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RPC 1.4:
The Communication Rule

"What we've got here is failure to communicate."
~Cool Hand Luke (1967)[1]

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Oddly for a profession where lawyers are sometimes called "mouthpieces,"[2] the failure to communicate is one of the most frequent sources of both professional discipline and malpractice risk. In fact, the WSBA's Discipline System Annual Reports typically list communication failures among the top five violations resulting in discipline.[3] Washington is by no means an outlier in this regard with, for example, the comparable Oregon disciplinary system reports producing similar statistics.[4] The most recent edition of the ABA's Profile of Legal Malpractice Claims series, in turn, noted that nearly 17 percent of malpractice claims nationally alleged "client relations" failures.[5]

RPC 1.4 defines our duty of communication in a regulatory sense.[6] It also reflects our underlying fiduciary duty.[7] While the former is enforced through the disciplinary system, the latter more typically plays out in civil damage claims.[8] As the ABA statistics noted above suggest, communication failures also lie at the heart of many negligence-based malpractice claims.[9]

In this column, we'll first survey the contours of RPC 1.4. We'll then turn to practical steps lawyers can take to lessen their risk of communication failures.

Before we do, however, three qualifiers are in order.

First, we'll focus on general considerations under RPC 1.4. Many other RPCs either reference communication generally or include specific information that must be disclosed to clients. RPC 1.14 is an example of the former when representing clients with diminished capacity.[10] RPC 1.7 is an example of the latter when discussing information that must be disclosed to clients in the conflict waiver process.[11]

Second, communication failures usually do not stand in isolation. Rather, they are often symptomatic of deeper problems in a representation and are frequently coupled with lack of diligence under RPC 1.3.[12] Similarly, a lawyer who does not communicate adequately with a client may not have sufficient information to handle a matter competently under RPC 1.1.[13]

Third, we'll focus on current clients. The ABA in Formal Opinion 481 (2018) concluded that the duty of communication under ABA Model Rule 1.4 on which Washington's corresponding rule is patterned only applies to current clients. At this writing, Washington appellate case law has not concluded otherwise.[14]

Contours of the Rule

Although communication is fundamental to all attorney-client relationships, a specific rule addressing communication did not exist until the ABA adopted Model Rule 1.4 in 1983.[15] During the consideration of Model Rule 1.4 by the ABA House of Delegates, some at the time argued that communication should just be encouraged rather than required.[16] The legislative history, however, reflects the reasons a mandatory rule was adopted:

> Representatives of the Commission [*i.e.,* the Kutak Commission that developed the ABA Model Rules] emphasized that a precatory rule would not adequately protect the interest of the client in knowing what was happening. Also, they noted that because a lawyer's failure to keep a client informed was a frequent source of disciplinary complaints, the obligation to keep a client reasonably informed should be made clear.[17]

As originally adopted by the ABA in 1983, Model Rule 1.4 had two central elements. Model Rule 1.4(a) required the lawyer to keep the client reasonably informed of material developments in the matter the lawyer was handling for the client (including responding to client requests for information). Model Rule 1.4(b) required the lawyer to explain the matter as necessary to allow the client to make informed decisions concerning the representation. Although the ABA refined portions of the rule and the accompanying comments in 2001, 2002, and 2012,[18]

these two central threads of informing and explaining remain at the heart of the ABA Model Rule today.

Washington RPC 1.4 followed a generally similar trajectory. Our rule was among those adopted in 1985 when Washington moved to the Rules of Professional Conduct patterned on the then-newly promulgated ABA Model Rules.[19] The Washington rule was then refined in 2006 and 2016 to mirror amendments to the ABA Model Rule.[20] Our rule also reflects two Washington-specific amendments. First, in 2015, conforming amendments were made to cross-reference LLLT practice.[21] Second, in 2021, an additional section—RPC 1.4(c)—was added addressing disclosures to clients required if lawyers do not maintain specified levels of malpractice insurance.[22]

Like its ABA Model Rule counterpart, Washington's rule focuses on keeping clients informed and explaining matters to them. RPC 1.4(a) addresses the former and RPC 1.4(b) focuses on the latter.

RPC 1.4(a) includes five distinct subparts oriented around informing. The first two require a lawyer to, respectively, advise the client of any circumstance in which the client's informed consent is required by the RPCs and consult with client about the means by which the client's objectives will be accomplished. The last two require a lawyer to, respectively, comply with reasonable requests by the

client for information and advise the client on any limits on the lawyer's representation. RPC 1.4(a)(3), in turn, captures the nub of the duty to keep clients informed: "A lawyer shall . . . keep the client reasonably informed about the status of the matter[.]"[23] RPC 1.4(a)(3) doesn't necessarily require a running report, but Comment 3 to RPC 1.4 notes that lawyers must keep clients apprised of "significant developments affecting the timing or the substance of the representation."

