

Proposed New Insurance Disclosure Rules
(June 16, 2006)
Public Comments

The following outline contains the gist of the comments received, as combined, and addresses those comments in roughly the same sequence as the original Insurance Disclosure Task Force Report and Recommendations.

I. Should California adopt an insurance disclosure requirement?

A. Summary of comments in opposition to *any* insurance disclosure requirement

1. The public may be misled by the disclosures and harmed by reliance on the disclosures. At the same time, lawyers who do *not* disclose the *absence* of coverage will be put at risk for allegedly misleading disclosures about the *presence* of coverage, made either implicitly or explicitly.

As discussed in Section III, below, several comments support the proposal, but *only if* it is amended to require the disclosure of *both* the presence *and* the absence of insurance coverage. Others, however, simply oppose the proposal as potentially misleading and harmful, for reasons that include the following:

- a. The proposed rules will create a false sense of security.

The range of insurance “protection” is extremely broad. The public will be confused and misled by a process that allows it to perceive that any lawyer not disclosing the absence of malpractice coverage is “completely” and “appropriately” covered.

- b. If a client rejects a lawyer because the lawyer discloses that he or she does *not* have insurance, the client will likely ask the next lawyer whether he or she “has” insurance.

If the second lawyer then discloses the *presence* of insurance, that disclosure will be fraught with peril, for the reasons that the Task Force noted in rejecting a requirement that lawyers disclose the presence of coverage. These conversations will inevitably take place as a result of any disclosure requirement.

- c. If insurance information is “material” and the client has a “right” to know, then all lawyers should be required to make a *full disclosure* so clients can be fully informed.

There is an inherent problem, however, given the extent of the information that would be required in order to make a meaningful

disclosure. A lawyer may need to give the client a copy of his or her insurance policy (which the client is unlikely to understand). Lawyers will bear the additional burden of explaining to clients and prospective clients the specifics of their coverage. The accuracy and adequacy of a lawyer's explanations about coverage may then become an issue in subsequent proceedings.

- d. Malpractice insurance is not like other types of insurance.

Stating whether you "have insurance" is often not a yes or no answer. Malpractice insurance is subject to many vagaries as to the existence and adequacy of coverage.

- e. Claims-made coverage raises unique issues.

Given the nature of claims-made coverage, simply telling a client that insurance coverage exists at the time of hiring (or failing to disclose the absence of insurance coverage at the time of hiring) can be tantamount to telling the client nothing. A lawyer may have insurance at the time of hiring, but it is more important that they have coverage in the future, when a claim is made against the lawyer.

- f. Education may assist, but it will not solve the problem.

Education about claims-made coverage may mitigate misinterpretation of insurance disclosures and resulting harm, but claims-made coverage is complex and may not be susceptible to adequate explanation that can be readily understood by the general public. Prospective clients are not likely to consult the State Bar about legal malpractice insurance and obtain copies of any educational material. The material would necessarily be general in nature and would not disclose information about the insurance policy of the particular lawyer being considered by the client.

- g. Given a requirement that a lawyer disclose the "absence" of coverage, if there is no coverage for *any part* of the lawyer's engagement (despite the existence of an insurance policy otherwise covering the lawyer) the lawyer arguably would be required to disclose that fact, perhaps with a discussion of the reasons for the exclusion.
- h. Lawyers will need to be concerned about the possibility of a gap in coverage, which may not be clear at the time it occurs.
- i. Assuming a client's decision to hire a lawyer is based on the chance that the client will want to make a malpractice claim, the presence of insurance is but one (misleading) component relating to a lawyer's

ability to satisfy a claim. Presumably, clients would want to know other information, including the lawyer's personal ability to pay a judgment (in excess of policy limits, if there is insurance) and the liability of a law firm or other individual partners to pay amounts that are not covered by insurance or the lawyer's personal assets.

2. The proposal will unfairly stigmatize uninsured lawyers.

Forcing attorneys to disclose the absence of insurance will unfairly stigmatize uninsured attorneys as second tier attorneys. Comments raise the following specific points:

- a. Clients will draw unwarranted and unfair inference from the absence of insurance.

Making an issue of the absence of insurance coverage will suggest that there are serious problems concerning uninsured lawyers. The required disclosure will imply that uninsured lawyers a) are not competent, or are less competent than insured lawyers; b) are a risk to potential clients, simply because they do not have insurance; c) are uninsurable; d) do not have insurance because they have committed malpractice or otherwise engaged in inappropriate behavior; and e) will poorly serve clients, who will then have no redress.

