

MANDATORY MALPRACTICE INSURANCE TASK FORCE

MEETING MINUTES

July 18, 2018

Members present were Chair Hugh Spitzer, John Bachofner (by phone), Stan Bastian (by phone), Dan Bridges, Christy Carpenter, Gretchen Gale, P.J. Grabicki, Mark Johnson (by phone), Kara Masters, Brad Ogura, Suzanne Pierce (by phone), Brooke Pinkham (by phone), and Todd Startzel (by phone). Members Lucy Isaki, Rob Karl, Evan McCauley, Stephanie Wilson, and Annie Yu were absent from the meeting.

Also present were Carol Bernick (Oregon Professional Liability Fund Chief Executive Officer), Jeff Crawford (Oregon Professional Liability Fund Director of Administration and Underwriting), Doug Ende (WSBA Staff Liaison and Chief Disciplinary Counsel), Thea Jennings (Office of Disciplinary Counsel Disciplinary Program Administrator), Rachel Konkler (Office of Disciplinary Counsel Legal Administrative Assistant), Sara Niegowski (WSBA Chief Communications and Outreach Officer), and Emilee Preble (Oregon Professional Liability Fund Staff Attorney and Excess Program Administrator).

The meeting was called to order at 1:02 p.m.

A. MINUTES

The minutes of the June 27, 2018 minutes were approved.

B. DISCUSSION WITH OREGON PLF REPRESENTATIVES ON OREGON'S MANDATORY INSURANCE EXEMPTIONS (EMILEE PREBLE, JEFF CRAWFORD, AND CAROL BERNICK FROM OREGON PROFESSIONAL LIABILITY FUND)

Emilee Preble, Jeff Crawford, and Carol Bernick of the Oregon Professional Liability Fund (PLF) joined the meeting telephonically to discuss the PLF's exemptions to its mandatory insurance requirement. The PLF representatives explained that, in their experience, it is rare for lawyers to violate the mandatory malpractice insurance rules by purposely or accidentally failing to comply with the insurance requirement and that PLF staff do not spend a significant amount of time resolving these issues.

Additionally, Ms. Preble, Mr. Crawford, and Ms. Bernick discussed how the PLF ensures compliance when Oregon bar members file for an exemption from the fund. Lawyers self-report their qualifying exemptions, making affirmative statements that their self-reported exemptions are accurate. Unless a lawyer's explanation is ambiguous, the self-categorization is accepted by the PLF. When disputes arise over whether an exemption applies to a lawyer's situation, that dispute may become a regulatory matter. Compliance issues are handled by the



Oregon State Bar. These disputes are rare; the PLF representatives approximated that an investigation about a compliance issue occurs roughly once a year.

The PLF representatives then discussed several of their exemptions, which includes practitioners:

1. With principal offices outside of Oregon. The PLF representatives indicated they would not recommend such an exemption;
2. Employed in non-law related fields. Activities such as escrow or real estate activities, lobbying, and accounting require the practitioner to make clear to any client that he or she is not acting as a lawyer on the client's behalf;
3. Employed as government attorneys or judges;
4. Providing legal services through legal aid programs and non-profits that provide their own coverage; and
5. On pro bono active status, who perform legal services only through Bar-certified pro bono programs.

Two Task Force members who are also licensed in Oregon reported that the culture of the PLF is proactive, and Oregon lawyers are often willing to self-report problems in order to resolve a claim. The average cost to repair a claim (average of \$5,000) is significantly lower than the cost to litigate a claim (average of \$22,000). The PLF representatives affirmed that the PLF works to ensure lawyers are not being punished through their policy for self-reporting problems.

The PLF representatives reported that approximately six to twelve lawyers each year face administrative suspension for failure to renew their PLF coverage. Lawyers facing financial difficulty have the option to pay late with a late fee, or enter into a quarterly payment plan. Lawyers who have a medical situation may be able to file for an exemption. Forbearance or postponement of coverage due to financial hardship is not an option that is offered, due to the nuances of defining "hardship" fairly for all members. Additionally, lawyers in their first three years of practice are offered a discount on their fees.

Overall, the Oregon PLF representatives found that the defined exemptions fit the needs of their members well. When lawyers are uncertain about exemptions they are typically resourceful and often contact PLF staff to discuss their options and get clarification.

C. DISCUSSION REGARDING POSSIBLE EXEMPTIONS FOR THE TASK FORCE'S MANDATORY MALPRACTICE INSURANCE RECOMMENDATION

The Task Force then drafted a tentative list of exemptions to consider for inclusion in its proposed mandatory malpractice insurance recommendation. The list, with prefacing language, is set forth below:

If you carry an active license to practice law in Washington, you must carry the mandated insurance coverage unless one of the following exemptions apply, if done exclusively:

- Employed as a government attorney, judge, administrative law judge, or hearing officer
- Employed by a business entity or nonprofit
- Employed by a public defender office
- Employed as a mediator or arbitrator
- Not providing any legal services, whether or not for compensation

Explanations of the tentative parameters of each proposed exemption are as follows:

Employed as a government attorney, judge, administrative law judge, or hearing officer

Lawyers who may be eligible for this exemption should be employed solely by the U.S. government or state of Washington, a federally-recognized American Indian Tribal Government, local government, or any other government body, board, or commission. Judges should also be able to claim this exemption.

Employed by a business entity or nonprofit

To qualify for this exemption, lawyers should be employed exclusively as in-house counsel for a business entity or non-profit organization.

Employed by public defender office

Employees of public defender offices may qualify for this exemption.

Employed as a mediator or arbitrator

A lawyer may qualify for this exemption if her or his practice is limited to mediation and arbitration services only, and he or she is not engaged in the private practice of law in any capacity.

Not providing any legal services whether or not for compensation

In order to qualify for this exemption, the lawyer must not provide any legal services whatsoever, whether or not for compensation. Other applicable situations may be if the lawyer is unemployed, retired, or employed only in a non-law related field.

Prior to concluding its discussion on exemptions, the Task Force identified a few issues for follow up before finalizing its list of exemptions. Specifically, the Task Force reserved the issue of whether to include an exemption for practitioners who represent family members, until such time as it can determine how insurers in the marketplace address this issue. The Task Force further reserved the issue of whether to include an exemption related to pro bono services provided to legal aid providers until research can be done regarding the coverage such

providers typically carry, if any. Finally, the Task Force would like research into whether the Office of Public Defense requires its contractors to carry insurance, and if so, in what amounts.

D. NEXT STEPS

The Task Force will deliver its Interim Report to the Board of Governors for presentation at the Board's July 28, 2018 meeting. Additionally, the Task Force will continue to define and distill the possible exemptions to its proposed mandatory malpractice insurance recommendation.

E. ADJOURNMENT

There being no further business, the meeting adjourned at 3:16 p.m.