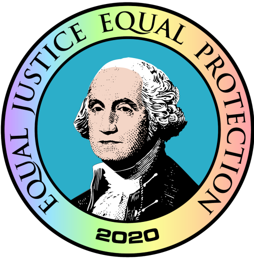

April 30, 2021

Dear Honorable Justices of the Supreme Court and valued members of the Rules Committee:

First, I would like to thank you all for donating your time to the people of Washington State to promote the administration and access-to-justice through the diligent work of this committee. We stand with you, united in that effort. In fact, it is the social purpose of Equal Justice Washington S.P.C.

"To promote the administration and access-to-justice and protect the integrity of the legal and judicial systems so everyone can be seen equally under the law."

Second, although we stand united in our goals, I would like to express our concern about the decision of the Rules Committee to defer action on APR 26 and give preferential treatment to the support of RPC 1.4. An insurance disclosure rule does nothing to resolve the conflicts stated in our GR9 purpose statement, nor is it supported by the unanimous conclusion and recommendation of the WSBA Task Force on Mandatory Malpractice Insurance. The report represents almost two years of research and fact-finding and is the most thorough and comprehensive review ever conducted in the United States.

"The Board of Governors should recommend, and the Washington Supreme Court should adopt, a rule mandating continuous, uninterrupted malpractice insurance for actively licensed lawyers engaged in the private practice of law, with specified exemptions."

Third, I would like to address the numerous misconceptions that have been promulgated by the WSBA Board of Governors and uninsured attorneys. It is disconcerting that the leadership of an agency of the state whose first burden of duty is to the public would knowingly and purposefully abandon its mission to the 7.5 million people of Washington and be obsequious to the thousands of uninsured attorneys who cause harm to the profession, restrict access-to-justice, and, most importantly, allow victims to be harmed.

The WSBA Board of Governors enumerated its official opposition to APR 26 to the Court and this Rules Committee in a letter dated January 26, 2020. In the four-page letter, the rationale to protect the thousands of uninsured attorneys versus protecting the 7.5 million people of Washington was only stated in one sentence. The remainder of the four-page letter was mostly a history lesson on malpractice insurance and why the people of Washington are not protected today.

The one-sentence rationale against protecting the people of Washington is the first paragraph on page one.

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"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."

To address the statement, I will take it line by line, showing this is beyond pure speculation, based upon pure meritless conjecture that has already been empirically disproven based upon factual information, expert testimony from legal scholars, malpractice insurance industry experts, and the executive leadership of bar associations that require insurance and victims of malpractice.

Supposition 1. "*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..."*

1. **Fact:** The Task Force on mandatory malpractice insurance unanimously concluded *"The Board of Governors' decision whether to recommend action on uninsured lawyers, and the Court's ultimate decision on this matter, must be approached overwhelmingly from the perspective of what is good for the public and what is good for clients - not what might be convenient or desirable for lawyers themselves."*

2. **Fact:** As noted by the Task Force, legal academics, and comments by victims, the benefits are numerous. Public protection, remediation when victimized, public confidence in the profession, and upholding the missions of the WSBA and the Supreme Court are all net benefits.

3. **Fact:** Zero demonstration of any quantifiable burden to the profession. As the Idaho and Oregon Bar Associations have stated, mandated insurance is not a burden to the profession but a benefit to those it serves.

Supposition 2. "...*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..."*

1. **Fact:** The BOG has failed to demonstrate any substantive risk to the profession, unintended consequences, or any risk at all; there simply is no proof. Not one legal academic concurs or has provided a written statement of support or any legal research paper. In addition, the Task Force could not find any substitute evidence, research on the matter, documented proof, or any demonstrated harm to the profession that mandated insurance would cause harm to the profession.

2. **Fact:** By creating an access-to-justice issue, the Task Force has demonstrated that all of the harm is to the public—not to the profession—but to whom the profession serves. Most notably, ATJ problems overwhelmingly and disproportionately affect people of color and low-income families. Seven in ten low-income families in Washington State face legal and ATJ issues and that number is only increasing at an alarming rate, since 2009 the number has tripled.