RPC 1.4(b) addresses, explaining: "A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." The rule is inherently situational in the sense that the explanation required will vary with both the nature of the matter concerned and of the client's ability to understand. An update to an experienced in-house corporate counsel who manages a specific docket of cases, for example, will ordinarily be different than an explanation given to an unsophisticated client with limited English.[24] Regardless, Comment 5 to RPC 1.4 summarizes the unifying theme for all client communication: "The guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interests[.]"

Lessening Risk

Good communication has the practical benefit of lowering risk of both regulatory discipline and civil claims—at the beginning of a representation, along the way, and at the end.

At the beginning, an engagement agreement memorializing initial discussions with a client is a key ingredient in overall risk management.[25] The engagement agreement should generally reflect who the lawyer is representing, the scope of the representation, and the fee arrangements.[26] An engagement agreement both summarizes these key aspects of the representation for the client and provides the lawyer with a written record of the understandings that launched the work involved.

Along the way, the pace and detail of communication will necessarily vary by client and circumstances. As discussed above, RPC 1.4 doesn't generally require a running narrative. Clients today, however, are attuned to a pace of communication that is much faster than a generation ago. To account for this expectation, many lawyers routinely forward clients correspondence and related materials.[27] To avoid misunderstandings, it can also be important to let the client know when not to expect developments—such as when a court has taken a motion under advisement and a decision is not expected for several weeks or

months.[28] As discussed earlier, lawyers also need to calibrate the content of their communication to the client. We can all easily lapse into the "lawyer code" for our particular practice area that even another lawyer in a different practice area will not necessarily understand. Therefore, we need to adjust the explanation to the client and circumstances.

At the end, a short summary of the work performed can provide the client a useful record in many kinds of matters. A closing letter (whether paper or electronic) also effectively confirms the end of the representation so there will not be any ambiguity later.[29]

Summing Up

While good communication will not solve all problems, it will help prevent many.

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[1] The cited phrase is part of "the Captain's speech" in this Academy Award winning film. *See* www.iMDb.com/title/tt0061512. The late Strother Martin played "the Captain."

[2] *See generally Rudin v. Dow Jones & Co., Inc.*, 510 F. Supp. 210, 213-16 (S.D.N.Y. 1981) (discussing the history of the term "mouthpiece" as applied to lawyers).

[3] *See* Washington Discipline System 2022 Annual Report at 18 (2023). The report series is available on the WSBA website.

[4] *See* 2022 Oregon State Bar Disciplinary Counsel's Annual Report at 7 (2023) (available on the Oregon State Bar's website at www.osbar.org).

[5] ABA, *Profile of Legal Malpractice Claims 2016-2019* at 22 (2020).

[6] *See, e.g., In re Van Camp*, 171 Wn.2d 781, 257 P.3d 599 (2011) (lawyer disciplined for violation of RPC 1.4).

[7] *See generally* Restatement (Third) of the Law Governing Lawyers § 20 (2000) (addressing the duty of communication); *see also Block v. Law Offices of Ben F. Barcus & Associates, PLLC*, 2015 WL 4531138 at *2 (Wn. App. July 27, 2015) (unpublished) (discussing the interplay between RPC 1.4 and the fiduciary duty of communication).

[8] *See, e.g., Shoemake ex rel. Guardian v. Ferrer*, 168 Wn.2d 193, 196-97, 225 P.3d 990 (2010) (claims for legal malpractice and breach of fiduciary duty over failure to communicate settlement offer to clients and later dismissal of case).

[9] *Id*.

[10] *See* RPC 1.14, cmts. 1-3 (discussing attorney-client relationships—including communication—in the context of clients with diminished capacity).

[11] *See* RPC 1.4(a)(1) ("A lawyer shall . . . promptly inform the client of any decision or circumstance with respect to which the client's informed consent . . . is required[.]"); *see also* RPC 1.0A(e) (defining "informed consent"); *see, e.g., In re Hall*, 180 Wn.2d 821, 829, 329 P.3d 870 (2014) (cross-referencing RPCs 1.4 and 1.7 in discussing conflict waivers).

[12] *See, e.g., In re Pfefer,* 182 Wn.2d 716, 727-28, 344 P.3d 1200 (2015) (lawyer disciplined for companion violations of RPCs 1.3 (diligence) and 1.4 (communication)).

[13] *See, e.g., In re Romero*, 152 Wn.2d 124, 131, 94 P.3d 939 (2004) (lawyer disciplined for intertwined violations of RPCs 1.1 (competence), 1.3 (diligence), and 1.4 (communication)).