- b. It is not professionally wrong to decide not to pay for insurance, especially when a lawyer is practicing in a field where malpractice claims are unlikely or, if filed, will lead to small damages.
- c. The proposal punishes those who have in good faith made a business and professional decision not to insure.
- d. The proposed rules will put insurance disclosure in same category as Rule 955 disclosures by attorneys who have been suspended.

3. The proposal will have a disparate impact on certain segments of the bar and clients served by those segments.

The proposal unfairly targets segments of the bar that are most likely to be uninsured. Those mentioned include solo and small firm practitioners, newly admitted attorneys, minority attorneys, and part time attorneys.

Comments raise the following specific points:

- a. The proposal will make it more difficult for solo and small firm practitioner to compete with the larger firms.

Solo and small firm practitioners need to pay disproportionately more of their income on insurance than large firms. For many, the cost of insurance creates an insurmountable bar to obtaining insurance. If purchased, the cost of insurance will eat into marginal profits of solo and small firm practitioners, and may force them out of business.

- b. The proposal will impose a disproportionate burden on lawyers who serve minorities, the legal aid eligible population, and the segment of the population that is not eligible for legal aid but generally unable to afford counsel. Law firms, which typically serve the more affluent, almost inevitably have insurance.
 - c. The State Bar is launching its Diversity Pipeline project. The added burden of the proposed disclosure rules on the already difficult road to a successful practice runs counter to the program's inclusionary spirit.
4. The required disclosures will have an adverse economic impact on consumers, and will adversely affect access to justice.

Even though the proposal does not mandate insurance coverage, comments note that lawyers will be forced to buy insurance if they wish to avoid a stigma, and raise the following specific points:

- a. Malpractice insurance increases overhead.

When confronted with added cost of malpractice insurance, attorneys will be faced with the dilemma of either passing that cost on to their clients or absorbing it themselves. If the cost is passed on, clients of solos and small firms in particular – including segments of the population who are least capable of affording legal services – will face an increase in the cost of legal services. If the cost is absorbed, the least prosperous portion of the bar will become even less profitable and some may be driven out of the practice of law, leaving fewer choices for consumers.

- b. One attorney notes that she would consider carrying insurance to avoid the stigma that would harm her business, but that would raise her overhead and force her to reduce or eliminate the time she spends providing free legal services.

- c. The public benefits more from representation by competent but uninsured attorneys than self-representation or representation by unlicensed and unqualified individuals.
 - d. Unless the losses associated with the lack of insurance are significant, the loss of available legal assistance to low and moderate income consumers is an even greater problem.
5. There is no evidence that a problem exists under current law.
- a. No evidence has been presented regarding the number of malpractice claims that are made *and* found to be meritorious, but are *not* satisfied due to lack of insurance or other assets.
 - b. There is no evidence or empirical support for the assertion that most consumers assume that lawyers carry malpractice insurance. (One comment notes that clients who pay high fees may have that expectation, but high-fee attorneys can pass on their costs to their clients, while other clients cannot afford to absorb the costs.)
 - c. Clients do not base their decision to hire a lawyer on whether the lawyer has malpractice insurance. Most clients do not care, and those that do are sophisticated enough to ask the question. If a client wants to know whether a lawyer has insurance, he or she can always ask.
 - d. California has not had an insurance disclosure requirement since 2000, and there has been no indication since that date that clients have been clamoring for the information.
 - e. No other professional is required to inform a client if he or she does not have liability insurance.
 - f. California should not be compared with other states that have adopted a disclosure requirement.

States with large populations of lawyers, with varied types of practice, have not mandated disclosure (New York, Texas, Florida, New Jersey). California has an enhanced and unique disciplinary system. There is no evidence that the same conditions exist in California, with its unique disciplinary system, which may justify the disclosure requirements in other states.

6. The proposed rules will result in little or no benefit.
 - a. There is not much benefit to clients in having the insurance information, isolated from other information indicating the overall quality of the attorney.
 - b. There is other information that is much more relevant to selecting a lawyer.
 - c. The proposal would not accomplish much, other than creating the need for additional bureaucracy to administer the papers.
7. The proposal will encourage malpractice lawsuits
 - a. Making an issue of insurance suggests that an attorney guarantees the outcome, that the client will probably be dissatisfied with the outcome, and that the client may wish to sue. An expectation will be created that, despite the lack of a desired result, the client may still be made whole through a claim covered by insurance. The proposal raises the issue of malpractice and suggests that a client may wish to go to a lawyer who has insurance so client can recover damages if they are awarded.
 - b. The unspoken assumption is that lawyers will inevitably commit malpractice and thus their clients need to be protected. Lawyers do not inevitably commit malpractice and lawyers buy malpractice insurance to protect themselves, not to protect clients.
 - c. Some comments state that the proposal will stir up litigation by targeting the *insured* attorney, given the availability of an insurance recovery. Others state that *uninsured* attorneys will be targeted by questionable malpractice claims for the purpose of forcing a quick settlement, given that personal assets will be at risk.
8. A disclosure requirement is unfair *unless* affordable insurance is made available to all attorneys.

