FEATURE

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Washington Supreme Court enhances malpractice insurance disclosure to clients

BY HUGH SPITZER

The long saga of mandatory malpractice insurance has come to an end—at least for now—with the Washington Supreme Court's June adoption of amendments to RPC 1.4[1] that starting Sept. 1, 2021, require disclosure of a lawyer's malpractice insurance status to clients and prospective clients if that lawyer's insurance fails to meet minimum levels.

In short, the new RPC 1.4(c) requires a lawyer, before or at the time of commencing representation of a client, to provide written notice to that client if the lawyer is not covered by professional liability insurance at specified minimum levels. The lawyer must promptly obtain written informed consent from the client. Similarly, if a lawyer knows (or reasonably should know) that the lawyer's malpractice insurance policy lapses or is terminated, the lawyer must within 30 days either obtain a new policy or get written consent from each client in order to continue the representation.

For disclosure purposes, the minimum level of insurance is $100,000 per occurrence and $300,000 in the aggregate ($100K/$300K). This matches Idaho's mandatory malpractice insurance levels and are the lowest levels of insurance offered by ALPS, the WSBA-endorsed professional liability insurance provider. All Washington-licensed lawyers in private practice are covered by the new insurance disclosure mandate. Certain lawyers are excluded, including judges, arbitrators, and mediators; in-house lawyers for governments and private entities; and employee lawyers of nonprofit legal services organizations, or volunteer lawyers, where the nonprofit entity provides malpractice insurance coverage at the minimum levels.

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.[2] When South Dakota implemented a similar disclosure requirement, the number of uninsured lawyers was halved, to about six percent.[3] 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.

A LONG HISTORY

In contrast with Oregon, Idaho, and the vast majority of common law and civil law countries outside the U.S.,[4] 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 in 2007 adopted 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's Legal Directory,[5] 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 in a tight market.[6] The Washington task force recommended the creation of a similar professional liability fund and system with required malpractice insurance, and this would have been incorporated into an APR. In December 1986, by a 7-4 vote, the WSBA Board of Governors approved the proposal for submission to the Supreme Court, subject to submission of the issue to a referendum of the membership. The membership defeated the referendum by a vote of 6,971 to 1,693.

In September 2017, after considering input from a new work group it had formed to consider approaches to the issue, the WSBA Board of Governors formed the WSBA Mandatory Malpractice Insurance Task Force to evaluate the characteristics of uninsured lawyers and the consequences for clients when lawyers are uninsured. The new task force was also asked to examine regulatory systems that require professional liability insurance, and to gather information and comments from WSBA members and others. The task force was further charged with determining whether to recommend 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.[7] That report recommended 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.[8] 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.[9] Critics expressed concerns regarding cost, especially for solo and small firm practices; the likely adverse impact on pro bono services provided by semi-retired members; high costs or uninsurability 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 lawyers should decide for themselves if they desired insurance, and clients should inquire for themselves whether their counsel carried insurance.

At its May 2019, meeting, after brief discussion of the task force report and listening to some public testimony, the WSBA Board of Governors voted not to forward the "free market" mandatory malpractice model to the Supreme Court. However, in the wake of the vote, several Board members urged the Board to consider other models eval-

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SIDEBAR

Highlights of New RPC 1.4(c)

- New RPC 1.4(c) is effective as of Sept. 1, 2021.
- For the disclosure requirements, the minimum level of insurance is $100,000 per occurrence and $300,000 in the aggregate ($100K/$300K).
- Any lawyer who does not have insurance that meets the minimum level must, before or at the time of commencing representation of a client, provide written notice of this to the client and obtain written informed consent from the client in order to continue to representation.
- Similarly if a lawyer learns (or reasonably should know) of a malpractice insurance policy lapse or termination, the lawyer must within 30 days either obtain a new policy or get written consent from each client in order to continue the representation.
- Lawyers covered by the rule:
  - lawyers with an active status with the WSBA,
  - pro bono status lawyers,
  - lawyers permitted to engage in limited practice under APR 3(g), i.e., visiting lawyers, and
  - any other lawyers authorized by Washington's Supreme Court to practice law, unless they come within one of these exemptions:
    - judges, arbitrators, and mediators not otherwise engaged in the practice of law;
    - in-house counsel for a single entity;
    - government lawyers practicing in that capacity; or
    - employee lawyers of nonprofit legal services organizations, or volunteer lawyers, where the nonprofit entity provides malpractice insurance coverage at the minimum levels.

uated by the task force that might serve to increase protections to the public against errors committed by uninsured lawyers.

