

MANDATORY MALPRACTICE INSURANCE TASK FORCE

AGENDA

May 23, 2018

1:00 p.m.

[Conference Call: 1-866-577-9294](tel:1-866-577-9294); Code: 52824#

AGENDA

1. Call to Order and Preliminary Matters
 - a. Approval of April 25, 2018 minutes
2. Discussion of Preliminary Background Information and Preliminary “Decision Agenda”
 - a. The Demonstrated Problem of Lawyers Who Go Uninsured
 - b. Expressed Concerns from the Membership
 - c. Potential Approaches
 - d. Potential Ways to Address Expressed Member Concerns
3. Next Steps

MEETING MATERIALS

- A. Draft April 25, 2018 minutes (pp. 403-408)
- B. Preliminary Background Information and Preliminary “Decision Agenda” (pp. 409-412)
- C. Comments Submitted to the Task Force (updated) (provided to Task Force separately)



A.
Draft April 25, 2018 Minutes

MANDATORY MALPRACTICE INSURANCE TASK FORCE

MEETING MINUTES

April 25, 2018

Members present were Chair Hugh Spitzer, Dan Bridges, Christy Carpenter, P.J. Grabicki, Lucy Isaki, Mark Johnson, Kara Masters (by phone), Brad Ogura, Suzanne Pierce (by phone), Brooke Pinkham (by phone), Todd Startzel, Stephanie Wilson, and Annie Yu. John Bachofner, Stan Bastian, Gretchen Gale, Rob Karl, and Evan McCauley were not in attendance.

Also present were Kevin Bank (Assistant General Counsel and Staff Liaison to the Client Protection Fund Board), Doug Ende (WSBA Staff Liaison), Judy Graf (Area Vice President and Account Executive at Arthur J. Gallagher Risk Management Services), 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), Chris Newbold (Executive Vice President of ALPS), and David Weisenberger (Vice President, Healthcare and Professional Liability, James River Insurance Company) (by phone).

The meeting was called to order at 11:30 a.m.

A. MINUTES

The minutes of the March 28, 2018 meeting were approved by consensus.

B. PANEL PRESENTATION BY INSURANCE INDUSTRY PROFESSIONALS

A panel of experienced insurance industry professionals presented an overview of the professional liability insurance market to the Task Force. The panel included Chris Newbold (Executive Vice President of ALPS), Judy Graff (Area Vice President and Account Executive at Arthur J. Gallagher Risk Management Services), and David Weisenberger (Vice President, Healthcare and Professional Liability, James River Insurance Company).

As described by the panel, both admitted and non-admitted carriers operate in Washington State. Admitted carriers, such as ALPS, are licensed by the Washington State Office of the Insurance Commissioner (OIC) and must abide by specific regulations governing admitted carriers. The OIC issues to each admitted carrier a certificate of authority to do business in the state and requires the carrier to file its rates and coverage forms annually. Whenever an admitted carrier wishes to increase its rates, it must first seek OIC approval. Because they are subject to strict government oversight, admitted carriers have less flexibility in setting rates and deviating from their filings. An admitted carrier must further submit an annual report regarding its activities, including the types of insurance written, a listing of direct premiums written and



earned, income, incurred claims and expenses, underwriting gains and losses, and other required information. When an admitted carrier becomes insolvent, a state fund operates to protect consumers by paying out claims (up to statutory maximums) and refunding premiums. Nationally, admitted carriers write approximately 85% of the lawyer professional responsibility policies.

In contrast, non-admitted carriers are not governed by state insurance departments and are not required to file their rates with the state. This is known as “surplus line” coverage. With less regulation, non-admitted carriers, such as James River Insurance Company, are free to set their own rates and underwrite higher risk insurance packages. Non-admitted carriers can further accommodate complex risks for which the traditional insurance market place does not provide adequate coverage. Consequently, non-admitted carriers are more likely to insure high-risk policyholders who are unable to obtain insurance through an admitted carrier. They have reporting requirements but not to the state, and no state fund protects consumers from non-admitted carrier insolvency.

