Washington Supreme Court enhances malpractice insurance disclosure to clients

BY HUGH SPITZER

In contrast with Oregon, Idaho, and the vast majority of common law and civil law countries outside the U.S., Washington lawyers have never been required to have professional liability insurance coverage. However, they are required to report yearly to the WSBA whether they are covered. Our state Supreme Court’s Admission and Practice Rule (APR) 26, requiring annual insurance reporting as part of the WSBA’s licensing process. All Washington lawyers must certify whether they are engaged in the private practice of law and, if so, whether or not they are covered by and intend to maintain professional liability insurance. That information has been available on the WSBA Legal Directory, and clients aware of that directory could check on the malpractice insurance status of their lawyers. However, most clients have probably been unaware of the directory.

In the late 1980s, the WSBA investigated the possibility of creating a mandatory malpractice insurance program. The key initiative was proposed in 1986 in a report of the WSBA Lawyers’ Malpractice Insurance Task Force chaired by former WSBA President William H. Gates Sr. In 1977, Oregon had established a Professional Liability Fund in response to demand from attorneys having trouble obtaining malpractice insurance. That information has been available on the WSBA Legal Directory, and clients aware of that directory could check on the malpractice insurance status of their lawyers. However, most clients have probably been unaware of the directory.

From a practical standpoint, it is likely that the enhanced disclosure will reduce the percentage of uninsured Washington lawyers. Currently, 14 percent of the state’s private-sector attorneys are practicing without insurance. When South Dakota implemented a similar disclosure requirement, the number of uninsured lawyers was halved, to about six percent. But the main thrust of the new requirement is to alert clients when their attorneys are uninsured so that those clients can decide whether to continue with the representation.

The task force was further charged with determining whether to recommend a mandatory malpractice insurance for lawyers in Washington and, if so, to develop a model and a draft rule for consideration by the WSBA Board of Governors. After examining data, hearing from national experts, and considering nearly 600 comments from Washington lawyers and others, in February 2019 the task force issued its final report. That report recommended a mandatory professional liability insurance for lawyers engaged in the private practice of law and proposed an amendment to APR 26 that would establish a “free market” regulatory model similar to Idaho’s. The task force focused on protecting the public, with the regulatory objective of assuring civil remedies for clients harmed by lawyer mistakes. Proponents of mandating insurance observed that most clients assumed their lawyers were insured, and that the public generally felt that if automobile drivers had to carry liability insurance, licensed lawyers ought to as well.

But a number of lawyers—many uninsured—vociferously objected to mandating malpractice insurance. Critics expressed concerns regarding cost, especially for solo practitioners and small firm practices; the likely adverse impact on pro bono services provided by semi-retired members; high costs or unaffordability for some hard-to-insure specialties; and what they characterized as an effective delegation of licensing to the insurance industry. Some opponents to mandatory insurance argued that the Board to consider other models evaluating...
Notice Language That Satisfies the Rule

Under Rule 14(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 (1) this firm does not carry insurance coverage to protect uninsured or underinsured representation. The lawyer must “promptly” obtain written informed consent from new and prospective clients, as well as from existing clients if the lawyer is withdrawing from representation.

The drafters drew the language from enhanced disclosure rules in several other states, including California, Pennsylvania, New Hampshire, New Mexico, and South Dakota, with the most influential.

The new rule is structured to address the issue of whether a lawyer must comply with the Board to the entrance or content of the mandatory malpractice insurance, in regard to potential viable alternatives to mandatory malpractice insurance. This ad hoc committee was chaired by then WSBA President Rajiv Malhotra and consisted of select members of the WSBA Committee on Professional Ethics and the earlier WSBA Mandatory Malpractice Insurance Task Force, together with several members of the Board and a public member.

From March to September 2020, the committee explored approaches to public protection rather than mandating malpractice insurance, including enhanced malpractice insurance disclosure requirements and “proactive management-based regulations” that emphasize lawyer self-assessment and insurance-based management. Ultimately, the committee focused on a rule requiring disclosure of a lawyer’s insurance status to clients when the lawyer is uninsured or underinsured. The Committee, and the full Board, proposed this as a less burdensome and more practicable regulatory requirement aimed at protecting the public without having an undue impact on private practitioners.

Members of the public, including clients harmed by uninsured lawyers, independently proposed to the Supreme Court that it adopt the mandatory malpractice insurance program as a regulatory solution. The court considered both approaches, rejecting a mandatory malpractice insurance mandate by a 7-2 vote.

The new RPC 14(c) is effective as of Sept. 1, 2021.

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ENHANCED INSURANCE DISCLOSURE: THE DETAILS

The enhanced malpractice insurance disclosure rule includes both a new RPC 14(c) and new Comments [8]-[13] to RPC 14. The sentiments that notice to a client may be delayed in emergencies “where the health, safety, or financial interest of a person is threatened with immi-
ently threatened future harm. The lawyer must then require the lawyer to provide the notice “as soon as reasonably practicable.”

The committee specified that a lawyer’s failure to provide the mandated disclosures to a client requires that the lawyer withdraw from the representation under RPC 13(c)(3) because continued representation would violate the Rules of Professional Conduct. Withdrawal must be carried out consistent with RPC 13(c)(4). Failure to comply with the new RPC 14(c) and with RPC 13(c)(4) would also constitute a violation of RPC 8.4(a) and could lead to discipline.

Minimum Levels of Professional Liability Insurance

The new rule also applies to (a) lawyers with an active status with the WSBA, (b) licensed lawyers, and (c) any lawyer authorized by the Washington State Supreme Court to practice in the lower courts of the state.

The disclosure requirement does not apply to: (a) judges, arbitrators, and mediators not otherwise engaged in the practice of law; (b) in-house counsel for a single entity; (c) government lawyers practicing in a hiring agency; and (d) employee lawyers of nonprofit legal services organizations, or volunteer lawyers, where the nonprofit entity provides malpractice insurance coverage at the minimum levels.

The future

Over the coming years, it will be quite interesting to observe the effectiveness of the new rule. RPC 14(c) at providing useful “consumer disclosure” about lack of lawyer professional liability insurance at the required levels. The new rule will require client consent and will be able to make intelligent decisions about engaging, or continuing to engage, practices insurance

Hugh Spitzer teaches professional responsibility at the University of Washington School of Law. He chaired the WSBA Mandatory Malpractice Insurance Task Force from 2017 to 2019, and in 2020 served on the Board's Access to Justice Committee to Investigate Alternatives to Mandatory Malpractice Insurance, which recommended the adoption of RPC 14(c) on enhanced malpractice insurance disclosure.

NOTES


2. Id. at 26.

3. Id. at 10.

4. Id. at 13.

5. The WSBA legal directory is located at https://mywsba.org/persons/directory/legaldirectory/


8. Report to WSBA Board of Governors at 45.

9. The full set of comments received by the Task Force and the Board is available at www.wsba. org/malpractice-task-force


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