THE STATE BAR OF CALIFORNIA

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DATE: June 2, 2006

TO: Members of the Regulation, Admissions and Discipline Oversight Committee

FROM: James E. Towery, Chair, Insurance Disclosure Task Force
Saul Bercovitch, Staff Attorney
Jill Sperber, Director, Office of Mandatory Fee Arbitration

SUBJECT: Insurance Disclosure Task Force – Report and Recommendations
1) Request for authorization to release proposed new insurance disclosure rules for public comment
2) Request to maintain the Insurance Disclosure Task Force as a resource to assist with developing public educational material concerning professional liability insurance

EXECUTIVE SUMMARY

In May 2005, State Bar President John Van de Kamp, in consultation with the California Supreme Court, appointed the State Bar of California Insurance Disclosure Task Force to study 1) if there should be a requirement in California that attorneys disclose whether they maintain professional liability insurance; 2) if so, what the exact nature and scope of that requirement should be; and 3) what the best vehicle would be for creating and enforcing any such requirement. To address these questions, the Task Force examined the *ABA Model Court Rule on Insurance Disclosure*, the status of insurance disclosure rules in other states, the history of an insurance disclosure obligation in California, and other general background material relating to professional liability insurance, attorney malpractice claims, and remedies available to address harm to clients.

The Task Force recommends that the Regulation, Admissions and Discipline Oversight Committee, as part of an insurance disclosure package, 1) approve a request to release for public comment two proposed insurance disclosure rules, one requiring direct disclosure to the client if an attorney is not covered by professional liability insurance, and the other requiring disclosure to the State Bar, to be followed by the public's ability to ascertain if an attorney is not covered by professional liability insurance; and 2) approve a recommendation to maintain the Insurance Disclosure Task Force as a resource to assist with developing public educational material concerning professional liability insurance, to complement any insurance disclosure requirement.

For further information on this item, contact Saul Bercovitch at (415) 538-2306 or by email at Saul.Bercovitch@calbar.ca.gov, or Jill Sperber at (415) 538-2023 or by email at Jill.Sperber@calbar.ca.gov.

I. Background

A. Process for developing the Task Force recommendations

1. Task Force creation and charge

In September 2004, Robert Welden, Chair of the ABA's Standing Committee on Client Protection, sent a letter to Chief Justice Ronald M. George, advising him that the ABA House of Delegates had adopted the ABA *Model Court Rule on Insurance Disclosure*, and expressing his hope that the Supreme Court consider implementing the ABA Model Court Rule or an equivalent rule. A copy of that letter was sent to Judy Johnson, along with the accompanying information providing additional detail about the ABA rule and related developments in other states.

Following receipt of Mr. Welden's letter, State Bar President John Van de Kamp, in consultation with the Supreme Court, appointed the State Bar of California Insurance Disclosure Task Force. The Task Force was created to study the following issues:

1. Should there be a requirement in California that attorneys disclose whether they maintain professional liability insurance?

2. If so, what should the exact nature and scope of that requirement be?

3. What is the best vehicle for creating and enforcing any such requirement?

Task Force recommendations for any new rules were to be presented to the Board of Governors and, if approved, to the Supreme Court.

2. Task Force composition

The Task Force includes attorneys from different segments of the Bar, representatives from the Legislature and the Supreme Court, and a public member who represents consumer groups. The participants in the Task Force are:

Chair:
James E. Towery, Hoge, Fenton, Jones & Appel, San Jose

Members:
Mary Alexander, Mary Alexander & Associates, San Francisco

Chris Bjorklund, public member, San Francisco

Kevin DeSantis, Butz, Dunn, DeSantis & Bingham, San Diego

Douglas Hendricks**,** Morrison & Foerster LLP, San Francisco

Beth Jay, California Supreme Court, San Francisco

Drew Liebert, Assembly Judiciary Committee, Sacramento

Maralee MacDonald, Boutin Dentino Gibson Di Giusto Hodell Inc., Sacramento

Edith Matthai, Robie & Matthai, Los Angeles

Steven Mehta, Mehta & Mann, Valencia

Frank Pitre, Cotchett, Pitre, Simon & McCarthy, Burlingame

Russell Roeca, Roeca, Haas & Hager, San Francisco

Terrie Robinson, attorney, Sacramento

Francis S. Ryu, Law Offices of Francis S. Ryu Los Angeles

Gene Wong, Senate Judiciary Committee, Sacramento

Staff:
Saul Bercovitch, Staff Attorney, State Bar of California

Jill Sperber, Director, Office of Mandatory Fee Arbitration, State Bar of California

The Task Force also coordinated with a staff and member liaison from the State Bar Commission for the Revision of the Rules of Professional Conduct, because the work of the Task Force involved the potential development and adoption of a new Rule of Professional Conduct.