3. **Fact:** Retired lawyers do not need to be insured to maintain their license. Again, the BOG spreads misinformation knowingly and purposefully to suit its own needs and not that of the public. They make deceitful claims in hopes of achieving their own agenda and encourage uninsured attorneys to write to the court to echo their misinformation and add confusion to the situation.

4. **Fact:** No harm to pro bono services. It is not necessary for any attorney to have malpractice insurance if they want to volunteer services as long as they do so through a qualified legal service provider who provides coverage under their policy. Data from Oregon and Idaho bar associations do not support this claim whatsoever. In fact, since 1977, Oregon has seen no decrease in pro bono services because they required malpractice insurance. Data from Idaho maybe even more revealing. Since requiring insurance, pro bono services are increasing. In the two trailing years since mandated insurance, Idaho has enjoyed highest number of pro bono hours that have ever been volunteered. The assumption from the Idaho bar is based on increased participation with QLSPs. Attorneys are able to be connected with more clients who are in need, and this leads to an increase in pro bono services offered to the public.

5. **Fact:** No de facto ouster of lawyers in high-risk practice areas. Again, the BOG knows full well from the testimony of the executive director of the Idaho Bar Association to the Task Force that she is unaware of any attorney who was unable to be insured who was eligible to practice law—none. As the only state to have a free-market insurance requirement, we must look at empirical facts, not speculative fiction designed to invoke fear and confusion.

Supposition 3. "...*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."*

1. **Fact:** Mandated insurance does not increase insurance premiums. The BOG's claim is once again asserted with zero factual proof or proof of any kind. The Task Force could not find any, the BOG could not find any, nor could any academic. The reason for that is because it is completely false and does not exist. As stated by the largest direct underwriter of malpractice insurance, ALPS, mandated insurance is not a policy cost factor nor a metric and is not a factor in determining insurance costs.

2. **Fact:** Even if that were true, the NORC study from the University of Chicago points out that 76% of the public surveyed believes lawyers already have insurance and 86% said that lawyers should be required to carry insurance even if it means they might charge higher fees.

RPC 1.4 versus amended APR26

The Rules Committee and the Court will decide between two mutually exclusive options. Either protect the 7.5 million people of Washington or not. It is socially inequitable for the people of Washington State not to have the same public protection as the people of Idaho and Oregon or the majority of the developed world. It is unconscionable to maintain a status quo that knowingly creates an access-to-justice issue that disproportionately affects low-income families and people of color.

It s an honor and a privilege to be an attorney, have a world-class education and be our defender of justice. It bears a great deal of responsibility and accountability. Insurance is required for LLLTs and LPOs, doctors, contractors, plumbers, and anyone who wants to drive a car; all are accountable and lawyers should be too.

On behalf of the people of Washington State, low-income families, people of color, and victims of malpractice, we strongly oppose amended RPC 1.4 and ask for the support and adoption of amended APR 26. I firmly believe in each and every one of you and your ability to do the right thing. Thank you for your time and leadership on this issue.

Respectfully,

Kevin Whatley
Executive Director

From: OFFICE RECEPTIONIST, CLERK
To: Linford, Tera
Subject: FW: Comment on RPC 1.4 Order Number 25700-A-1321
Date: Friday, April 30, 2021 1:18:20 PM
Attachments: RPC1.4 comments.pdf

From: Kevin Whatley [mailto:equaljusticewa@gmail.com]
Sent: Friday, April 30, 2021 1:15 PM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Cc: Johnson, Justice Charles W. <Charles.Johnson@courts.wa.gov>
Subject: Comment on RPC 1.4 Order Number 25700-A-1321

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Susan L. Carlson
Clerk of the Supreme Court
Washington Supreme Court
P.O. Box 40929
Olympia, WA 98504

Re. Comment re the Matter of the Proposed Amendment to Publication Order Number 25700-A-1321 to RPC 1.4

Dear Madam Clerk:

Thank you and all the AOC staff who work daily to make sure that the wheels of justice turn for the people of Washington. Please find the attached comments on the proposed amendment to RPC 1.4.

I would also like to ask that you please distribute this to each Justice. The Court will be deciding one of the most important public protection issues with regard to lawyer regulation and it's important to hear diverse opinions.

Respectfully,

Kevin Whatley
Executive Director

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