Some comments contend that it is unfair to require insurance disclosures without providing the means for all attorneys to be able to obtain low cost/affordable malpractice insurance. Others (as discussed under proposed alternatives, below) contend that affordable malpractice insurance should be explored as an *alternative* to *any* disclosure requirement.

9. The proposal is a ploy to encourage mandatory malpractice insurance.

10. The proposal is being driven by insurers, and the State Bar should not be so closely aligned with those interests.

11. The proposal is an end run around the Legislature, which did away with any insurance disclosure requirement.

Through the legislative process, Business and Professions Code Sections 6147 and 6148 were enacted. The disclosure requirement was repealed by its own terms on January 1, 2000. In allowing the lapse of the disclosure requirements, with no new legislation in the area, the Legislature has spoken on the issue. If this is a matter of consumer protection, the Legislature should deal with it by making all professionals disclose whether they have insurance.

12. Requiring disclosure of the absence of insurance to current or prospective clients would be highly embarrassing. Having an attorney's name listed on the Internet would further embarrass the attorney.

13. Many clients are "telephone clients" who never meet their attorneys and only call on occasion for a quick consultation. An attorney would need to abruptly begin the call with an insurance disclosure.

14. Some are skeptical of the benefits of malpractice insurance and raise personal experience with premiums being increased, claims being denied, etc. Some do not believe the benefit of malpractice insurance for their practice justifies the cost.

15. One comment found it a "shame" that we have reached a stage where the State Bar has so little confidence in its members that it demands that attorneys "insure or warn," and asks whether this helps the profession look competent and reliable. One comment asks whether we need to develop "informed consent" forms to confirm that clients have knowingly assumed the risk of engaging the services of a California attorney, and whether malpractice is so prevalent that it is likely that any attorney service should come with a "warning label."

16. Insurance carriers should not be involved in regulation of the legal profession.

One comment states that a secondary level of lawyer regulation is effectuated independent of the statutes and rules governing lawyers, by insurance carrier exclusions. Certain activities that are permissible under the Rules of Professional Conduct can be excluded from coverage.

17. Some comments raise particular issues relating to *court-appointed* and *criminal defense* attorneys, including the following:

- a. The majority of one commenting attorney's law practice consists of court-appointed appellate work in state and federal court. Insurance coverage would be provided through appointing entities for that work. The comment states that the attorney should not be forced to pay the full cost of insurance or make a disclosure for situations where occasional private client seeks to retain the attorney.
- b. In the post-conviction criminal defense area, the proposal would hurt both clients and responsible counsel.

One comment notes that most of the attorney's work consists of court-appointed appellate work with malpractice coverage provided by the appellate project system. The attorney also has occasional private client. The likelihood of malpractice is remote, given the law's requirement of a complete exoneration as a prerequisite to malpractice relief. The proposed disclosure would be virtually meaningless and may scare away private clients. A private attorney in a law firm with lots of malpractice insurance may in fact provide a lower quality service.

- c. Malpractice insurance is not necessary for a lawyer who does only criminal defense work.
- d. One comment notes that the attorney's court-appointed appellate criminal work is covered if in the state system, but the coverage does not extend to federal habeas corpus matters.

18. Comments propose the following *alternatives* to *any* insurance disclosure rules.

- a. Mandatory insurance

Professional liability insurance should be mandatory. Several comments note the Oregon model. Some say that certain minimum limits should be required. One comment proposes mandatory insurance with something like an assigned risk plan for lawyers who cannot otherwise obtain insurance on the open market.

- b. Affordable insurance

The State Bar should come up with a means of low cost/affordable malpractice insurance for all of its members.

- c. Further study, including evaluation of establishment of a captive carrier

The State Bar should determine why over 18% of the active members in private practice do not maintain professional liability insurance coverage; evaluate whether the establishment of a captive professional liability insurance carrier would achieve coverage for all active members in private practice; and, if so, propose the enactment of appropriate legislation.

- d. Available insurance

One comment states the attorney is ready, willing and able to pay for coverage but has been unable to obtain coverage, despite efforts. She is a solo, part-time practitioner who practices in the areas of business law, estates and trusts, and trademarks. She has had no complaints against her and has not been subject to any disciplinary actions.