3. Task Force meetings

The Task Force had two in-person meetings and communicated by e-mail. At the first meeting, on June 29, 2005, the Task Force reviewed the history of an insurance disclosure obligation in California, and the insurance disclosure rules proposed and adopted by the ABA and other states.[1] The Task Force was then polled on the initial question of whether it should move forward and take action with respect to recommending that some sort of disclosure be required about an attorney's maintenance of professional liability insurance, or whether it should take no action and leave things as they are. Although one Task Force member expressed the view that it was premature to move forward, a consensus was reached that the Task Force should take some action on an insurance disclosure requirement, leaving aside for the moment

[1] The California history and the status of insurance disclosure rules outside of California are discussed in Sections C.1 and 2, below. A chart with detail about proposed and adopted insurance disclosure rules in other states is included as Attachment 1 in the Appendix to this Agenda Item.

the extent, manner, and details of disclosure, the preferred vehicle for imposing a disclosure requirement, the appropriate enforcement mechanism for failure to comply with any requirement that is adopted, and other details. At its second meeting, on September 27, 2005, the Task Force reviewed supplementary material relating to an insurance disclosure requirement, discussed the specific details of the proposed insurance disclosure rules, and decided on its recommendations.

B. Summary of Task Force recommendations

The Task Force recommendations are discussed in detail in Section D, below. In summary, those recommendations are:

1. California should adopt an insurance disclosure requirement.

2. The required disclosure concerning insurance should be made a) directly to the client; and b) to the State Bar, which will make the information publicly available on the State Bar's website or by a similar method.

3. Attorneys should be required to make the insurance disclosure to clients – directly, and indirectly through the State Bar – only when they are *not* covered by professional liability insurance.

4. Two companion rules should be adopted. A new Rule of Professional Conduct should require direct disclosure of the absence of insurance to a client. A new Rule of Court should require attorneys to certify to the State Bar whether they are covered by insurance, and provide that the State Bar will make publicly available the identity of individual attorneys who inform the State Bar that they are not insured.

5. Failure to comply with the new Rule of Court in a timely fashion should result in non-disciplinary, administration suspension. Supplying false information in response to the new Rule of Court should subject an attorney to appropriate disciplinary action. Violation of the new Rule of Professional Conduct would implicate all the remedies that otherwise apply to a violation of the Rules of Professional Conduct, so there is no need to create a specific remedy.

6. Attorneys who are employed as government lawyers or in-house counsel and do not represent clients outside that capacity should be exempt from the insurance disclosure requirements.

7. State Bar staff should develop educational material for the public concerning professional liability insurance, in consultation with members of the Task Force, to complement the proposed insurance disclosure requirements.

C. Background material considered as part of Task Force deliberations

1. California history of insurance disclosure obligation (Business and Professions Code Sections 6147 and 6148)

California initially had a form of required insurance disclosure that commenced in 1992. A sunset clause was added to the statue in 1993, and the statute was repealed by its own terms, effective January 1, 2000. There has been no insurance disclosure requirement in California since that date.

In 1992, the malpractice insurance disclosure requirement was added to Business and Professions Code Section 6147 (governing contingency fee contracts) and Section 6148 (governing non-contingency fee contracts) through the enactment of SB 1405 (Presley), a “mini-omnibus” bill sponsored by Bar Discipline Monitor Robert Fellmeth.

For contingency fee cases and those non-contingency fee cases in which it was reasonably foreseeable that total expenses to a client would exceed $1,000, the written contract between the attorney and the client had to include:

> “A statement disclosing whether the attorney maintains errors and omissions insurance coverage applicable to the services to be rendered and the policy limits of that coverage if less than one hundred thousand dollars ($100,000) per occurrence up to a maximum of three hundred thousand dollars ($300,000) per policy term.”

