

Advisory Opinion: 202202

Year Issued: 2022

RPCs: 1.4(c), 5.5(d)(1), 5.7, 8.5(b)

Subject: Malpractice Insurance Disclosure Requirements

FACTS:

The Washington State Supreme Court recently adopted a new Rule 1.4(c) of the Rules of Professional Conduct. RPC 1.4 focuses on communication from a lawyer to a client so the client can make informed decisions regarding the representation. RPC 1.4(c) requires disclosure of a lawyer's malpractice insurance status to clients and prospective clients if the lawyer's professional liability insurance ("malpractice insurance") does not meet minimum levels. A lawyer must promptly obtain written informed consent from each client, and within 30 days obtain similar consent from each client when the lawyer's malpractice insurance policy lapses or is terminated. The minimum levels are \$100,000 per occurrence and \$300,000 in the aggregate. Affected lawyers include lawyers with an active status in the Washington State Bar Association ("WSBA"), emeritus pro bono status lawyers, and visiting lawyers permitted to engage in limited practice under APR 3(g). The disclosure requirements do 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, when those lawyers are provided malpractice insurance coverage at the minimum levels. RPC 1.4(c) became effective September 1, 2021.

The WSBA has received several questions regarding the meaning and applicability of RPC 1.4(c). These questions are addressed below.

QUESTIONS:

1. Does RPC 1.4(c) apply retroactively to existing clients of uninsured lawyers, or to new clients only? If an insured lawyer's insurance policy lapses or is terminated, must the lawyer disclose that fact and obtain waivers from all existing clients, including those who had engaged the lawyer prior to the effective date of the new rule?

RPC 1.4(c) does not apply retroactively to an uninsured lawyer's clients whose representation commenced prior to the effective date of RPC 1.4(c), i.e., September 1, 2021. Indeed, RPC 1.4(c)(1) on its face requires an attorney to notify a client in writing of the absence of such insurance coverage only "before or at the time of commencing representation of a client," and

thus the rule does not require notice of the absence of such insurance with respect to representation that commenced prior to September 1, 2021.

With respect to the lawyer who is insured as of September 1, 2021, whose insurance policy lapses or is terminated during the representation, the duties set forth in the second and third sentences of RPC 1.4(c)(1) will apply. There is no language in those sentences which exempts an insured lawyer from the termination-of-policy notice requirements, even if the representation had commenced prior to September 1, 2021.

2. If a lawyer or law firm is “self-insured” at or exceeding the minimum coverage levels through the accumulation of reserved amounts or retentions, or covered by a “captive insurer,” is that sufficient coverage by lawyer professional liability insurance as defined in RPC 1.4(c)?

A lawyer or firm that decides to be wholly “self-insured” with personal or corporate assets and otherwise is without a malpractice policy issued by an insurance company, is “not covered by lawyer professional liability insurance” under RPC 1.4(c). Such an attorney or law firm essentially is “going bare,” and therefore must comply with the notice and consent provisions of RPC 1.4(c).

RPC 1.4(c)’s reference to “lawyer professional liability insurance” generally means coverage under a malpractice policy offered through the private, competitive insurance marketplace. However, there is nothing in RPC 1.4(c) that precludes insurance coverage from a “captive insurer,” “risk retention group,” “insurance purchasing group,” or some other insurance entity that is in good standing, chartered or licensed as an insurer in its domicile jurisdiction, has assets that exceed its liabilities, has the ability to pay claims, and complies with all applicable statutory and regulatory requirements. A lawyer or law firm insured by such an insurance entity generally does not violate RPC 1.4(c).

A liability insurance policy with a self-insured retention, reserve, or deductible, does not by itself violate RPC 1.4(c). However, as noted in Comment [9] of the rule, if the lawyer knows or has reason to know the deductible or self-insured retention cannot be paid by the lawyer or the law firm if a loss occurs, the attorney or firm’s insurance coverage is insufficient to meet the minimum dollar amounts set forth in RPC 1.4(c).

3. Is coverage by a professional liability fund such as the Oregon State Bar Professional Liability Fund (PLF) “lawyer professional liability insurance” within the meaning of RPC 1.4(c)?

