LESLIE C. LEVIN
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HARTFORD, CT 06105

April 25, 2021

Washington Supreme Court
P.O. Box 40929
Olympia, WA 98504

Re. Comment re Suggested Amendments to Washington Rule of Professional Conduct 1.4

To the Honorable Justices of the Washington Supreme Court:

I am a law professor at the University of Connecticut Law School who has studied uninsured lawyers, the lawyer discipline system, and lawyer regulation. In April 2020 I wrote this Court a letter supporting the proposal to amend APR 26 to require Washington lawyers to maintain minimum amounts of lawyer professional liability (LPL) insurance. I continue to support that proposal and I am now writing concerning the Washington State Bar Association's suggested amendment to Washington Rule of Professional Conduct 1.4, which would require uninsured lawyers to disclose to their clients that they do not carry LPL insurance.

The WSBA's proposal is preferable to the status quo, but it is still inadequate to protect the public. As the Court is aware, approximately 14% of Washington lawyers in private practice are uninsured.[1] Most are solo and very small firm lawyers who represent individuals. Currently, the only way these individuals might be alerted to the fact that a Washington lawyer is uninsured is by looking at the MyWSBA Legal Directory. Even if the they think to look for and find the directory (which is not listed under "The Public" portion of the WSBA's website), the directory does not advise the public of the risks of hiring an uninsured lawyer.

The WSBA now proposes direct written notice to clients when lawyers do not carry minimum amounts of LPL insurance. The suggested amendments would require notification "before or at the time of commencing representation of a client." This proposal does not sufficiently address the problem. First, it is unlikely that individual clients—who frequently are not experienced users of legal services—will carefully read the notice. Indeed, research reveals that people do not read disclosures even when providing consents for life-threatening surgery. Moreover, this disclosure to clients can occur when the lawyer *commences* the representation and client consent need not occur until ten days thereafter. *See* Proposed Rule 1.4 (c) cmt. 8. At that point, the client may have paid an advance fee and feel committed to the relationship. There may also be time constraints that require the client to continue with the lawyer even after learning the lawyer is uninsured. Power imbalances, social norms, and psychological processes also make it difficult for individuals to change course at that time.

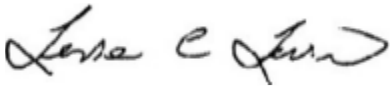
[1] Support for these and many of the other statements in this letter can be found in the WSBA's MANDATORY MALPRACTICE INSURANCE TASK FORCE REPORT (Feb. 2019) and in Herbert M. Kritzer & Neil Vidmar, WHEN LAWYERS SCREW UP, IMPROVING ACCESS TO JUSTICE FOR LEGAL MALPRACTICE VICTIMS (2018); Leslie C. Levin, *When Lawyers Screw Up*, 32 GEO. J. LEGAL ETHICS 109 (2019); Leslie C. Levin, *Lawyers Going Bare and Clients Going Blind*, 68 FLA. L. REV 1281 (2016).

South Dakota's insurance disclosure rule potentially addresses some of these problems. In South Dakota, uninsured lawyers must disclose their lack of insurance on their letterhead and in every written communication with clients. *See* South Dakota Rule of Professional Conduct 1.4. (c)-(d). Given the ways in which clients now find their lawyers, disclosure should also be required on lawyers' websites so that the public has some opportunity to learn even before contacting a lawyer that the lawyer is uninsured.

The problem with any direct disclosure rule, however, is that it requires the public to understand the potential dangers when a lawyer is uninsured and to bear the risk of loss. If such a rule were to be imposed, it should ensure that the public is truly informed of the risks before they are financially or psychologically committed to the attorney-client relationship. The WSBA's proposal does not do that.

In truth, any disclosure rule will provide the public with significantly less protection than an insurance requirement. For that reason, I hope the Court will consider the mandatory insurance proposal at the same time as it considers the WSBA's most recent proposal. Idaho's three-year experience with an insurance requirement has proven to be successful. In 2019, the WSBA's Task Force carefully considered the question of whether LPL insurance should be required and recommended that it should be. The WSBA Board of Governors voted it down because (mostly) uninsured lawyers objected. As I wrote last year, the question before the Court is whether lawyers' objections to an insurance requirement should trump the interest in public protection. I urge the Court to decide in favor of the public's interests.

Respectfully yours,



Leslie C. Levin
Hugh Macgill Professor of Law

**From:** OFFICE RECEPTIONIST, CLERK
**To:** Linford, Tera
**Subject:** FW: Comment re Suggested Amendments to Washington Rule of Professional Conduct 1.4
**Date:** Monday, April 26, 2021 8:10:25 AM
**Attachments:** Letter to Supreme Court re Proposed Amendment of Rule 1.4.pdf

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**From:** Levin, Leslie [mailto:leslie.levin@uconn.edu]
**Sent:** Sunday, April 25, 2021 8:08 AM
**To:** OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
**Subject:** Comment re Suggested Amendments to Washington Rule of Professional Conduct 1.4



To the Clerk of the Court:

Attached is my Comment regarding the WSBA's Suggested Amendments to Washington Rule of Professional Conduct 1.4. I believe Comments are due by April 30. If I should be submitting this Comment somewhere else, would you please let me know?

Thank you in advance for your assistance.

Respectfully,

Leslie C. Levin