In 1993, the California Trial Lawyers Association (now Consumer Attorneys of California) sought to eliminate the malpractice insurance disclosure requirement through an amendment contained in the State Bar's fee bill at the time, SB 373 (Lockyer). Ultimately, the statutory disclosure language was modified and included in SB 645 (Presley), and a sunset clause was inserted, repealing the disclosure requirement effective January 1, 1997, unless specifically extended. The modified statutory language, effective January 1, 1994, required the following in the written contract between the attorney and the client:

> “If the attorney does not meet any of the following criteria, a statement disclosing that fact:
> (A) Maintains errors and omissions insurance coverage.
> (B) Has filed with the State Bar an executed copy of a written agreement guaranteeing payment of all claims established against the attorney by his or her clients for errors or omissions arising out of the practice of law by the attorney in the amount specified in paragraph (c) of subdivision (1) of Section B of Rule IV of the Law Corporation Rules of the State Bar. The State Bar may charge a filing fee not to exceed five dollars ($5).
> (C) If a law corporation, has filed with the State Bar an executed copy of the written agreement required pursuant to paragraph (a), (b), or (c) of

subsection (1) of Section B of Rule IV of the Law Corporation Rules of the State Bar."

The August 24, 1993 Assembly Judiciary Committee analysis of SB 645 provides some insight into the issues that were raised:

> "Recently, the Committee amended SB 373 (Lockyer), the State Bar dues bill, to delete the existing disclosure requirement pertaining to malpractice insurance. Basically, it was concluded that the disclosure requirement was too simplistic and may, in some instances, actually mislead consumers. The proposal in SB 645 eliminates many of the concerns about the existing requirement. For example, issues concerning coverage disputes, or whether defense costs are inside or outside limits no longer pertain. SB 645 merely requires the forthright disclosure that no insurance, in an[y] amount, is maintained. However, some unfairness and difficulty persists. For example, some attorneys are unfairly canceled, or not renewed. Clients may not understand the nature of a claims made policy. A claim filed after an existing policy lapses will be uncovered. An attorney who honestly informs a client that he or she has insurance is under no continuing obligation to inform the client that the attorney has lost his or her coverage, reduced limits, or obtained coverage that excludes certain areas of practice. The California Trial Lawyers Association (CTLA) has expressed concern about the 'partial reinstatement' of the disclosure requirement. The delayed effective date will provide an opportunity to negotiate a more complete solution to this problem before the disclosure requirement activates."

In 1996, the State Bar sponsored AB 2787 (Kuehl), a successful omnibus bill that contained an extension of the sunset clause for an additional three years. The August 5, 1996 Senate Judiciary Committee analysis states:

> "This provision extends for three years the sunset on malpractice disclosure requirement. The provisions of the Business & Professions Code requiring an attorney to disclose in his or her contingent fee agreement or other contract fee agreement the fact that he or she is unwilling to guarantee financial responsibility for professional errors and omission will sunset on January 1, 1997. The way the sunset clause was drafted, the pre-existing disclosure requirement would not be resurrected; rather, all statutory malpractice insurance/guarantee disclosure requirements would disappear. The disclosure language scheduled to sunset was added through the enactment of SB 645 (Presley), Chapter 982, Statutes of 1993. It replaced far more vague and onerous malpractice disclosure requirements added the year before."

No later legislation was sponsored to extend or repeal the sunset clause, and the malpractice insurance disclosure requirement was repealed by its own terms, effective January 1, 2000.

2. ABA Model Court Rule on Insurance Disclosure

On August 9, 2004, the ABA House of Delegates adopted the *ABA Model Court Rule on Insurance Disclosure*. The Model Court Rule requires attorneys to disclose on their annual registration statements whether they maintain professional liability insurance, and provides that the information submitted by attorneys will be made available to the public. Attorneys who fail to comply with the rule in a timely fashion may be suspended until they comply, and supplying false information subjects an attorney to appropriate disciplinary action. The Report accompanying the Model Court Rule also suggests that the bar educate the public about the nature of legal malpractice insurance.[2]

3. Insurance disclosure obligations in other states

According to a survey compiled by the ABA's Standing Committee on Client Protection, sixteen states have adopted an insurance disclosure requirement. Seven states, other than California, are currently considering a disclosure requirement.

Five states have amended their Rules of Professional Conduct to require attorneys to disclose directly to their clients if the attorneys do not maintain a minimum level of professional liability insurance (Alaska, New Hampshire, Ohio, Pennsylvania, and South Dakota). Kentucky is also considering this approach.

Eleven states have followed the ABA model, and require attorneys to disclose on their annual registration statements whether they maintain professional liability insurance (Arizona, Delaware, Illinois, Kansas, Michigan, Nebraska, Nevada, New Mexico, North Carolina, Virginia, and West Virginia). In eight of those states, the information has been or will be made available to the public. In three of those states, the information will not be made available to the public. Six other states are considering the approach of the ABA model (Idaho, Massachusetts, Minnesota, New York, Utah, and Washington).

