 definition of the practice of law, and an otherwise exempt lawyer couldn't intervene in these situations without purchasing expensive insurance for which no market currently exists.

Consider also the likelihood that many exempt lawyers would, if confronted with compelling circumstances, simply break the rule and render advice without obtaining insurance, and then lie on their next annual certification. This does nothing to promote respect for the law.

We all read *Carroll Towing Co.* in law school: we evaluate risk by multiplying the magnitude of the harm posed by the risk by the probability of its occurrence. In those cases where the probability of malpractice is low and the monetary harm posed is also low, then the risk is low. By barring exempt lawyers from advising relatives in low-risk situations, a small amount of harm is avoided, but at a great price. As someone who views the law as a helping profession, I think the proposed rule would constitute a step backward in this respect, a counterintuitive result for a rule that is supposed to protect the public.

Not every representation of a family member is "high risk": Providing legal services poses risks. However, as the Task Force noted, the risk presented is "high ... in certain situations." Other situations pose little risk. A simple will or statutory form health care power of attorney poses little (though not zero) risk. Other matters may present greater or lesser risk, depending on the lawyer's experience and education and the facts of the matter. By forbidding otherwise competent lawyers from handling these low-risk matters with a small set of potential clients who might otherwise lack access to legal advice, the proposed rule would expand the universe of matters in which a lawyer's relatives are obliged to go without advice.

The “high risk situations” the Task Force alluded to could be carved out of a broader exemption. I suggest including the following as examples of high-risk situations:

- written opinions for the use of an unrelated third party, such as a securities, transactional, or tax opinion;
- advocacy in a contested matter before any court, agency, or tribunal, though perhaps excluding ex-parte proceedings and some forms of non-advocacy advice provided to unrepresented parties on a limited-representation basis;
- any matter requiring the lawyer to hold property belonging to the client; and
- contested domestic proceedings such as a dissolution or child-custody matters.

Alternatively, the rule could define low-risk situations where exempt lawyers could serve related persons without engaging in “private practice” under APR 26. Those might include:

- drafting wills and revocable inter-vivos trusts of which family members and charities are the sole grantors, trustees, and beneficiaries;
- powers of attorney;
- preparation of individual tax returns and individual tax advice;
- drafting property transfer documents such as deeds where family members are the sole parties to the transaction; and
- Ex parte proceedings and applications for protective orders, and reviewing pleadings for otherwise unrepresented clients.

The rule should also exclude advice or guidance provided in connection with any matter in which the lawyer is himself or herself a participant, which does not fit within a naïve understanding of a “representation.” An example would be an explanation about the terms of a real-estate purchase-and-sale agreement for the benefit of the lawyer’s spouse in a transaction in which both the lawyer and the spouse were parties.

The rule could require that any services provided by the lawyer be gratis, though perhaps not including the voluntary gift of the client where the gift is the object of the representation. Any amended rule should require

disclosure to the client that the lawyer lacks malpractice insurance, so that the client can make an informed decision.

The rule need not define "family member" when we already have a definition of "related person": The Task Force was concerned with the potential for gamesmanship in the definition of "family member." Lawyers, as a group, are prone to reading rules in self-serving ways when there is an opportunity to do so, and the task of writing a rule that could apply in all situations at all times would be daunting.

However, the rule is already written, and carries with it a body of interpretive law. RPC 1.8(c) forbids a lawyer from preparing an instrument giving the lawyer or a related person a gift unless the lawyer or other recipient is related to the client. The rule defines "related persons" to include a "spouse, child, grandchild, parent, grandparent or other relative or individual with who[m] the lawyer or the client maintains a close, familial relationship." While the text of the rule could be interpreted to apply this definition solely to the class of persons who are prohibited donees, Comment 6 clarifies that the exception applies "where the lawyer is related to the client as set forth in paragraph (c)," and the only definition provided is the one just described. Similar language appears in section 127 of the Restatement (Third) of the Law Governing Lawyers; comment e to the Restatement points out that the exception covers those situations where the lawyer is so related to the client that the gift should not cause suspicion of undue influence. The comment also points out that "in many families, one of whose members is a lawyer, it would be thought unusual for a family member for a family member to go outside the family for legal advice, for example, to write a will or create a trust for a family member."

Rather than take on the arduous task of defining "family member" (or more to the point, avoiding the task and thus throwing the baby out with the bathwater), the Court could simply adopt the definition of "related persons" in RPC 1.8(c) in defining the class of clients for whom an otherwise exempt lawyer may provide services without coming within the ambit of the mandatory malpractice insurance rule.

The proposed rule, as written, goes too far. However, were the Court inclined to adopt the proposal, the Court should create an exception for otherwise exempt lawyers to provide help in low-risk situations for members of the lawyer's family. As the Restatement correctly points out

that, when it comes to relatives, the rules are, and ought to be, relaxed in some respects so as to increase, rather than limit, access to advice.

Yours very truly,

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From:	OFFICE RECEPTIONIST, CLERK
To:	Tracy, Mary
Subject:	FW: Comment on Proposed APR 26 Amendment
Date:	Monday, April 27, 2020 8:11:37 AM
Attachments:	Comment on Mandatory Malpractice 2020-04-25.docx

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From: William D. Richard [mailto:wm.richard@gmail.com]
Sent: Saturday, April 25, 2020 6:45 PM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Subject: Comment on Proposed APR 26 Amendment

Attached please find my comment on proposed APR 26.

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