The panel then discussed multiple variables that apply when underwriting lawyer malpractice insurance. Specifically, some areas of practice present higher risks than others. Insurers further consider the number of attorneys in a firm, the years of coverage, the professional experience of the lawyer, limits of liability and deductibles, any claims or disciplinary history, premium payment history, and other factors.

Additionally, the panel addressed feedback that the Task Force has received from retired, or semi-retired, members who are concerned about obtaining tail coverage under a mandatory malpractice insurance regulatory scheme. In claims-made coverage (the most common type of professional liability coverage), insurers cover a claim when both the alleged incident occurs and the related claim is filed during the policy period. Claims made coverage will only cover claims after the policy period expires if the insured purchases “tail” coverage. Tail coverage protects lawyers from claims arising after the policy period has expired, meaning it protects them retroactively. Retiring lawyers often purchase tail coverage to protect themselves against claims that may arise several years after they retire. A question was raised about the effectiveness of a mandatory malpractice requirement if it does not require lawyers leaving practice to purchase a tail. The panel noted that admitted carriers, such as ALPS, offer a Death, Disability, or Retirement tail free of charge for clients, and that the state mandates the amount insurance companies can charge for a tail.

The Task Force also raised concerns with the panel that mandatory malpractice insurance, if enacted, might create a gap in coverage for members who already have a malpractice insurance plan, or that mandating insurance might cause current policyholders’ premiums to increase. The panel noted that these concerns would only be at issue if Washington followed Oregon’s Professional Liability Fund model, which could hypothetically require Washington lawyers to buy insurance through the new mandatory fund and then provide the option to purchase additional coverage on the open market for any amount above the minimum-mandated coverage. Differences in coverage and pricing could result from the shift from

primary to excess coverage. Under a free market model, lawyers would be free to choose their own coverage amounts (at or above the minimum mandated coverage amount) without having to seek gap coverage. Such a model would not affect premiums because the lawyers would not be purchasing two separate insurance packages, and, in many cases, would simply be maintaining or renewing their current policies.

One panelist observed that in Idaho, no attorneys have reported being unable to obtain malpractice insurance since the mandatory insurance rule went into effect at the beginning of 2018. There was consensus among the panelist that in today's competitive insurance market, few if any Washington lawyers would be unable to find insurance.

The Task Force acknowledged the need for a policy that works for every member if mandatory insurance is enacted. The Task Force further discussed the possibility that some lawyers would simply be unable to obtain coverage, despite their good faith efforts, and would risk facing an administrative suspension as a result. However, the panel expressed a belief that under current market conditions, every legal professional should be insurable. A history of frequent malpractice claims or bar complaints may pose a barrier to obtaining coverage; however, even with such a history, there is likely still an insurer willing to underwrite the risk, although it may be at a higher premium. They did note, however, that market conditions could change at any time.

C. PRESENTATION BY MARK JOHNSON, ATTORNEY AT LAW, JOHNSON FLORA SPRANGERS PLLC

Task Force member Mark Johnson, an attorney whose firm represents plaintiffs in malpractice claims, described the impact on clients with apparently worthy claims against uninsured lawyers, and how clients who have been damaged by uninsured lawyers rarely get justice. Lawyers representing plaintiffs in malpractice claims are typically unwilling to take cases with meritorious claims if the defendant lawyer is uninsured due to the diminished likelihood of recovery and the lawyer being effectively judgment proof. Mr. Johnson observed that virtually all physicians carry malpractice insurance because admitting hospitals require it.

D. PRESENTATION BY KEVIN BANK, ASSISTANT GENERAL COUNSEL AND STAFF LIAISON TO THE CLIENT PROTECTION FUND BOARD, WSBA

Kevin Bank presented on the Washington Supreme Court's Client Protection Fund (CPF), administered by the WSBA. The CPF is funded by a mandatory assessment on lawyers and provides gifts to clients who are victims of licensed legal practitioner dishonest conduct or the practitioner's failure to account for money or property entrusted to the practitioner. The CPF receives its mandate from APR 15. Under APR 15(b)(4), the CPF cannot provide gifts for allegations of negligence or malpractice. Information regarding applications to the Fund is confidential, but, in general, the most common reasons for denial of a CPF application relate to fee disputes and allegations of malpractice.