On January 21, 2006, the House of Delegates of the Arkansas Bar Association voted not to adopt an insurance disclosure rule. The proposal, which would have followed the ABA Model Court Rule, was approved by the Bar's Board of Governors, but was defeated in the House of Delegates by a vote of 29 against to 14 in favor, with about 12 abstentions.

[2] The ABA Model Court Rule and accompanying Report are included as Attachment 2 in the Appendix to this Agenda Item.

Oregon remains the only state that requires lawyers to carry malpractice insurance.

4. Supplementary background material

The Task Force reviewed supplementary background material to assist in evaluating the categories of attorneys who would be most affected by an insurance disclosure requirement, where the greatest impact is likely to fall, and the overall context in which a disclosure requirement would operate.[3]

The Task Force inquired into the percentage of practicing attorneys who are uninsured. Although it is difficulty to obtain hard data regarding the percentage of uninsured attorneys in California, the Chair noted that estimates are in the range of about 20 percent.[4] Available data from other states was reviewed, and the Task Force took particular note of data from Illinois showing that 40% of solo practitioners did not maintain malpractice insurance, as compared with 4% of those in firms of 2-10 attorneys, .7% of those in firms of 11-25 attorneys, and 1% of those in firms with more than 25 attorneys.

Before formulating its recommendations, the Task Force also considered 1) the legal areas in which the majority of malpractice claims against attorneys arise, and the types of claims that most often arise; 2) the member groups that are most likely to experience the malpractice claims; 3) the range of remedies available to a client based on harm resulting from an attorney's negligence or other misconduct, including the Client Security Fund, an attorney's professional liability insurance, and restitution arising out of disciplinary proceedings; 4) existing Rules of Professional Conduct that have a client disclosure component; and 5) the existing types of non-disciplinary, administrative suspensions based on non-compliance with other professional obligations in California, such as a failure to comply with MCLE requirements or pay State Bar dues.

D. Task Force discussions and recommendations

1. Should California adopt an insurance disclosure requirement?

The initial question presented to the Task Force was whether California should adopt any insurance disclosure requirement, or leave things where they stand today. At least one Task Force member expressed concern throughout the discussions that an insurance disclosure requirement could "penalize" an attorney without insurance, noting the potential competitive disadvantage that may result from such a requirement, particularly affecting solo, small firm and young practitioners who may have no insurance and may not be able to afford insurance. The Task Force considered these

[3] The supplementary material provided to the Task Force for its meeting on September 27, 2005 is included as Attachments 3 – 14 in the Appendix to this Agenda Item.

[4] A *California Bar Journal* survey from September 2001 that was based on interviews with 1,500 members found that 18% of those in private practice did not maintain professional liability insurance.

points, and discussed the need to balance this concern against other issues, particularly the interests of the client or potential client. Among the counterbalancing points that Task Force members raised were 1) clients may have an expectation that attorneys maintain professional liability insurance, and should be advised if an attorney who may be hired does *not* maintain insurance; 2) insurance disclosure should be viewed as a matter of consumer protection; and 3) the presence or absence of insurance should be considered a material fact that a potential client should know.

Ultimately, the view disfavoring any insurance disclosure requirement did not prevail. The Task Force concluded that the important goals of consumer protection and a client's right to know would be advanced by an insurance disclosure requirement, and outweighed the concerns expressed against such a requirement. The Task Force also believes that consumer education about professional liability insurance should complement any reporting requirement, to provide additional information about insurance-related issues.[5] The Task Force therefore recommends the adoption of an insurance disclosure requirement in California, together with the development of public educational material concerning professional liability insurance.

2. Should the required disclosure concerning professional liability insurance be made directly to the client, to the State Bar, or to both?

Various states are now using two insurance disclosure models: 1) direct disclosure to the client; and 2) disclosure to the State Bar (which in most but not all states is followed by public disclosure of the information). The Task Force discussed at length the relative pros and cons of these two approaches.

The Task Force voiced a strong preference for some form of direct disclosure to the client. It viewed disclosure *solely* to the State Bar as inadequate, concluding that this model is less likely to result in the information getting to the clients, particularly the least sophisticated clients who may have the greatest need for that information. Members of the Task Force opined that most consumers assume that lawyers carry malpractice insurance. The Task Force disfavored placing the burden on the consumer to seek and obtain information concerning an attorney's insurance coverage, and concluded that attorneys should be required to take affirmative steps and make the insurance disclosure directly to the client.