In January 2020, then WSBA President Rajeev Majumdar convened an Ad Hoc Committee to Investigate Alternatives to Mandatory Malpractice Insurance to gather more information and advise the Board on potential viable alternatives to mandatory malpractice insurance. This ad hoc committee was chaired by then WSBA President-Elect Kyle Sciuchetti and composed primarily 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 other than mandating malpractice insurance, including enhanced malpractice insurance disclosure requirements and "proactive management-based regulation"[10] that emphasizes lawyer self-assessment and improved practice 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 then 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 proposal suggested earlier by the WSBA task force but rejected by the Board.[11] The court considered both approaches, rejecting a malpractice insurance mandate by a 7-2 vote[12] and adopting the enhanced disclosure requirement by a 7-2 vote.[13]

The new RPC 1.4(c) is effective as of Sept. 1, 2021.

ENHANCED INSURANCE DISCLOSURE RULE: THE DETAILS

The enhanced malpractice insurance disclosure rule includes both a new RPC 1.4(c) and new Comments [8]-[13] to RPC 1.4. The drafters drew the language from enhanced disclosure rules in several other states, including California, Pennsylvania, New Hampshire, New Mexico, and South Dakota, with New Mexico's RPC 16-104(c) having the most influence.

The cost to lawyers of complying with the new notice requirement is insubstantial, as compared to requiring acquisition of insurance.

Substance of the Rule Change. Specifically, the new RPC 1.4(c) requires a lawyer, before or at the time of commencing representation of a client, to provide notice to the client in writing if the lawyer is not covered by professional liability insurance at specified minimum levels. The lawyer must "promptly" obtain written informed consent from that client. In addition, a lawyer whose malpractice insurance policy lapses or is terminated must within 30 days either obtain a new policy or obtain, from each client, written consent to continue the uninsured or underinsured representation.

It appears that the provisions requiring notice apply prospectively only. In other words, an uninsured/underinsured lawyer would be required to provide notice and obtain consent from new and prospective clients, but would not be required to do so with all existing clients as of the Sept. 1 effective date.

The new rule is structured to address the major lawyer concerns expressed to the Board about mandating insurance, concerns that resulted in the Board's decision not to recommend that approach to the Supreme Court. Importantly, the cost to lawyers of complying with the new notice requirement is insubstantial, as compared to requiring acquisition of insurance.

As reflected in new Comment [8], a lawyer without a basic level of professional liability insurance might not pay for damages or losses a client incurs due to the lawyer's mistakes or negligence. Consequently, according to Comment [8], 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.

The new RPC 1.4(c) requires a lawyer to provide disclosure if the lawyer is without the specified level of lawyer professional liability insurance. The lawyer must promptly obtain every client's acknowledgment and informed consent to uninsured or underinsured representation. The amendment includes disclosure and consent language which, if used, is meant to serve as a "safe harbor" for compliance with the rule. Each lawyer must maintain a record of these non-insurance disclosures and consents for at least six years.

Comment [13] specifies that notice to a client may be delayed in emergencies "where the health, safety, or a financial interest of a person is threatened with imminent and irreparable harm." The lawyer is then required to provide the notice "as soon as reasonably practicable."

Comment [12] makes it clear that a lawyer's failure to provide the mandated disclosures to a client requires that the lawyer withdraw from the representation under RPC 1.16(a)(1) because continued representation would violate the Rules of Professional Conduct. Withdrawal must be carried out consistent with RPC 1.16(c) and (d). Failure to comply with the new RPC 1.4(c) and with RPC 1.16(a)(1) would also constitute a violation of RPC 8.4(a) and could lead to discipline.

Minimum Levels of Professional Liability Insurance. The new RPC 1.4(c) sets the minimum levels at $100,000 per occurrence and $300,000 in the aggregate. These are the mandatory malpractice insurance levels in Idaho and the lowest levels of insurance offered by ALPS, the WSBA-endorsed professional liability insurance provider. The Mandatory Malpractice Insurance Task Force found that, nationally, 89.1 percent of malpractice claims are resolved for less than $100,000 (including claims payments and expenses).[14] According to ALPS, for all Washington claims where payments were made by ALPS, its average loss payment was $119,856 and average loss expenses were about $40,454.82. Given these statistics, the proposed minimum level of insurance of $100K/$300K was deemed both reasonable and sufficient.