- e. Disclosure of different information

Several comments state that there are other potential disclosures that might be more relevant to the issue of consumer protection – and more important to a client – than the absence of insurance. Some advocate in favor of those disclosures, and others simply use those disclosures to illustrate the relative lack of importance of disclosures concerning insurance coverage. Among the other disclosures mentioned are: a) malpractice claims history; b) complaints made to the State Bar; c) whether the lawyer has ever tried a case before a jury or drafted a similar contract; d) the lawyer's win/loss record and other evidence of results obtained for clients in the past; e) criminal convictions; and f) past or current drug or alcohol problems.

One comment states that the State Bar should publish an annual report that specifically describes the aggregate amount of money that lawyers pay out of pocket for client protection, including attorney discipline, MCLE, the client protection fund, and (if the disclosure requirement is adopted) the full cost of malpractice insurance imposed on all lawyers in California. The comment notes that it might be too much to include the billable hours and dollars lost attending MCLE, but that would be informative also. One comment states that if the disclosure requirement is adopted, the State Bar should list its website the average cost of insurance for the typical lawyer, or perhaps list the average cost by type of practice, so that clients can appreciate what lawyers are in fact doing to protect the public.

- f. The State Bar should provide public education about malpractice insurance

The State Bar should post and publish educational material for consumers on malpractice insurance. If the goal is to educate people and better equip them to hire lawyers, then education is the answer. Requiring lawyers simply to state that they do or do not have coverage provides little education and does very little good for the public. The State Bar should conduct a public awareness program that helps clients select lawyers and suggests that insurance might be one of the questions to be asked of a potential lawyer.

One comment states that regardless of whether the proposed rules are adopted, public education about malpractice insurance should be emphasized. Greater emphasis should also be placed on lawyer education about malpractice and malpractice insurance.

- g. The State Bar should note publicly the cost of insurance and other related issues.
- h. The issue has not been adequately studied. Further study is warranted before taking any action.
- i. One comment proposes adopting a Rule of Professional Conduct that is triggered by a lawyer a) failing to satisfy a judgment for legal malpractice, including breach of fiduciary duty; and b) failing to establish that he or she took reasonable steps to be financially responsible to clients.
- j. One comment proposes adding a new subdivision to Rule 3-400 of the Rules of Professional Conduct, to provide that if a lawyer cannot satisfy a final judgment against the lawyer arising from liability for professional negligence, his or her license will be suspended until that judgment is satisfied.

B. Summary of comments in support of an insurance disclosure requirement

- 1. The absence of insurance coverage is a material fact.
 - a. Clients have the right to know material facts in making the decision to hire a lawyer, and whether to continue to use the services of a lawyer. The absence of malpractice insurance coverage is a material fact in that decision.
 - b. The disclosure requirements will only have an adverse impact on uninsured lawyers if one assumes many clients with the information

would not hire the lawyer, thereby making the case that the information is material.

- c. Many lawyers make mistakes during the course of their careers and some of those mistakes result in financial injury to clients. Clients often have no viable remedy when they have been damaged by uninsured lawyers. The absence and/or cessation of professional liability insurance coverage is therefore significant, potentially affecting the client's interest and willingness to hire or continue to use the services of the particular lawyer in question.
 - d. Comments provide examples of potential malpractice claims against uninsured lawyers, and state that the lawyer would not have been hired if the client had been informed about the absence of insurance.
2. Clients have a right and a need to know about their attorney's malpractice insurance status.
- a. Clients should have advance notice of the absence of insurance.
 - b. Some comments wrote about incidents of clients who assumed lawyers had insurance. Some say that many clients assume lawyers have professional liability insurance.
 - c. One comment discusses experience with an attorney being sued for malpractice who announced that he had no insurance and no assets in his name. The case, worth about \$500,000 in damages, went away as no contingency based lawyer would continue representation because of the difficulty of collecting any judgment. Client never imagined that a lawyer would ever practice without insurance.
 - d. By making the information available, the client has better information to make an informed decision in choosing an attorney.
 - e. If a client chooses not to hire an attorney because the attorney does not have insurance, that only means the client is making a better informed choice.
 - f. Some uninsured lawyers may lose clients, but they are not selling the same product as an attorney with insurance.

A fee may include a percentage to purchase insurance. The lawyer without insurance is not including within his or her fee the cost of insurance. Hence, the product sold to the consumer is different, and the consumer needs to be informed.