From 2013-2017, 598 applications were considered. 129 (22%) were denied because the application was regarding a fee dispute, 29 (5%) were denied because the application alleged malpractice and/or negligence, and 37 (6%) were denied because the application was regarding both a fee dispute and alleged malpractice. Applications are investigated only when there is a chance the fund could pay the victim, meaning that there is evidence of malfeasance. Applications regarding malpractice cannot be considered and, thus, are not investigated. Consequently, the CPF has no evidence of whether the applicants' malpractice claims were meritorious.

E. PRESENTATION BY THEA JENNINGS ON THE AMERICAN BAR ASSOCIATION (ABA) PROFILE OF LEGAL MALPRACTICE CLAIMS (2012-2015), ABA STANDING COMMITTEE ON LAWYERS' PROFESSIONAL LIABILITY, AMERICAN BAR ASSOCIATION, SEPTEMBER 2016

Thea Jennings presented a snapshot of the ABA Profile of Legal Malpractice Claims (2012-2015) ("Profile"). The Profile is issued periodically by the ABA Standing Committee on Lawyers' Professional Liability and reflects malpractice insurer statistics. The Profile is based on self-reporting by insurers, so it does not present a comprehensive review of the legal malpractice insurance market. Data collected includes claims by area of law, size of firm, disposition, types of alleged errors, expenses paid, indemnity dollars paid, and file processing times. Of all malpractice claims reported in the 2015 study, the two highest areas of practice were personal injury (plaintiff) at 18.24% and real estate law at 14.89%. The firms with the highest percentage of claims had between 1 and 5 attorneys, with 34.21% of claims against solo practitioners and 32.03% of claims against firms with 2-5 attorneys. In other words, over 65% of claims arose from firms with 5 or fewer attorneys.

In the 2015 study, 52.82% of claims alleged substantive errors, compared to administrative errors, client relations, or intentional wrongs. Substantive errors include failure to know/properly apply the law, planning error or procedure choice, inadequate discovery/investigation, or drafting error.

The Profile reported that of indemnity dollars and expenses paid, including those claims for which zero sums were paid out or expended, 89.12% of claims paid totaled \$100,000 or less and 95.12% totaled \$250,000 or less. Ms. Jennings then extrapolated from these statistics that of actual claims paid, excluding those claims for which no sums were paid or expended, approximately 81% of actual claims and expenses paid totaled \$100,000 or less, and 92% totaled \$250,000 or less.

F. DISCUSSION AND NEXT STEPS

In preparation for their next meeting, the Task Force will start compiling options for a recommendation regarding mandatory malpractice insurance in Washington. The Task Force Chair will consult with WSBA staff to identify options while continuing to consider the feedback that has been submitted by members. Sara Niegowski will continue to work with WSBA communications staff on membership outreach regarding the work of the Task Force.

G. ADJOURNMENT

There being no further business, the meeting adjourned at 2:21 p.m.

B.
Preliminary Background Information
and Preliminary “Decision Agenda”

PRELIMINARY BACKGROUND INFORMATION &
PRELIMINARY “DECISION AGENDA” FOR MAY 23, 2018 MEETING

A. INTRODUCTION

Since its first meeting in January 2018, the WSBA Mandatory Malpractice Insurance Task Force has focused on gathering the information necessary to make a considered recommendation on whether professional liability insurance should be a required in some form for Washington lawyers. During this information-gathering phase, the Task Force obtained information from the following sources, among others: jurisdictions with mandatory malpractice insurance programs in place or under consideration; a jurisdiction that has implemented a proactive management-based regulation (PMBR) model; a law professor regarding her research into lawyers who go uninsured; experienced insurance industry professionals; a legal malpractice plaintiff’s lawyer; WSBA members through comments submitted to the Task Force; and various WSBA staff regarding member demographics, the Client Protection Fund, and the *2015 ABA Profile on Legal Malpractice Claims*.

The Task Force will now begin discussing options in anticipation of providing an interim report to the WSBA Board of Governors in July, 2018. This document summarizes the key information acquired by the Task Force, and preliminarily identifies possible regulatory approaches to be discussed at the May 23, 2018, Task Force meeting.

