

TO: WSBA Board of Governors
FROM: Kyle Sciuchetti, President Elect, Chair of the Committee to Investigate Alternatives to Mandatory Malpractice Insurance; Committee to Investigate Alternatives to Mandatory Malpractice Insurance
DATE: September 9, 2020
RE: Action on Suggested Amendment to RPC 1.4: Enhanced Malpractice Insurance Disclosure

Action: Approve the *Ad Hoc* Committee to Investigate Alternatives to Mandatory Malpractice Insurance suggested amendment to RPC 1.4 for submission to Washington Supreme Court according to GR 9 procedures

On January 21, 2020, WSBA President Rajeev Majumdar convened the *Ad Hoc* Committee to Investigate Alternatives to Mandatory Malpractice Insurance (“Committee”) to gather information and advise the Board on potential viable alternatives to mandatory malpractice insurance.

The Board of Governors convened the Committee after the Board’s decision last year not to submit the February, 2019 recommendation of the Mandatory Malpractice Insurance Task Force to the Washington Supreme Court. The Board decision was based on lawyer concerns about mandated insurance, including concerns about expense, the perceived difficulty of obtaining reasonably priced insurance in specialized practice areas, and the limited amount of work being performed by some lawyers. The Committee explored approaches to public protection other than mandating malpractice insurance, and ultimately focused on a rule requiring disclosure of a lawyer’s insurance status to clients when the lawyer is uninsured or underinsured.

At its August 2020 meeting, the Committee presented, and the Board considered and provided feedback on, a suggested amendment to RPC 1.4. Specifically, it considered the Committee’s proposal to add a new section (c) that would require disclosure of a lawyer’s malpractice insurance status to clients and possible clients if the lawyer’s insurance does not meet minimum levels. See [the Board of Governor’s August 29, 2020 meeting materials](#) for more information on the specific proposal. During the Committee’s presentation, the Board expressed concerns regarding the recommended minimum coverage amount that would trigger the disclosure rule and the scope of additional disclosure requirements that extended beyond communications with clients.

The Committee met on September 9, 2020, and, after consideration of the Board’s feedback, revised the draft rule. A copy of the revised suggested rule amendment is attached as Appendix A. The Committee revised the draft as follows, based on comments from various Governors.

Minimum levels of professional liability insurance. The Committee initially recommended that to avoid the disclosure requirement the minimum level of insurance be at least \$250,000 per occurrence and \$500,000 in the aggregate (“\$250K/\$500K”). Some Board members asked whether the minimum level of coverage might be too high, and questioned whether instead the rule should impose a minimum level of \$100K/\$300K and/or should be a “non-wasting” policy. After discussion, the Committee reaffirmed its conclusion that the \$250K/\$500K level is appropriate given the typical amount of resolved claims, recognizing that the vast majority of malpractice policies are “wasting” in that the costs of the defense of a claim are deducted from the coverage amount.

Additional disclosure requirements. The draft also recommended a requirement, in section (c)(3), that a lawyer without a minimum level of insurance also provide notice of lack of professional liability insurance on the lawyer's letterhead, on electronic communications, and on the home pages of a lawyer's website. The Board expressed concern regarding the breadth of that requirement, namely the requirement of disclosure on letterhead and emails, especially because that correspondence might be directed to individuals other than the client. After discussion, the Committee agreed that the scope of the notice requirement should be narrowed. In the revised draft, the requirement of notice on the lawyer's letterhead is deleted, and notice requirement applies only to written communications with clients, written solicitations of new clients, and a lawyer's website (which can actively function as a solicitation mechanism).

Recordkeeping requirement. The draft included, in section (c)(4), a six-year records retention requirement applicable to records of disclosures and signed consents and acknowledgements. The Board questioned the rationale for a retention period of six years. After discussion, the Committee noted that the only other specific retention period in the RPCs—for trust account records—is seven years. See RPC 1.15B(a). The Committee reaffirmed the six-year period, concluding that six years is a good balance between shorter and longer periods that might be required.

With this Memo, the Committee asks that the Board approve its revised suggested amendment to RPC 1.4 and recommendations for submission to and consideration by the Washington Supreme Court according to General Rule (GR) 9 procedures.

APPENDIX A

Proposed New Washington RPC 1.4(c)

(c) Disclosure of lawyer professional liability insurance status to clients.