- g. Some comments discuss experience dealing with clients who have learned after legal malpractice has harmed them that their attorneys had no liability insurance or other resources to satisfy claims. Clients felt betrayed and defrauded under the circumstances.
3. The client's interest should come first.
 - a. Between the attorney who does not make a lot of money and the unsuspecting client who may be left without a remedy if the lawyer commits malpractice, the client's interest should come first.
 - b. Belated discovery by the client of the absence of insurance adversely affects the public, which is a more important consideration than the adverse impact of the disclosure rule on uninsured lawyers.
 - c. A client's right to be fully informed is more important to the integrity of the Bar than allowing a lawyer to be silent on the issue.
 4. Attorneys should adhere to a very high standard of professionalism.
 5. As professionals who must uphold the highest of fiduciary duties to clients, attorneys should be required to make the disclosures.

Clients may not have the level of sophistication to enable them to ask for relevant information. Failure to make the insurance disclosure should be viewed as a breach of fiduciary duty.

6. Clients should not be required to ask their attorney whether the attorney has insurance.
 - a. Most often clients will not ask if an attorney has insurance, not because they do not care, but because they do not know the potential benefits of malpractice insurance coverage.
 - b. Lawyers frequently interact with prospective clients who do not understand, or do not think about, the ramifications of the absence of insurance coverage at the commencement of the relationship. Many clients would be hesitant to start a relationship asking the lawyer if he or she has insurance.
7. Attorneys will not be forced to purchase insurance, so the proposal does not have a direct economic impact on attorneys who choose not to maintain insurance.
8. A client who does not receive an absence of insurance disclosure may not be fully protected, but will at least know if the attorney has taken

reasonable steps to provide some level of protection for the client's benefit.

9. Some attorneys who do not disclose the absence of coverage may be underinsured, but many drivers have minimum limits that do not provide adequate protection. Clients may be happier to recover something instead of nothing.
10. The proposal prevents a lawyer from hiding his or her possible judgment-proof status from a client.
11. The proposed rules may have the incidental benefit of causing more lawyers to be insured, but that is not the purpose.
12. One comment states that affordable malpractice insurance for solos is available through several insurance companies and that other options are available, including insurance pools, buying groups and other risk management techniques.
13. One comment sees "nothing wrong" with a disclosure requirement, but does not see requiring a method that would create expense and excess paper work.

II. Should the required disclosure be made directly to the client, to the State Bar, or to both?

A. Comments concerning disclosure directly to the client

1. Comments opposed to direct disclosure to the client

As discussed in Section IV, below, several comments express opposition to a Rule of Professional Conduct, which provides the *enforcement mechanism* for the direct disclosure to the client. A few comments were addressed solely to the issue of direct disclosure to the client, in and of itself.

- a. If a current or potential client wants to check on insurance coverage, a client is welcome to contact the State Bar. One comment specifically disagreed with the implication that direct disclosure is necessary because "less sophisticated" consumers do not have access to a computer to check the information on-line. Computers have become ubiquitous and a client can call the State Bar in any event to check on insurance status.
- b. Direct disclosure would be embarrassing.

- c. Direct disclosure will interfere with the relationship with a client (particularly disclosure to *existing* clients on the effective date of the new rules, as opposed to *new* clients after the effective date).

2. Comments supporting direct disclosure to the client

One comment says that direct disclosure to the client is the most important recommendation for adoption.

The disclosure requirement serves two purposes: a) to inform clients of whether a lawyer or prospective lawyer is insured; and b) to encourage lawyers to obtain insurance. Neither purpose is served if the information is kept secret from clients or if clients do not understand how to access the information.

B. Comments concerning disclosure to the State Bar, followed by public posting on the State Bar website

1. Comments opposed to disclosure to the State Bar, followed by public posting on the State Bar website

- a. Dual disclosure is overkill and unnecessary.

Requiring direct disclosure to the client (or potential client) would enable the client to personally question the lawyer regarding the circumstances surrounding any absence of insurance and enable the client to make a more informed consumer decision about whether the absence of insurance is an issue. Website posting will result in many consumers making potential engagement decisions base *solely* on the public disclosure, without being fully informed of the facts and circumstances surrounding the absence of insurance that might otherwise impact the consumer's decision to engage a particular attorney.

- b. It is of no concern to the general public if an attorney is insured or not.

Those who have no need to know whether an attorney has insurance should not have public access to the information. There is a potential for misuse and abuse of the information.

- c. The identity of uninsured attorneys should not appear on a database or on member information with public access because attorneys will receive solicitations for insurance.