The Task Force also agreed that disclosure to the State Bar would be appropriate, if required *in addition to* direct disclosure to the client. Members of the Task Force noted the advantages to a *potential* client of disclosure to the State Bar, followed by public availability of the information. Direct disclosure by an attorney to the client may not occur until the time of the actual engagement. If insurance information is

[5] The Task Force discussed an approach that would consist solely of general consumer education about professional liability insurance, but would not have any disclosure requirement. There was a consensus against an education-only model without a disclosure requirement. The Task Force concluded that education, by itself, would be an insufficient means of alerting and protecting the public.

made available to the public (on the State Bar's website, for example) potential clients would be able to ascertain whether an attorney is uninsured *before* deciding whether to contact the attorney about a potential engagement. In addition, requiring disclosure to the State Bar may be a useful way of assisting the State Bar in tracking information pertaining to member maintenance of professional liability insurance, and helping it to develop insurance products that can meet member needs.

Upon consideration of the issues, the Task Force decided to recommend two companion insurance disclosure rules. One rule would require direct disclosure to the client, and the other would require disclosure to the State Bar, followed by public availability of the information. If adopted, this dual disclosure requirement would be unique. Some states require direct disclosure to the client, others require disclosure to the Bar, but no state requires both. The Task Force concluded that a dual disclosure requirement should be adopted in order to maximize consumer protection and a client's right to know.

3. Should attorneys be required to disclose to clients 1) the presence *or* absence of insurance coverage, or 2) *only* the absence of insurance coverage?

The Task Force discussed at length whether the proposed new rules should require attorneys to disclose to clients – directly, or indirectly through the State Bar – whether they are *or* are not covered by professional liability insurance, or whether disclosure should be required *only* if an attorney is *not* insured.

The Task Force recognized that requiring disclosure of the presence *or* absence of insurance coverage would raise the issue of insurance coverage at the outset of the attorney-client relationship in all cases. The Task Force also considered whether this approach would provide clients with more information than a requirement to disclose only the absence of insurance coverage.

The Task Force expressed significant concerns about requiring disclosure of the presence of insurance. Specifically, a bare statement by an attorney that he or she is covered by professional liability insurance – without additional information – may not be meaningful and may be potentially misleading because it does not address 1) the applicable policy limits; 2) the scope of the coverage; 3) coverage limitations; 4) coverage exclusions; 5) the amount of the deductible under the policy; 6) the fact that the policy may have "wasting limits" (i.e, the amount of coverage is reduced by any defense costs that are expended); and 7) the potential significance of the claims-made nature of most professional liability insurance policies. These issues could affect individual clients differently, and it would be difficult to provide clear, accurate, and complete information at the outset of each engagement.[6] Moreover, coverage available at the outset of an engagement may not be available when a malpractice claim is

[6] As discussed in Section I.D.7, below, the Task Force has proposed that issues such as these be addressed in a public education component that is made part of an insurance disclosure package.

actually made, and other facts and circumstances could also change, implicating the ongoing obligation of an attorney to disclose material changes to the client.

Because of these concerns, the Task Force recommends the adoption of rules that would require disclosure to a client only if an attorney is *not* covered by professional liability insurance. One rule would require direct disclosure of that information to the client. The second rule would provide that the State Bar will identify individual attorneys who inform the State Bar that they are *not* insured, by making that information publicly available. The Task Force concluded that this approach will provide basic, meaningful information that a client or potential client will be able to consider.[7]

4. What is the best mechanism for creating and enforcing an insurance disclosure requirement, and what should the sanctions be for noncompliance?

Under the approach of the ABA Model Court Rule, failure to disclose the required information on an attorney's annual registration statement in a timely fashion is grounds for administrative suspension, and supplying false information subjects an attorney to appropriate disciplinary action. Under the approach requiring direct disclosure to the client, the model has been a rule of professional conduct, which forms the basis for invoking the disciplinary process if the rule is violated. The Task Force considered these two models, in addition to the previous model under the Business and Professions Code, which made the disclosure obligation part of the fee agreement. By statute, failure to comply with that obligation rendered the fee agreement voidable at the option of the client, with the attorney then entitled to collect a reasonable fee.

The liaisons from the State Bar's Rules Revision Commission provided additional background information for the Task Force to consider in connection with this aspect of its discussions. They described the Rules Revision Commission's approach to the development of new Rules of Professional Conduct in general, considerations underlying any decision to implement a Rule of Professional Conduct, the context in which new Rules of Professional Conduct are considered, and the general principles underlying the attorney disciplinary system.