The PLF website describes the PLF as follows:

For over forty years, the Oregon State Bar Professional Liability Fund (PLF) has provided malpractice coverage to lawyers in private practice in the state of Oregon. The PLF is a unique organization within the United States. The Oregon State Bar Board of Governors created the PLF in 1977 pursuant to state statute (ORS 9.080) and with approval of the OSB membership. The PLF began operation on July 1, 1978, and has been the mandatory provider of primary malpractice coverage for Oregon lawyers since that date. Though a handful of other states in the U.S. require malpractice coverage for lawyers, Oregon is the only state that provides that coverage through a mandatory bar-related program.

www.osbplf.org/about/who-we-are.html 11/21/2021. Based on this description and the answer to Question 2 above, coverage by the PLF at or exceeding the minimum levels required by RPC 1.4(c) meets the requirements of the Rule.

4. Are lawyers who only provide non-legal services, or “law-related services” as defined RPC 5.7, subject to RPC 1.4(c)’s disclosure and waiver requirements?

A Washington licensed lawyer whose work is entirely unrelated to legal services would not be subject to the disclosure provisions of RPC 1.4(c). RPC 1.4(c)(4) implicitly establishes that the disclosure requirements apply to active members of the Washington State Bar Association who are engaged in the practice of law. A lawyer who provides no legal services and provides no legal advice, but instead only works, for example, as a commercial banker, an orchardist or a bartender, is not required to comply with the RPC 1.4(c) disclosure requirements.

RPC 5.7(b) denotes “law-related services” as services that “might reasonably be performed in conjunction with and in substance are related to the provision of legal services, and that are not prohibited as unauthorized practice of law when provided by a nonlawyer.” Typical law-related services include title insurance and real estate work, legislative lobbying, accounting, financial planning, and certain human resources work. RPC 5.7 Comment [9]. RPC 5.7(a) states that when a lawyer is providing “law-related services,” the lawyer will be subject to the RPCs unless those services are provided in circumstances that are clearly distinct from the lawyer’s provision of legal services, or unless the lawyer makes it clear to recipients of the services that those are not legal services and that the protections of the client-lawyer relationship do not exist.

A lawyer who provides only law-related services, including but not limited to the examples in RPC 5.7 cmt. [9], is subject to the RPCs, including the disclosure requirements of RPC 1.4(c), unless that lawyer complies with the provisions of either RPC 5.7(a)(1) or RPC 5.7(a)(2), *i.e.*, by providing the services in a manner clearly distinct from legal services, or by taking reasonable

measures to assure that a person obtaining the law-related services knows that the services are not legal services and that the protections of the client-lawyer relationship do not exist.

5. Is a lawyer in private practice subject to RPC 1.4(c)'s disclosure and waiver requirements if the lawyer represents only one entity, or a group of corporate or LLC entities that are controlled by that single entity?

A lawyer in private practice must comply with RPC 1.4(c) whether the lawyer represents a single client or many clients.

6. If a lawyer employed by an entity as in-house counsel advises that entity and also advises other corporate or LLC entities that are controlled by the single entity, will that lawyer be subject to RPC 1.4(c)'s disclosure and waiver requirements?

RPC 1.4(c)(4)(ii) provides that the disclosure requirement of RPC 1.4(c)(1) does not apply to “in-house counsel for a single entity.” It is not customary for an employee to purchase insurance to cover potential claims by the person’s employer. If a lawyer’s employer expects the lawyer also to represent its affiliates, such work would be considered within the scope of the lawyer’s employment. In that situation, the lawyer must comply with applicable rules governing conflicts of interest, but the lawyer is not required by Rule 1.4(c) to notify the employer’s affiliates of the absence of insurance meeting the requirements of this Rule. Cf. RPC 5.5(d)(1) and Comment [16] to RPC 5.5, permitting an in-house lawyer not admitted in Washington to represent the affiliates of the employer, as well as the employer, in circumstances meeting the requirements of that rule.

7. If a Washington licensed lawyer does not represent any clients within Washington State, will that lawyer be subject to RPC 1.4(c)'s disclosure and waiver requirements?

Yes. RPC 1.4(c) defines “lawyer” as an active member of the Washington State Bar Association, without regard to the lawyer’s office location and without regard as to whether the lawyer’s clients are in Washington, in another state, or in another country. With regard to exercise of the disciplinary authority, Comment [10] to RPC 1.4(c) observes that whether the disclosure and notice obligations of that Rule apply to a Washington-licensed lawyer practicing in another jurisdiction is determined by the choice of law provisions of Rule 8.5(b).