- d. There is no excuse for trying to publicly embarrass or condemn licensed attorneys in good standing for simply refusing to maintain malpractice insurance.
 2. Comments supporting disclosure to the State Bar, followed by public posting on the State Bar website
 - a. The disclosure will have the benefit of making the information accessible to members of the public.
 - b. Disclosure to the State Bar followed by information on the website would seem to have minimal impact on practitioners.
- III. Should attorneys be required to disclose to clients 1) the presence *or* absence of insurance coverage, or 2) *only* the absence of insurance coverage?
- A. Comments opposed to disclosure of only the absence of insurance coverage
- Several comments opposed the disclosure of *only* the absence of insurance coverage, and argued in favor of disclosing *both* the presence *and* the absence of coverage. Comments differed with respect to the extent of the disclosure that should be required for attorneys who *do have* insurance coverage. Comments raise the following specific points:
1. The proposal is harmful to consumers because partial disclosure is often more deceptive than either full disclosure or no disclosure.
 2. Disclosure should be required across the board. Where the lawyer has insurance, the disclosure does not need to disclose all the details of the coverage. The client is free to ask the lawyer for additional detail.
 3. The only acceptable way to protect all clients is to either a) require all lawyers to carry and maintain a minimum level of approved coverage and/or b) require that an approved format of the actual coverage (or lack thereof) be communicated by all lawyers to all existing and potential clients.
 4. If insurance information is “material” and the client has a “right” to know, then all lawyers should be required to make a full disclosure so that clients can be fully informed.
 5. If consumer protection and “informed consent” are the point, all lawyers should be required to disclose the presence or absence of insurance and, if there is insurance, the amount of coverage.

The information provided to client would then relate to amount of capital a client puts at risk. A client who has a \$500,000 case with an uninsured attorney is in the same situation as a client who has a \$1,000,000 case with an attorney insured by a \$500,000 policy. An attorney could buy \$100,000 of coverage including defense costs and take on a \$1,000,000 representation. The disclosure or lack thereof becomes meaningless without reference to policy limits.

6. Some argue that disclosing the existence of insurance encourages litigation but the same can be said for disclosing the absence of insurance. The threat of exposing personal assets may lead to quick settlement.

B. Comments supporting disclosure of only the absence of insurance coverage

1. One comment states that for purposes of a new disciplinary rule, the focus of any new disclosure requirements should be on those lawyers who are not insured.
2. Clients with claims against *insured* lawyers have *some* recourse.

Clients who learn after the fact that they have no recourse against the uninsured lawyer whose mistakes have caused their losses do not feel they have been protected by the justice system and lose respect and confidence in the legal system. While no client is guaranteed that he or she will prevail on a claim against a lawyer or that a valid claim will be covered by insurance, the vast majority of clients with valid legal malpractice claims against insured lawyers have some recourse.

IV. What is the best method of enforcement for an insurance disclosure requirement, and what should the sanctions be for noncompliance?

A. Comments opposed to a Rule of Professional Conduct

1. Improperly elevates insurance disclosure to a disciplinary matter.
2. The ABA rejected the concept of mandatory disclosure in its proposed amendments to the Model Rules of Professional Conduct.
3. Insurance coverage has nothing to do with ethics.
4. Lawyers will need to be concerned about the possibility of a gap in coverage, when switching carriers or when obtaining coverage and failing to obtain coverage for errors and omissions occurring before the effective date of the new policy. Failure to notify clients of a gap, which may not be clear at the time it occurs, may subject lawyers to discipline.

5. Under certain circumstances the uncertainty of the rule could be used in civil litigation as a basis for an alleged professional liability claim. Although there may be no basis for discipline, the rule may be used as “evidence” of wrongdoing.
6. A coverage disclosure (i.e., a *failure* to disclose the *absence* of coverage) will be completely fraudulent as to those clients whose claims are ultimately not covered, for whatever reason.
7. Remedies should be civil, not disciplinary.

The former remedies under Business and Professions Code Sections 6147 and 6148 were adequate. Under those statutes failure to comply with the disclosure obligation rendered the fee agreement voidable at the option of the client, with the attorney thereupon entitled to collect a reasonable fee. This discouraged clients who were not damaged by the omission from seeking a windfall or forfeiture of a portion of the fees. If an attorney can be disciplined for failure to make a disclosure, the consumer gets no benefit from the discipline. Either the attorney has properly represented the client or not. If the attorney has committed malpractice, the client has the same remedy, with or without the disclosure. There is an increasing number of predatory clients attempting to manipulate the Rules of Professional Conduct so as to use the threat of a State Bar complaint to get an attorney to reduce or withdraw a legitimate bill.

