

MANDATORY MALPRACTICE INSURANCE TASK FORCE

MEETING MINUTES

June 27, 2018

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

Also present were 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 Chris Newbold (Executive Vice President of ALPS).

The meeting was called to order at 1:01 p.m.

A. MINUTES

With a technical edit requested, the minutes of the May 23, 2018 meeting were otherwise approved as written.

B. DISCUSSION WITH CHRIS NEWBOLD (EXECUTIVE VICE PRESIDENT, ALPS) ON POTENTIAL FREE MARKET MODELING

At its May 23, 2018 meeting, the Task Force determined it would likely recommend an open-market mandatory malpractice insurance model. If an open market model is ultimately recommended by the Task Force, the proposal would require malpractice insurance as a condition of annual licensure for lawyers in Washington. The Chair invited Chris Newbold (Executive Vice President of ALPS) to lead a discussion from the insurer's perspective on potential considerations for developing an open market model.

Mr. Newbold shared his perspective that adopting an open market model would give lawyers the freedom to obtain competitive quotes and select a carrier that best meets their personal and financial needs. As it develops its proposed open market model, the Task Force will also need to consider possible exemptions for lawyers who are not engaged in the private practice of law, as well as others. Mr. Newbold noted that the recently implemented Idaho open market model provides for no exemptions, while the recent proposal that went to the Nevada Supreme Court in June 2018 provides for narrow exemptions.

Next, Mr. Newbold discussed the underwriting process for malpractice insurance carriers. He noted that solo practitioners represent the greatest proportion of uninsured lawyers, so



understanding the underwriting process for individual lawyers is critical to determining the impact of a mandatory malpractice system. Mr. Newbold highlighted three critical factors that affect the underwriting process for solo attorneys: prior acts, area of practice, and limited practice factors. With respect to prior acts, for an attorney purchasing malpractice insurance for the first time, his or her premium will likely increase annually by approximately 15% as the lawyer's length of exposure grows year-over-year and will continue to increase until the lawyer's practice (and his/her risk profile) is fully matured at six years. Mr. Newbold expressed concern that if a proposed regulatory scheme does not require prior acts coverage to cover claims that predate the current coverage period, lawyers might elect to purchase coverage only for the current coverage period—a cheaper option that would lessen the annual premium increase but would not protect clients for acts occurring outside the current coverage year.

Mr. Newbold further noted that the average premium can vary significantly based on a firm's principal area(s) of practice, and whether lawyers are practicing full-time or part-time. Additional factors affecting premiums include size and practice mix of a firm, attorney history with malpractice claims and disciplinary actions, the lawyer-to-nonlawyer staff ratio, law office management systems, and state characteristics.

Additionally, the Task Force discussed its concerns about lawyers who, in good faith, may be unable to obtain coverage from an insurance carrier under a mandatory insurance model. Although insurance industry experts who have met with the Task Force are optimistic that a policy will likely exist for every lawyer, it was noted that some lawyers who have histories of material malpractice claims or discipline may need to evaluate their ability to competently protect the public from errors and harm.

Finally, Mr. Newbold shared ALPS-specific statistics on average premiums and claims payouts. The average premium of Washington lawyers based on current market trends is \$2,500. However, the average premium amount reflects all insured practitioners, some of whom may carry coverage amounts of \$1,000,000. To determine what the range of possible premiums would likely be for new entrants into the market, the Task Force will need to perform some modeling of minimum coverage levels. Minimum levels of coverage under consideration by the Task Force are \$100K/\$300K, \$250K/\$250K, \$250K/\$500K, and \$500K/\$500K.

To provide context for discussions regarding minimum coverage amounts, Mr. Newbold noted that over the last 10 years, 97% of ALPS claims have resolved for less than \$250,000 and 50% resolved without any payment. Although ALPS only recently entered the Washington market, ALPS statistics show that in Washington, for all claims closed for which there was a payment, the average loss payment was \$119,856 and the average loss expense to defend those claims was \$40,454. Given these statistics, it was Mr. Newbold's assessment that a limit of liability coverage requirement of \$250K/\$250K would likely suffice to cover most claims.

There was additional dialogue with the Task Force members about the problem of ensuring continuous coverage to deal with prior acts, the difficulty of mandating tail coverage, deductibles, and claims expense allowances being "inside" or "outside" the coverage limit.

C. REPORT ON RECENT ABA REPORTS REGARDING THE PRO BONO WORK OF LAWYERS IN WASHINGTON AND NATIONWIDE (THEA JENNINGS)

Thea Jennings reported on the American Bar Association's national and Washington-specific reports on the pro bono work of lawyers, published in April 2018 and July 2017, respectively. The surveys assessed how, when, and why lawyers are motivated to undertake pro bono services. According to the surveys, pro bono services are services personally performed, without charge or expectation of fee, to persons of limited means or organizations that serve persons of limited means.

In Washington, approximately 56% of lawyers who provide pro bono services find clients through legal aid providers, non-profits, or bar associations. Lawyers providing malpractice insurance under these circumstances would likely be insured through these organizations. Given this information, the Task Force discussed the potential impacts on those who receive pro bono legal help, if lawyers providing pro bono services through other means stopped providing pro bono services in response to a mandatory malpractice insurance requirement.

D. REPORT TO THE BOARD OF GOVERNORS ON REVISED BACKGROUND INFORMATION AND "DECISION AGENDA"

The Task Force discussed revisions to its draft report to the Board of Governors and will continue to refine the report before it is presented to the Board in July.

In addition, the Task Force emphasized that it is sensitive to the feedback it is currently receiving from members regarding the mandatory malpractice insurance discussion. To ensure clear communication with the membership about this ongoing work, an article is expected to be published in *NWLawyer* in August or September to further inform the membership of the Task Force's recommendations.

In the meantime, WSBA Chief Communications Officer Sara Niegowski and WSBA Communications staff will continue outreach to members about the work of the Task Force through direct outreach at WSBA events and via written communications such as *Take Note*.

E. NEXT STEPS

At its July 2018 meeting, the Task Force will consider possible exemptions. Staff will reach out to representatives from the Oregon Professional Liability Fund to present to the Task Force on Oregon's exemptions.

F. ADJOURNMENT

The meeting adjourned at 2:48 p.m.