

MANDATORY MALPRACTICE INSURANCE TASK FORCE

MEETING MINUTES

October 24, 2018

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

Also present were WSBA Governor Michael Cherry, 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), and Jean McElroy (WSBA Chief Regulatory Counsel).

The meeting was called to order at 1:04 p.m.

A. UPDATES & INFORMATION

It was announced that the Supreme Court of Nevada denied the State Bar of Nevada's June 29, 2018 petition to amend Supreme Court Rule 79 to require professional liability insurance for attorneys engaged in private practice. The Court denied the petition on grounds that the Bar did not provide adequate support demonstrating that mandating insurance was appropriate. However, the Court supported a mandatory disclosure requirement.

B. DISCUSSION OF OPEN FORUM AND WRITTEN COMMENTS

Hugh Spitzer and Doug Ende gave an update on the Mandatory Malpractice Insurance Open Forum that was held on October 16, 2018 at the WSBA offices. 15 callers provided comments regarding mandatory malpractice insurance, and approximately four people attended in person. A webcast of the open forum is available to view on the WSBA website.

C. DISCUSSION OF DRAFT RECOMMENDATIONS, EXEMPTIONS, AND RESPONSES TO CONCERNS

The Task Force discussed its draft recommendations, exemptions, and responses to member comments. The Task Force noted that its recommended minimum coverage amount of \$250,000/500,000 is to ensure that policy coverage will not be consumed by the cost of defense. With respect to its recommendation regarding annual certification and enforcement, the Task Force emphasized that the process of administrative suspension for noncompliance



should be simple, and that lawyers should be obligated to notify the Bar of any lapse in coverage.

The Task Force also discussed its recommended exemptions. After reviewing the latest set of written comments received from WSBA members and considering feedback provided by others at the open forum, the Task Force deliberated over four additional exemptions.

1. Providing legal services to family members exemption

Several commenters raised the concern that because they provide only limited legal services to family members, they should not be required to obtain insurance for that narrow purpose. The Task Force deliberated over a possible exemption for lawyers who only assist or advise family members. By a 9-5 vote, the Task Force decided that such an exemption creates high risk in certain situations and that family members are not immune to lawyer malpractice. Additionally, it would be too difficult to define what a family member is, as this term is not capable of easy or precise definition.

2. Lobbying or legislative advocacy exemption

The Task Force also considered an exemption for lawyers who only participate in lobbying work or legislative advocacy. General Rule (GR) 24 defines the practice of law, and includes as a permissible activity “acting as a legislative lobbyist,” whether or not it constitutes the practice of law. GR 24(b)(7). The consensus of the Task Force was that a bright-line lobbying exemption was inappropriate because individual lawyers are in a better position to determine whether the lobbying work they perform falls within the definition of the practice of law. If the work does not constitute the practice of law, then by definition the lawyer would be automatically exempted from the rule. If it constitutes the practice of law, the lawyer should obtain insurance.

3. Providing pro bono services to nonprofit organizations exemption

The Task Force also considered an exemption for lawyers who only provide pro bono services to non-profit organizations. While the Task Force is sensitive to member concerns that mandatory malpractice insurance costs could in limited situations affect a member’s ability to provide pro bono services, it decided on a 9-5 vote that this exemption should not be included. The Task Force discussed whether any distinction should be made between the potential harm to individual pro bono clients versus organizational pro bono clients where lawyers go uninsured, and ultimately concluded that non-profit organizations are just as vulnerable to lawyer malpractice as members of the public and are entitled to recourse in the event of legal malpractice.

4. Unaffordable insurance exemption

Additionally, the Task Force discussed a potential financial hardship exemption for lawyers who believe insurance to be unaffordable. The Task Force acknowledged that insurance premiums

may be priced higher because of claims history, discipline history, or high-risk area of practice. However, affordability is subjective, and the Task Force did not believe an affordability exemption could be drafted with adequate precision. Furthermore, evaluation of exemption claims based on affordability of insurance policies would require substantial WSBA administrative resources to conduct review or adjudication of such claims. The consensus was that this exemption should not be included.

D. UPDATE ON MEMO RE QUALIFIED LEGAL SERVICE PROVIDERS AND MALPRACTICE INSURANCE

Thea Jennings provided an update on the Memo re Qualified Legal Service Providers and Malpractice Insurance to illustrate how qualified legal service providers in Washington are providing insurance to their lawyer volunteers. The purpose of the Memo was to research whether qualified legal service providers are providing insurance to their lawyer volunteers across the state, in response to member comments related to the potential effect mandatory malpractice insurance could have on those who primarily provide pro bono legal services.

The Task Force emphasized the importance of considering the potential impacts on pro bono services throughout the state, and ensuring that lawyers who want to provide these types of services are able to. As part of the publicity of launching a mandatory malpractice insurance program if adopted, the Task Force recommends promoting how lawyers may connect with the many volunteer lawyer programs across the state that provide insurance to their volunteers.

E. DISCUSSION RE PUBLIC DISCIPLINARY INFORMATION AND APR 26 INSURANCE DISCLOSURE AND DEMOGRAPHIC INFORMATION

Ms. Jennings discussed the Memo re 2014-2017 Public Disciplinary Information & Public-Facing APR 26 Insurance Disclosure and Demographic Information, which compiled disciplinary information from the years 2014-2017 and public-facing APR 26 insurance disclosure and demographic information. Public discipline data was collected from the 2014-2017 discipline system annual reports to obtain the names of all disciplined lawyers. The names were then used to collect public member profile information from the WSBA website, including current license status, insurance coverage status, and voluntary demographic information related to firm size.

Prior to discussing the results of the research, Ms. Jennings noted that member information is updated only when a lawyer submits his or her licensing renewal package. Further, the Bar does not collect data for disbarred, resigned, or suspended lawyers; thus, the data for these lawyers reflects data from their last date of reporting. Additionally, the existence or nonexistence of insurance in 2018 does not indicate whether and when a lawyer had insurance coverage previously. Relatedly, it does not indicate whether and when the disciplined lawyer was in private practice previously. For these reasons, the correlation between public disciplinary information and APR 26 insurance disclosure information may not accurately reflect whether the population of uninsured lawyers is generally more likely to make errors or become subject to malpractice claims.

After making that disclaimer, Ms. Jennings noted that 232 public disciplinary actions involving 211 lawyers occurred during 2014-2017. There were 37 disbarments, 35 resignations in lieu of discipline, 93 suspensions, 49 reprimands, and 18 admonitions. Of the 211 lawyers who were disciplined, 183 were in private practice as of their last reporting. 89 of these 183 lawyers reported being uninsured. Of those 89 uninsured lawyers, 55 reported running a solo practice and four reported working in a firm of two-to-five lawyers. As of the date of the Memo, only 62 of the 211 lawyers disciplined between 2014 to 2017 who last reported being in private practice had an active license to practice law. 22 of those actively licensed lawyers reported being uninsured.

It was suggested that data collected be narrowed to reflect only those lawyers who received reprimands or admonitions.

F. MINUTES

The minutes of the September 12, 2018 meeting were approved.

G. NEXT STEPS

It was agreed that the Task Force will need to detail its findings with more specificity before issuing its final report. The Chair expects to have a draft final report for review by the Task Force by its next meeting on November 28, 2018, in anticipation of its final report to the Board of Governors. The Chair stated that he will be unavailable in January 2019 to present the final report to the Board of Governors. Accordingly, it was noted that it will likely be necessary for the Task Force report to the Board to be scheduled for the March 2019 Board meeting.

H. ADJOURNMENT

The meeting adjourned at 3:40 p.m.