8. It is a waste of time and money to bring failure to give notice into the discipline system.
9. Because the rule is self-reported and not verified, it encourages noncompliance. If no notice is given, the consumer will feel protected. There is no procedure to confirm coverage, the lack thereof or its inadequacy or lapse.

B. Comments supporting a Rule of Professional Conduct

1. Failure to disclose the absence of malpractice insurance is a material omission and therefore a matter properly covered by the Rules of Professional Conduct (as well as the Rules of Court).
2. The stated purpose of the rules is “to protect the public and to promote respect and confidence in the legal profession.” [Rule 1-100(A)]
3. Former Business and Professions Code Sections 6147 and 6148 required disclosure in the written fee agreement, but that is not required in all circumstances.

C. Comments opposed to a Rule of Court

1. An insurance disclosure requirement has no place in a Rule of Court. It has nothing to do with “court administration, practice and procedure.” [California Rules of Court, Introductory Statement]
2. Lawyers will need to be concerned about the possibility of a gap in coverage, when switching carriers or when obtaining coverage and failing to obtain coverage for errors and omissions occurring before the effective date of the new policy. Failure to notify the State Bar of a gap, which may not be clear at the time it occurs, may subject lawyers to suspension or discipline.

D. Comments supporting a Rule of Court

Failure to disclose the absence of malpractice insurance is a material omission and therefore a matter properly covered by the Rules of Court (as well as the Rules of Professional Conduct).

E. Comments opposed to a Rule of Professional Conduct and a Rule of Court, but supporting a statute

Any disclosure requirement should be placed in the context of the Business and Professions Code, along the lines that it previously existed. Former Sections 6147 and 6148 worked well and should be revived.

F. Comments proposing a specific penalty

1. One comment proposes that failure to disclose should make the lawyer liable for any judgment obtained, and failure to pay the judgment within a reasonable period of time should be a basis for presumptive disbarment. At the very least, continued practice should be contingent upon malpractice insurance coverage.
2. One comment states that the penalties associated with the lack of disclosure should be similar to that of commingling funds, as the integrity of the profession is compromised at the client’s expense

V. What categories of attorneys should be exempt from an insurance disclosure requirement?

The comments raised the following exemptions, not covered by the current proposal:

1. Attorneys who offer pro bono or low cost legal services.

One in-house lawyer who does minimal part-time representation, primarily pro bono, says he would abandon the limited outside practice to avoid the cost of insurance and posting on the State Bar website with the negative connotation that not having insurance will carry.) One comment asks what happens with government or in-house attorneys who also do pro bono work?

2. Attorneys whose income is below a designated amount.

3. Free legal advice

One comment asks what happens if a government or in-house attorney who is otherwise exempt provides free legal advice (e.g., advice given at a party), and whether there should be an exemption for free legal advice.

4. Practice that is *similar* to in-house counsel.

One comment comes from an attorney who consults with two entities and provides services that include writing articles, writing proposed legislation, and presenting workshops. He does no litigation and does not represent individuals. He primarily consults with the Executive Director of a statewide professional association on legal and legislative issues. He says his practice is similar to “in-house” counsel except he is not a W-2 employee.

VI. Suggested revisions to the proposed new insurance disclosure rules

A. The comments suggest several revisions to the proposal, some more substantive than others.

1. The rules should be prospective only, given:

- a. Time and expense

Notice of the absence of insurance should be required only for new clients retained after the implementation date. Notifying existing clients could involve a significant amount of time, and the cost of notifying existing clients may be prohibitive.

b. Interference with the relationship between the attorney and client

Requiring notice to existing clients will negatively intrude into an already existing relationship. Clients may be angry or suspicious for not revealing the information sooner, and only revealing it when required to do so by the State Bar. This sets up the attorney for other potential problems. The notice requirement could create confusion for clients who receive notice of absence of insurance in the middle of litigation. There may be a backlash when clients receive notice and decide to seek new counsel.

c. Unclear definition

As discussed in Section VI, below, some comments state that the definition of clients for whom an attorney is “currently rendering legal services” is not clear, but offer suggested alternative language.

2. The effective date should be a delayed.

a. Notice to existing clients

The effective date of the written notice to existing clients should be deferred for 2 – 3 years. The notice can be disruptive to an existing relationship. A decent interval is needed so the insurance market can adjust.

b. Notice to new clients

There should be a period of time to allow the insurance markets to adjust, 1 – 2 years before the requirement becomes effective for new clients.