The Task Force recommends following both of the insurance disclosure models now in use. The proposed rule requiring direct disclosure to the client should be contained in a new Rule of Professional Conduct, and a violation would implicate all the remedies that otherwise apply to a violation of the Rules of Professional Conduct. The proposed rule requiring disclosure to the State Bar should be contained in a new Rule of Court, providing that a member who fails to comply with the rule in a timely fashion may be suspended from the practice of law until such time as the member complies, and that

[7] In other states, the requirement to inform a client about the absence of insurance is triggered if an attorney does not maintain insurance *of at least certain limits*. Similarly, the insurance disclosure requirement originally added to the Business and Professions Code in 1992 was tied to certain policy limits. The Task Force does not favor an approach along these lines, as it could result in unnecessary complexity and confusion about coverage.

supplying false information in response to the rule will subject the member to appropriate disciplinary action.[8]

5. What other details should be addressed in the insurance disclosure rules?

The Task Force concluded that the proposed rules should address certain specific details – such as the timing, form, and content of the required insurance disclosure – to provide clear and uniform guidance to attorneys. The Task Force agreed that the Rule of Professional Conduct should require an attorney to disclose the absence of insurance to the client *at the time of the engagement*. A comment in the proposed rule would specify that this requirement applies with respect to *new* clients and *returning* clients who engage a member to provide additional legal services. The Task Force also agreed that the rule should require a *written* disclosure and a signed and dated acknowledgment from the new or returning client, to avoid evidentiary issues in the event a dispute were to arise about the fact of the disclosure.

The Task Force recognized that a newly adopted Rule of Professional Conduct would raise compliance issues with respect to *existing* clients on the effective date of the new rule. Some Task Force members expressed concern that requiring disclosure to existing clients could be onerous, given the number of existing clients that some attorneys may have. At the same time, if an attorney is *not* covered by professional liability insurance, it appeared as though existing clients should be put on equal footing with new clients in terms of the disclosure. As a way to address the potential burden that may arise in connection with existing clients, the Task Force recommends requiring written notice to existing clients, if an attorney is not covered by professional liability insurance, but *not* requiring a signed acknowledgment from existing clients, as opposed to new or returning clients. Attorneys would be required to provide written notice to existing clients within thirty days of the effective date of the new rule. The proposed rule would also clarify that it applies to existing clients for whom an attorney is currently rendering continuing legal services on the effective date of the new rule.

Next, the Task Force agreed that the proposed Rule of Professional Conduct should not mandate that the written disclosure to the client be in any particular document, leaving the written format of the disclosure to the discretion of each attorney. The Task Force therefore recommends that the proposed rule contain a comment stating that an attorney may include the disclosure in a written fee agreement with the client or in a separate writing. The Task Force also agreed that the rule should not mandate any specific disclosure language, but recommends that a comment be included in the proposed rule, specifying language that *may* be used to comply with the rule.

[8] Suspension under the proposed Rule of Court would be a non-disciplinary, administrative suspension, similar to the remedy for failure to comply with a member's MCLE requirements.

Finally, the Task Force recommends that both the proposed Rule of Court and the proposed Rule of Professional Conduct specify a thirty day time frame for providing notice of changed circumstances, such as the termination or lapse of coverage.

6. What categories of attorneys, if any, should be exempt from an insurance disclosure requirement?

The ABA Model Court Rule and many of the rules adopted or under consideration in other states contain exemptions from the applicability of the insurance disclosure rules. The two most common exemptions are government lawyers and in-house counsel, and those exemptions are expressed in slightly different ways in different rules. The Task Force recommends those same two exemptions for both the Rule of Court and the Rule of Professional Conduct, and proposes that both rules include a comment clarifying the scope of the exemptions. The purpose of the disclosure rules is to provide information to a client or potential client. If an attorney is employed directly by and provides legal services directly for an entity – whether private or governmental – that entity presumably knows whether the attorney is or is not covered by professional liability insurance. The exemptions would not apply if an attorney represents clients outside the exempt capacities.

One other potential exemption raised during the second Task Force meeting would apply to pro bono attorneys. State Bar staff to the Task Force agreed to confer with State Bar staff in the Office of Legal Services, Access & Fairness Programs, and report back to the Task Force on this issue. The preliminary staff recommendation, as reported to the Task Force, was not to include that exemption, primarily because 1) it would provide pro bono clients with less information about an attorney's insurance coverage than paying clients, a policy that typically would be disfavored; and 2) the concept of "pro bono" has been difficult to define with precision, and may be subject to debate. If pro bono services are being provided under the umbrella of a qualified provider that has professional liability insurance covering the attorney's services, this does not appear to be an issue. If, however, an attorney is providing legal services on a pro bono basis to a client, and is not covered by professional liability insurance for those services, it appears as though the insurance disclosure rules should apply. The Task Force does not recommend a "pro bono" exemption because of these considerations.