The new Comment [9] to RPC 1.4(c) explains that the $100K/$300K minimum limits include deductible or self-insured retention amounts that must be paid by a lawyer or law firm for claim expenses and damages. But the comment adds that qualifying lawyer professional liability insurance does not include a policy with deductibles or self-insured retentions that a lawyer knows or has reason to know cannot be paid by the lawyer or the firm if a loss occurs.

Lawyers Covered by the Rule. The new rule applies to each "lawyer," defined as:

- lawyers with an active status with the WSBA,
- pro bono status lawyers,
- lawyers permitted to engage in limited practice under APR 3(g), i.e., visiting lawyers, and
- any other person authorized by the Washington State Supreme Court to engage in the practice of law.
- The disclosure requirement does *not* apply to:
  - judges, arbitrators, and mediators not otherwise engaged in the practice of law;
  - in-house counsel for a single entity;
  - government lawyers practicing in that capacity; and
  - 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 RPC 1.4(c) at providing useful "consumer disclosure" about lack of lawyer professional liability insurance at the required levels. In concept, clients will receive informed consent and will be able to make intelligent decisions about engaging, or continuing to engage, lawyers without adequate malpractice insurance. Further, a significant number of previously uninsured lawyers may opt for minimum insurance coverage in lieu of possibly losing clients who prefer an attorney who is covered. Washington's percentage of uninsured lawyers might drop, perhaps to the South Dakota level (6 percent) that is less than half of Washington's current percentage of uninsured lawyers. This might sufficiently satisfy advocates of an across-the-board malpractice insurance mandate. But if the needle does not move much, and our state's percentage of uninsured lawyers remains around 14 percent, a renewed push for mandatory insurance could develop in the future. Board members and some past WSBA presidents continue to advocate a closer look at either a free market insurance mandate or a mandatory in-house insurance system like Oregon's. But that would require a shift in lawyer attitudes generally, and, of course, a change in the view of members of the Washington Supreme Court. BN

SIDEBAR

Notice Language That Satisfies the Rule

> 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 one hundred thousand dollars ($100,000) per occurrence, and three hundred thousand dollars ($300,000) 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.

RPC 1.4(c)(2)(i).

Hugh Spitzer teaches professional responsibility at the University of Washington School of Law. He chaired the WSBA's Mandatory Malpractice Insurance Task Force from 2017 to 2019, and in 2020 served on the Board's Ad Hoc Committee to Investigate Alternatives to Mandatory Malpractice Insurance, which recommended the addition of the new RPC 1.4(c) on enhanced malpractice insurance disclosure.

NOTES

1. https://perma.cc/AG26-496L.
2. Mandatory Malpractice Insurance Task Force, *Report to WSBA Board of Governors* (Feb. 2019)(hereafter, *"Report to WSBA Board of Governors"*), at i.
3. *Id.* at 26.
4. *Id.*
5. The WSBA legal directory is located at https://mywsba.org/PersonifyEbusiness/LegalDirectory.aspx.
6. OSB Professional Liability Fund, *About the PLF*, available at: www.osbplf.org/about-plf/overview.html.
7. www.wsba.org/docs/default-source/legal-community/committees/mandatory-malpractice-insurance-task-force/mandatory-malpractice-insurance-task-force-report.pdf?sfvrsn=558e03f1_0.
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/insurancetask-force.
10. www.isba.org/barnews/2017/01/25/illinois-supreme-court-adopts-proactive-management-based-regulation.
11. The APR 26 proposal from Equal Justice Washington and Kevin Whatley can be found at: www.courts.wa.gov/court_rules/?fa=court_rules.proposedRuleDisplay&ruleId=4751.
12. WA Supreme Ct Order 24700-A-1357 (In the Matter of the Proposed Amendment to APR 26--Insurance Disclosure) is available at: https://perma.cc/EH7Z-D9H3. Justices Sheryl Gordon McCloud and Helen Whitener did not sign the order rejecting the mandatory malpractice insurance proposal.
13. WA Supreme Ct Court Order 25700-A-1351 (In the Matter of the Suggested Amendment to RPC 1.4 (Communications)) is available at: https://perma.cc/AG26-496L. Justices Charles Johnson and Susan Owen did not sign the order adopting the amendment to RPC 1.4 that implemented the enhanced insurance disclosure approach.
14. *Report to WSBA Board of Governors* at 17.