B. KEY INFORMATION

What follows is a listing of the most significant data acquired by the Task Force regarding the problems associated with lawyers who go uninsured.

1. Approximately 32,000 lawyers are actively licensed to practice law in Washington.
2. Over the last three reporting years, 14% of Washington lawyers in private practice have consistently reported being uninsured.
3. Lawyers who practice in solo or small firms are most likely to be uninsured. According to 2017 voluntary demographic information reported by Washington lawyers as part of the annual licensing process, approximately 28% of solo practitioners reported being uninsured.
4. Solo and small firm practitioners represent a disproportionate share of the malpractice claims. According to the *2015 ABA Profile on Legal Malpractice Claims*, claims against lawyers in firms of five or fewer lawyers represented over 65% of claims during the period of 2012-2015.
5. Most grievances and disciplinary actions involve solo and small firm practitioners.



6. Malpractice plaintiffs' lawyers report numerous instances of worthy claims that are rejected because the defendant lawyer is uninsured.
7. Over the last five years, Client Protection Fund application statistics indicate that 11% of applications were denied because they describe instances of malpractice rather than theft or dishonest conduct.
8. The value of most malpractice claims is less than \$100,000.
9. There is a disparity in Washington's regulatory/financial responsibility requirements for different legal license types (LLTs/LPOs/lawyers).
10. Other?

C. EXPRESSED CONCERNS FROM MEMBERSHIP

A number of concerns have been expressed by some WSBA members regarding the possibility of implementing mandatory malpractice insurance.

1. Prohibitive costs for insurance;
2. The inapplicability of insurance requirements for lawyers not engaged in private practice (*e.g.*, government lawyers, in-house counsel, non-profit legal assistance or defense counsel);
3. Concerns that retired/semi-retired/retiring attorneys will no longer be able to practice;
4. Possible unfairness of requiring malpractice insurance for lawyers (often retired/semi-retired/retiring lawyers) who provide mainly pro bono services;
5. Uninsurable/inability of attorneys in certain specialties, or attorneys who practice solely before specialized non-Washington State courts, to obtain insurance at reasonable cost; and
6. Other?

D. POTENTIAL APPROACHES: "DECISION AGENDA"

What follows is a list of possible regulatory approaches the Task Force might recommend to the WSBA Board of Governors.

1. **Do nothing and maintain the status quo.**
 - a. No resource cost or fiscal impact on WSBA
 - b. Problem not addressed in any way
2. **Implement a Proactive Management-Based Regulation model** (*e.g.*, Illinois model).
 - a. Directly addresses issues of competence/practice management but not financial responsibility
 - b. Practical effect of PMBR in Illinois not yet known

- c. May encourage acquisition of insurance
- 3. **Implement more extensive malpractice insurance disclosure requirements** (e.g., South Dakota model).
 - a. Low cost to administer
 - b. Impact on conduct appears significant
 - c. May encourage acquisition of insurance
- 4. **Combine PMBR with more extensive disclosure requirements.**
- 5. **Implement mandatory malpractice insurance through a free market model** (e.g., Idaho model).
 - a. Provides coverage options to members
 - b. Free market allocates risks and costs based on practice character, claims history, and other underwriting standards
 - c. Highly competitive market provides reasonable cost and different coverage, exclusions, and deductibles (Idaho reports no lawyers unable to obtain insurance)
 - d. Modest operating costs
 - e. Key issues to consider:
 - i. What level to require?
 - ii. Which types of lawyers should be excluded from the requirement?
 - iii. Should the State mandate any policy terms?
 - iv. Other?
- 6. **Implement professional liability fund model** (e.g., Oregon model).
 - a. Coverage available for all members
 - b. Robust practice management, member support, and claims support systems
 - c. Relatively high annual premium (in current market) and high operating costs
 - d. Large staff required to administer and significant fiscal impact to implement
 - e. Choice restricted to single provider
 - f. Spreads risks across all classes of lawyers
- 7. **Consider other approaches:**
 - a. Captive insurer(s)
 - b. Multiple “approved” insurers
 - c. Letters of credit or surety bonds for uninsured lawyers
 - d. Other?