7. Should adoption of an insurance disclosure requirement be part of a broader insurance-related package?

The Task Force considered various ways in which an insurance disclosure requirement could be made more useful to consumers. In addition to the proposed rules, the Task Force recommends that general educational information about professional liability insurance be developed and made publicly available.

The Task Force did not discuss the content of the proposed educational information in detail. It noted that public educational material from other states could be reviewed as part of the process of developing material for California. Example of issues

that could be addressed include 1) the potential significance of policy limits; 2) typical coverage limitations; 3) typical coverage exclusions; 4) deductibles; 5) "wasting limits"; and 6) the claims-made nature of most professional liability insurance policies. The information may also note that California attorneys are not required to maintain professional liability insurance, and encourage prospective clients to discuss certain insurance-related issues with an attorney before an engagement.

The Task Force recommends that State Bar staff develop the public educational information in consultation with the Task Force members.[9]

E. Proposal

The Task Force proposes that the Regulation, Admissions and Discipline Oversight Committee 1) approve the request to release the proposed new insurance disclosure rules for public comment period of 90 days; and 2) approve the accompanying recommendation to maintain the Insurance Disclosure Task Force as a resource to assist with developing public educational material concerning professional liability insurance, to complement any insurance disclosure requirement.

III. FISCAL/PERSONNEL IMPACT

The fiscal and personnel impact are unknown at this time. The mere adoption of the proposed Rule of Professional Conduct does not involve an unbudgeted fiscal or personnel impact. The cost associated with the new Rule of Court is largely dependent on the mechanism by which the required attorney reporting is accomplished. If the State Bar is required to mail a form to each active member – likely to be separate and apart from the annual fee statement – and each active member is then required to fill out the form and mail it back to the State Bar, there would be additional postage costs and increased staff costs associated with receipt of the information and data entry. If, on the other hand, attorneys are able to enter the information online through the State Bar's member profile, there would be some programming costs, but they would be relatively minor compared to the costs of manual processing. In either event, there will also be unknown staff costs that are required in order to perform routine compliance, monitoring, and auditing functions.

IV. IMPACT ON THE BOARD BOOK/ADMINISTRATIVE MANUAL

Operational issues relating to the new rules, if adopted, will need to be incorporated into the Board Book and Administrative Manual.

[9] The Task Force also briefly considered the Oregon model of mandatory malpractice insurance, and the possibility of being involved with the State Bar in exploring ways to make affordable professional liability insurance more available to members. The Task Force took no specific action, leaving those issues open for the moment.

V. PROPOSED RESOLUTION

Should the Regulation, Admissions and Discipline Oversight Committee approve the request to release the proposed new insurance disclosure rules for public comment, and the accompanying recommendation to maintain the Insurance Disclosure Task Force as a resource to assist with developing public educational material concerning professional liability insurance, the following resolutions would be appropriate:

RESOLVED that the Regulation, Admissions and Discipline Oversight Committee hereby authorizes staff to make available for public comment for a period of 90 days the proposed amendment to Rule 950.5 of the California Rules of Court, and proposed new Rule 950.6 of the California Rules of Court, in the form attached hereto as Attachment A; and it is

FURTHER RESOLVED that the Regulation, Admissions and Discipline Oversight Committee hereby authorizes staff to make available for public comment for a period of 90 days proposed new Rule 3-410 of the California Rules of Professional Conduct, in the form attached hereto as Attachment B; and it is

FURTHER RESOLVED that this authorization for release for public comment is not, and shall not be construed as, a statement or recommendation of approval of the proposed items; and it is

FURTHER RESOLVED that the Regulation, Admissions and Discipline Oversight Committee recommends that the Insurance Disclosure Task Force be maintained as a resource to assist with developing public educational material concerning professional liability insurance, to complement any insurance disclosure requirement.

Proposed Amendment to Rule 950.5 of the California Rules of Court
and
Proposed New Rule 950.6 of the California Rules of Court

(June 16, 2006)

California Rules of Court

Rule 950.5. Roll of attorneys of persons admitted to practice

The State Bar shall maintain, as part of the official membership records of the State Bar, the Roll of Attorneys of all persons admitted to practice in this State. Such records shall include the information specified in sections 6002.1 and 6064 of the Business and Professions Code, rule 950.6 of these rules, and other information as directed by the Court.