[14] *But see* RPC 1.9(a), (c) (addressing conflicts and associated waivers from former clients).

[15] ABA, *A Legislative History: The Development of the ABA Model Rules of Professional Conduct, 1982-2013* at 74 (2013) (ABA Legislative History). An "ethical consideration"—EC 9-2—that was part of the former ABA Model Code of Professional Responsibility encouraged (but did not require) lawyers to "fully and promptly inform . . . client[s] of material developments in the matters being handled for the client." ABA Model DR 6-101(A), in turn, swept related concepts of competence and diligence into a single rule.

[16] ABA Legislative History, *supra*, at 72.

[17] *Id*.

[18] *Id*. at 74 (2001 amendments), 78 (2002 amendments), and 79 (2012 amendments). *See also* ABA, *Annotated Model Rules of Professional Conduct* at 75 (10th ed. 2023) (outlining amendments).

[19] *See generally* Jan. 18, 1985 Letter from the WSBA to the Washington Supreme Court at 2 (transmitting RPCs and noting that RPC 1.4 mirrored the ABA Model Rule) (WSBA Archive); Robert H. Aronson, *An Overview of the Law of Professional Responsibility: The Rules of Professional Conduct Annotated and Analyzed*, 61 Wash. L. Rev. 823, 837-38 (1986) (discussing RPC 1.4 in the context of the newly-adopted RPCs).

[20] *See* Reporter's Explanatory Memorandum to the Ethics 2003 Committee's Proposed Rules of Professional Conduct at 141-43 (2004) (outlining Washington amendments to RPC 1.4 proposed in the wake of the ABA's "Ethics 2000" amendments to the ABA Model Rules) (on file with author); Washington Supreme Court Order No. 25700-A-1146, June 2, 2016 (adopting amendments to RPCs—including the comments to RPC 1.4—reflecting ABA "20/20" amendments).

[21] *See* Washington Supreme Court Order No. 25700-A-1096 at 14-16 (Mar. 23, 2015); *see also* Washington Supreme Court Order No. 25700-A-1146, *supra* (including additional cross-references to LLLTs).

[22] *See* Washington Supreme Court Order No. 25700-A-1351 (June 4, 2021) (adding RPC 1.4(c) and accompanying Comments 8-13); *see also* WSBA Advisory Op. 202202 (2022) (discussing malpractice insurance disclosure requirements).

[23] Comment 6 to RPC 1.4 notes that when dealing with an organization or group, communication may be channeled through "appropriate officials of the organization." The same comment counsels that when many routine matters are involved, "as system of limited or occasional reporting may be arranged with the client."

[24] *See generally* ABA Formal Op. 500 (2021) (discussing ABA Model Rule 1.4 in the context of clients with limited English proficiency); *see, e.g., Hamblin v. Castillo Garcia*, 9 Wn. App.2d 78, 88 n.26, 441 P.3d 1283 (2019) (noting attorney wrote email in Spanish to comply with RPC 1.4). *See also* RPC 1.4, cmt. 6 (addressing clients with diminished capacity and cross-referencing RPC 1.14 in this regard).

[25] *See generally* Mark J. Fucile, *Engagement Agreements: A Cornerstone of Law Firm Risk Management*, 71, No. 7 Washington State Bar News 21 (Oct. 2017).

[26] RPC 1.2(c) addresses—and generally permits—a lawyer to limit the scope of a representation as long as the limitation is reasonable under the circumstances and the client gives informed consent. RPC 1.5, in turn, addresses fees and fee arrangements. Any conflict waivers necessary to proceed should also be confirmed in writing at the outset.

[27] *See generally* WSBA Advisory Op. 202201 (2022) (discussing whether copying a client on an email to opposing counsel provides opposing counsel with implied permission under RPC 4.2 to contact the client directly). *See also* ABA Formal Op. 503 (2022) (same). WSBA Advisory Opinion 202201 notes that "blind copying" clients may not solve the problem because depending on the particular electronic mail application being used, "bc" may be treated as functionally the same as "cc" when a person responds. The WSBA advisory opinion, therefore, suggests that forwarding electronic mail to clients is a safer practice in this regard.

[28] Comment 7 to RPC 1.4 addresses comparatively rare circumstances when information can be temporarily delayed or when court orders restrict sharing some information with clients.

[29] *See generally Hipple v. McFadden*, 161 Wn. App. 550, 255 P.3d 730 (2011) (discussing end of representation for statute of limitation purposes in later malpractice claim); *Oxford Systems, Inc. v. CellPro, Inc.*, 45 F. Supp.2d 1055 (W.D. Wash. 1999) (analyzing whether client was current or former for conflict purposes).