(1) A lawyer not covered by lawyer professional liability insurance in the amounts specified in paragraph (c)(5) shall, before or at the time of commencing representation of a client, notify the client in writing of the absence of such insurance coverage and promptly obtain the client's informed consent in writing. A lawyer who knows or reasonably should know that the lawyer's professional liability insurance policy has either lapsed or been terminated during the representation shall within 30 days either (i) obtain a new policy in the required amounts or (ii) provide notice in writing to the client and promptly obtain the client's informed consent in writing. If a lawyer does not obtain a new policy in the required amounts or provide notice to the client and obtain the client's informed consent in writing within 30 days of a lapse or termination, the lawyer shall withdraw from representation of the client.

(2) (i) A notice to the client in substantially the following form satisfies the notice requirements of paragraph (c)(1):

Under Rule 1.4(c) of the Washington Rules of Professional Conduct, I must obtain your informed consent to provide legal representation, and ensure that you understand and acknowledge that [I][this Firm] [do not][does not][no longer] maintain[s] [any lawyer professional liability insurance (sometimes called malpractice insurance)] [lawyer professional liability insurance (sometimes called malpractice insurance)] of at least two hundred fifty thousand dollars (\$250,000) per occurrence, and five hundred thousand dollars (\$500,000) for all claims submitted during the policy period (typically 12 months). Because [I][we] do not carry this insurance coverage, it could be more difficult for you to recover an amount sufficient to compensate you for your loss or damages if [I am][we are] negligent.

Lawyer's Signature

(ii) A client consent and acknowledgment in substantially the following form satisfies the informed consent requirements of paragraph (c)(1):

I acknowledge and supply this written consent, required by Rule 1.4(c) of the Washington Rules of Professional Conduct, that [insert attorney or firm's name] [does not][no longer] maintain[s] [any lawyer professional liability insurance (sometimes called malpractice insurance)][lawyer professional liability insurance (sometimes called

malpractice insurance)] with at least maximum coverage of \$250,000 for each claim, and at least \$500,000 for all claims submitted during the policy period (typically 12 months), and I consent to representation by [the lawyer][the firm].

Client's Signature

(3) A lawyer not covered by lawyer professional liability insurance shall provide clear and conspicuous notice of that fact: (i) ~~on the lawyer's letterhead;~~ (ii) on each written electronic communication with a client or possible client; ~~and~~ (iii) on any form of written solicitation of professional employment ~~from~~ directed to a possible client, and (iii) ~~v~~ on the home page of a lawyer's firm website.

(4) A lawyer shall maintain a record of notices of disclosure to clients, and the signed consents and acknowledgments received from clients, for at least six (6) years after the representation is terminated.

(5) As used in this paragraph (c), "lawyer" means an active member of the Washington State Bar Association, and any other person authorized by the Washington State Supreme Court to engage in the practice of law, including emeritus pro bono status lawyers and lawyers permitted to engage in the limited practice of law in this state as provided in Admission and Practice Rule (APR) 3(g); however, as used in this paragraph (c), "lawyer" does not include, (i) a judge, arbitrator, or mediator not otherwise engaged in the practice of law; (ii) in-house counsel for a single entity; (iii) an employee of a governmental agency practicing law in that capacity; (iv) an employee of a nonprofit legal service organization, or a lawyer volunteering with such an organization, where the nonprofit legal service organization provides lawyer professional liability insurance coverage at the minimum levels required by this paragraph to that employee or volunteer pro bono lawyers. "Lawyer professional liability insurance" means a professional liability insurance policy that provides coverage for claims made against the lawyer that arise from an act, error, or omission in the lawyer's performance of legal services to a client, with limits of liability of at least two hundred fifty thousand dollars (\$250,000) per occurrence, and five hundred thousand dollars (\$500,000) for all claims submitted during the policy period.

