

# NEW RULE FOR CLIENT COMMUNICATION AND DISCLOSURE OF LAWYER MALPRACTICE STATUS (RULE 1.4)



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# RPC 1.4 CHANGES IN BROAD STROKES – EFFECTIVE SEPTEMBER 1, 2021.

- Changes to RPC 1.4 require disclosure to the client if the lawyer does not have a specified level of lawyer professional liability insurance.
- The lawyer will have to promptly obtain every client’s acknowledgement and informed consent to uninsured or underinsured representation.
- The lawyer will have to maintain the record of disclosures and consents for at least six years.
- Exclusions: judges, arbitrators and mediators, in-house lawyers for a single entity, and employees of governmental agencies; nonprofit legal services organization lawyers or volunteers where the nonprofit entity provides malpractice at the minimum levels.

**Reasoning:** Clients should have sufficient information about whether the lawyer maintains a minimum level of lawyer professional liability insurance so the client can determine whether they wish to engage, or continue to engage, that lawyer.

# SIGNIFICANT CHANGES TO RPC 1.4 – WHY?

## The Preamble of the Rules of Professional Conduct and Lawyer Responsibilities

- Comment 1: A lawyer, as a member of the legal profession, is a representative of clients, an officer of the court and a public citizen having special responsibility for the quality of justice.
- Comment 4: In all professional functions a lawyer should be competent, prompt and diligent. A lawyer should maintain communication with a client concerning the representation.
- Comment 5: A lawyer's conduct should conform to the requirements of the law, both in professional service to clients and in the lawyer's business and personal affairs.
- Comment 12: The legal profession's relative autonomy carries with it special responsibilities of self-government. The profession has a responsibility to assure that its regulations are conceived in the public interest and not in furtherance of parochial or self-interested concerns of the bar.

# SIGNIFICANT CHANGES TO RPC 1.4 – WHY?

## **General Rule 12.1: The Washington Supreme Court and the Washington State Bar Association Have a Duty to Protect the Public and Maintain the Integrity of the Profession.**

In regulating the practice of law their objectives include:

- Protection of the public
- Competent and ethical delivery of ethical services
- Transparency regarding the nature and scope of legal services to be provided, the credentials of those who provide them, and the availability of regulatory protections
- Accessible civil remedies for negligence and breach of other duties owed and disciplinary sanctions for misconduct

# SIGNIFICANT CHANGES TO RPC 1.4 – WHY?

## Every Lawyer is a Fiduciary With Ethical and Legal Duties to Protect a Client's Interests

1 Restatement (Third) of the Law Governing Lawyers, Section 16 & Comment (2000)

- “A lawyer is a fiduciary, that is, a person to whom another person’s affairs are entrusted in circumstances that often make it difficult or undesirable for that other person to supervise closely the performance of the fiduciary. Assurances of the lawyer’s competence, diligence, and loyalty are therefore vital .... Special safeguards are therefore necessary. “

# SIGNIFICANT CHANGES TO RPC 1.4 – BACKGROUND

## A Few Facts From the Mandatory Malpractice Insurance Task Force Report to the WSBA Board of Governors (February, 2019)

- Consistently, 14 percent of Washington lawyers in private practice do not carry insurance.
- On average, Washington lawyers are practicing longer, and once lawyers reach the age of 71, the number in private practice who carry malpractice insurance drops.
- Private practice areas where Washington lawyers are most likely to be uninsured include business-commercial law, civil litigation, contract law, estate planning and probate, criminal law, family law, general practice and personal injury.
- 2017 WSBA voluntary demographic information reported that private practice lawyers who practice solo or in small firms are most likely to be uninsured – approximately 28%.
- Nationally, 89.1% of malpractice claims are resolved for less than \$100,000 (including claims payments and expenses).

# RPC 1.4 – THE DETAILS

Washington lawyers are not required to have professional liability insurance coverage.

In 2020, a BOG ad hoc committee explored approaches to public protection other than mandating malpractice insurance. In the fall of 2020, the BOG sent proposed rule changes up to the Supreme Court for comment.

- **New RPC 1.4(c) and new Comments 8 to 13** require a lawyer before or at the time of commencing representation to provide notice to the client or prospective client in writing that the lawyer does not have professional liability insurance at specified minimum levels. The minimum level of insurance limits of liability are at least \$100,000 per occurrence and \$300,000 for all claims submitted during the policy period.
- A form of the Notice is provided in new RPC 1.4(c).
- The lawyer must get written consent from the client. The form of the Consent and Acknowledgment is provided in new RPC 1.4(c). This Consent should be obtained within 10 days of the provision of Notice.
- If a lawyer allows a malpractice insurance policy to lapse or terminate during a current representation they must either obtain a new policy or obtain written consent from all existing clients.

## RPC 1.4 – THE DETAILS

- What is required if the lawyer knows or reasonably should know that their professional liability insurance policy has either lapsed or has been terminated during a representation?
  - Within 30 days
    - Obtain a new policy in the required amounts, or
    - Provide notice in writing to the client and promptly obtain the client’s informed consent.
- What is required if the 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?
  - Must withdraw from representation of the client – in conformity with RPC 1.16(c) and (d).
  - Withdrawal is obligatory under RPC 1.16(a)(1) because the representation would violate the RPCs.

**Reasoning: Lawyers in private practice who do not carry malpractice insurance pose a significant risk to their clients.**



# RPC 1.4 – THE DETAILS

## What If There is an Emergency?

- An emergency is where the health, safety, or a financial interest of a person is threatened with imminent and irreparable harm (Comment 13).
- What if in an emergency a lawyer is not covered by lawyer professional liability insurance as prescribed by this rule?
  - The lawyer may take legal action on behalf of a person even if this person cannot receive or evaluate the notice as prescribed by this rule or there is insufficient time to provide it.
  - The lawyer who is representing a person in this exigent situation shall provide the notice required by this rule as soon as reasonably practicable.

# APR 26 INSURANCE DISCLOSURE

(a) An active lawyer must certify annually to the Bar:

- Whether the lawyer is currently covered by professional liability insurance;
- Whether the lawyer will maintain professional liability insurance while practicing law; and
- Whether the lawyer is practicing full-time as a government lawyer, or is of counsel to an organizational client and does not represent clients outside of that capacity.

The lawyer must notify the Bar in writing within 30 days if the insurance coverage lapses, is no longer in effect, or terminates for any reason.