Rule 950.6. Insurance disclosure

(a) Each active member who is not exempt under subdivision (b) must certify to the State Bar in the manner that the State Bar prescribes:

(1) Whether the member is currently covered by professional liability insurance; and

(2) Whether the member represents clients.

(b) Each active member who is employed as a government lawyer or in-house counsel and does not represent clients outside that capacity must certify those facts to the State Bar in the manner that the State Bar prescribes. Members who provide this certification are exempt from providing information under subdivision (a).

(c) Each member who transfers from inactive status to active status must provide the State Bar with the certification required under subdivision (a) or (b), as applicable, within thirty days of the effective date of the member's transfer to active status.

(d) A member must notify the State Bar in writing of any change in the information provided under subdivision (a) or (b) within thirty days of that change.

(e) The State Bar will identify each individual member who certifies under subdivision (a) that he or she is not covered by professional liability insurance by making that information publicly available upon inquiry and on the State Bar's website or by a similar method.

Attachment A

(f) A member who fails to comply with this rule in a timely fashion may be suspended from the practice of law until the member complies. If a member supplies false information in response to this rule, the member will be subject to appropriate disciplinary action.

Comment

Rule 950.6(b) provides an exemption for a "government lawyer" or "in-house counsel" provided the member does not "represent clients outside that capacity." The basis of both exemptions is essentially the same. The purpose of this rule is to make information available to a client or potential client, through the State Bar, if a member is not covered by professional liability insurance. If a member is employed directly by and provides legal services directly for a private entity or a federal, state or local governmental entity, that entity presumably knows whether the member is or is not covered by professional liability insurance. The exemptions under this rule are limited to situations involving direct employment and representation, and do not, for example, apply to outside counsel for a private or governmental entity, or to counsel retained by an insurer to represent an insured.

Proposed New Rule 3-410 of the California Rules of Professional Conduct

(June 16, 2006)

California Rules of Professional Conduct

Rule 3-410. Insurance Disclosure

(A) A member who is not covered by professional liability insurance shall inform a client at the time of the client's engagement of the member that the member is not covered by professional liability insurance. The notice required by this paragraph shall be provided to the client in writing, and the member shall obtain from the client a signed and dated acknowledgment of receipt of that notice.

(B) If a member is covered by professional liability insurance at the time of a client's engagement of the member, and the member subsequently ceases to be covered by professional liability insurance during the representation of the client, the member shall inform the client in writing within thirty days of the date that the member ceases to be covered by professional liability insurance.

(C) Within thirty days of [*insert effective date of this rule*], a member shall inform in writing all existing clients for whom the member is currently rendering continuing legal services if the member is not covered by professional liability insurance.

(D) Paragraphs (A), (B) and (C) do not apply to a member who is employed as a government lawyer or in-house counsel and does not represent clients outside that capacity.

Discussion

[1] Under Paragraph (A) of this rule, a member who is not covered by professional liability insurance is required to disclose that fact directly to a client at the time of the engagement. This requirement applies with respect to new clients and returning clients who engage a member to provide additional legal services. Paragraph (C) of this rule is transitional, and requires notice to existing clients for whom a member is currently rendering continuing legal services on the effective date of this rule. Notice is not required pursuant to Paragraph (C) if, for example, before the effective date of this rule, a member has completed the preparation of a will for a client or completed legal services relating to the incorporation of a client's business, if no continuing legal services are being provided for the client on the effective date of this rule. If, however, the same client returns for additional legal services after the effective date of this rule, notice would be required pursuant to Paragraph (A).

[2] A member may use the following language in making the disclosure required by Rule 3-410(A) or Rule 3-410(C), and may include that language in a written fee agreement with the client or in a separate writing:

"Pursuant to California Rule of Professional Conduct 3-410, I am informing you in writing that I am not covered by professional liability insurance."

[3] A member may use the following language in making the disclosure required by Rule 3-410(B):

"Pursuant to California Rule of Professional Conduct 3-410, I am informing you in writing that I am no longer covered by professional liability insurance."

[4] Rule 3-410(D) provides an exemption for a "government lawyer" or "in-house counsel" provided the member does not "represent clients outside that capacity." The basis of both exemptions is essentially the same. The purpose of this rule is to provide information directly to a client if a member is not covered by professional liability insurance. If a member is employed directly by and provides legal services directly for a private entity or a federal, state or local governmental entity, that entity presumably knows whether the member is or is not covered by professional liability insurance. The exemptions under this rule are limited to situations involving direct employment and representation, and do not, for example, apply to outside counsel for a private or governmental entity, or to counsel retained by an insurer to represent an insured.