Proposed New Comments to RPC 1.4

Additional Washington Comments (8-14)

Insurance Disclosure

[8] A lawyer without a basic level of professional liability insurance might not pay for damages or losses a client incurs that result from the lawyer's mistakes or negligence. Consequently, possible clients and clients should have sufficient information about whether the lawyer maintains a minimum level of lawyer professional liability insurance so they can intelligently determine whether they wish to engage, or continue to engage, that lawyer. Paragraph (c) requires a lawyer to provide disclosure if the lawyer is without a level of lawyer professional liability insurance specified in paragraph (c), and to obtain each client's acknowledgement and informed consent. Client consent should be obtained promptly—ordinarily within 10 days of the lawyer's providing disclosure. Certain lawyers are excluded from the disclosure requirements of Rule 1.4(c), including full-time judges, arbitrators and mediators, in-house lawyers for a single entity, and employees of governmental agencies. If a lawyer serving as a judge represents clients outside judicial duties, or an in-house lawyer or government employee represents other clients, such a judge or lawyer is subject to the requirements of Rule 1.4(c) regarding those representations.

[9] As used in paragraph (c) a lawyer who "maintains" or "is covered by" lawyer professional liability insurance is an insured lawyer under a lawyer professional liability insurance policy providing coverage regarding claims relating to legal services provided by that lawyer. The minimum limits of lawyer professional liability insurance specified by paragraph (c)(2) include any deductible or self-insured retention that must be paid by the lawyer or the lawyer's law firm for claim expenses and damages. Lawyer professional liability Insurance, as defined in paragraph (c)(2), does not include an insurance policy with a deductible or self-insured retention that the lawyer knows or has reason to know cannot be paid by the lawyer or the firm if a loss occurs.

[10] As used in paragraph (c)(3), the requirement of notice on a website (including a lawyer's or a law firm's blog) applies to a website when the lawyer or the lawyer's law firm controls the URL (Uniform Record Locator) of the site. It does not apply to a website if the URL is controlled by an independent referral or networking service. "Clear and conspicuous notice" means disclosure in a font type and size easy to read and at least as large as the font used to convey the majority of content in the written client communication, ~~on the letterhead~~, or in the solicitation. . Written communications include electronic communications, such as email. See Rule 1.0A(n). The notice to a client or possible client is not required in an electronic communication whereif inclusion of the notice language would be impracticable, such as in brief text messages or "tweets."

[11] Whether the disclosure and notice obligations of paragraph (c) apply to a Washington-licensed lawyer practicing in another jurisdiction is determined by the choice of law provisions of Rule 8.5(b).

[12] In addition to complying with paragraph (c), every active member of the bar must comply with the reporting requirements of APR 26, under which lawyers in the private practice of law are required to annually report their insurance coverage to the Washington State Bar Association.

[13] Withdrawal from a representation under paragraph (c)(1) is a circumstance where withdrawal is obligatory under Rule 1.16(a)(1) because the representation would violate the Rules of Professional Conduct. The withdrawal shall be accomplished in conformity with the requirements of Rule 1.16(c) and (d).

[14] In an emergency where the health, safety, or a financial interest of a person is threatened with imminent and irreparable harm, a lawyer not covered by lawyer professional liability insurance in the amounts specified in paragraph (c)(5) may take legal action on behalf of such a person even though the person cannot receive or evaluate the notice required by paragraph (c)(1) or there is insufficient time to provide it. A lawyer who represents a person in such an exigent situation shall provide the notice required by paragraph (c)(1) as soon as reasonably practicable.

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(5) As used in this paragraph (c), "lawyer" means an active member of the Washington State Bar Association, and any other person authorized by the Washington State Supreme Court to engage in the practice of law, including emeritus pro bono status lawyers and lawyers permitted to engage in the limited practice of law in this state as provided in Admission and Practice Rule (APR) 3(g); however, as used in this paragraph (c), "lawyer" does not include, (i) a judge, arbitrator, or mediator not otherwise engaged in the practice of law; (ii) in-house counsel for a single entity; (iii) an employee of a governmental agency practicing law in that capacity; (iv) an employee of a nonprofit legal service organization, or a lawyer volunteering with such an organization, where the nonprofit legal service organization provides lawyer professional liability insurance coverage at the minimum levels required by this paragraph to that employee or volunteer pro bono lawyers. "Lawyer professional liability insurance" means a professional liability insurance policy that provides coverage for claims made against the lawyer that arise from an act, error, or omission in the lawyer's performance of legal services to a client, with limits of liability of at least two hundred fifty thousand dollars (\$250,000) per occurrence, and five hundred thousand dollars (\$500,000) for all claims submitted during the policy period.

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