3. There should be a minimum fee threshold.

Disclosure of the absence of insurance should only apply when fees received per case are above a designated amount. Some suggest \$1,000, the amount under Business and Professions Code Section 6148 that triggers the requirement for a written fee agreement.

4. There should be options in addition to insurance coverage that permit a non-disclosure.

- a. Self-insurance

Adequate self-insurance is in the public interest and should be recognized in the rules instead of leaving the impression that firms and individuals that self-insure offer no protection to clients. Keeping money in a protected account is preferred over paying insurance premiums. There is a greater motivation not to commit malpractice if personal assets are at risk.

- b. Other options, such as those permitted for automobile insurance. [Note: For drivers, California has three types of financial responsibility, in addition to insurance: a) cash deposit with the DMV; b) adequate self-insurance; and c) a surety bond.]

- c. Law corporations that maintain security for claims in accordance with the State Bar's rules should be allowed to represent that they are in effect "covered" or "self-insured" (i.e., they should not be required to disclose an absence of insurance).

5. The requirement for a signed acknowledgment from the client should be deleted.

Proposed Rule of Professional Conduct 3-410 requires a lawyer to obtain the client's signed and dated acknowledgment of receipt of notice of non-coverage. That would put the issue on a par with Rule 3-300 regarding disclosure and documentation of potentially conflicting interests. That places too much emphasis on the issue and suggests that lack of insurance is a serious matter. It is difficult to get client to sign and return a document. Until the lawyer receives the signed acknowledgement back from the client, he could not perform legal services without violating rule. The requirement is a recipe for mischief.

6. Consideration should be given to tying the disclosure rules to certain *minimum* insurance policy limits.

Once the disclosure requirement is in effect, the market may be targeted with policies that have very low limits, which would permit an attorney not to disclose the absence of insurance. Comments express concern that offshore or other unlicensed insurers may offer extremely low limits of insurance or otherwise lack sufficient financial wherewithal, thus making the insurance coverage illusory to the client.

7. Rule 950.6 should be redrafted so it requires attorneys to disclose to the State Bar whether they are covered by insurance *only when* they “represent clients or provide legal advice to clients” (similar to the structure of the rule in several other states).

As proposed, the rule requires a member to certify to the State Bar “whether the member represents clients” but does not explain the significance of providing that information. The rule does not define “represent clients.” Some understand it to mean represent clients in litigation or administrative proceedings, which is too narrow. Full-time ADR neutrals – who do not “represent clients” – should not be treated for purposes of Rule 950.6 in the same way as attorneys who do represent clients.

8. The term “covered by” professional liability insurance is problematic without reference to other factors (nature and timing of the claim, policy terms, etc.), and raises possible legal coverage issues.
 - a. The language should be amended to require notice if a member “does not have professional liability insurance.”
 - b. One comment states that for lawyers who obtain a professional liability insurance in which they are the “named insured” there can be little doubt about whether they are “covered by professional liability insurance.” For most lawyers, who rely upon policies obtained by law firms, there can be substantial reasons for uncertainty in a number of situations. The comment’s proposed solution is to:
 - i. Add a provision that would clarify the type of information (short of an insurance policy issued in the lawyer’s own name) that would suffice as the basis for a reasonable and informed belief the lawyer is “covered by professional liability insurance.” The comment proposes that a lawyer may rely on such coverage if the lawyer after written inquiry to the member of the law firm to whom the policy was issued has a) been advised in writing that the attorney has coverage; or b) been given a copy or written summary of the policy provision that afford coverage and on that basis reasonably believe that the individual lawyer has coverage; and
 - ii. Add a provision imposing on a lawyer who is in possession of information relevant to the professional liability coverage of another lawyer with whom he or she is affiliated an obligation to provide the other lawyer with information that will enable him or her to fulfill his or her disclosure obligations. This could be satisfied by giving the other lawyer a copy or written summary of the policy provisions.

- c. One comment suggests broadening Rule 3-410 to require disclosure only if the attorney is not covered under *any* professional liability insurance policy *whatsoever* (by adding the word “any” in front of professional liability insurance).
9. There is uncertainty in Rule 3-410(C) about the meaning of “currently rendering legal services.”
- a. One comment notes the uncertainty and states that the term is not adequately explained in the discussion section of the rule. It is not clear whether lawyers who have dormant files, but still monitor developments in the law and periodically contact clients (e.g., estate planning lawyers) would be covered. The comment suggests revising the rule to denote *activity*, with language such as: “actively performing current legal services.” The discussion could explain that the rule does not apply to dormant files of existing clients, but if a file is dormant, notice should be required within a certain number of days after the file becomes active, if notice has not already been provided.
 - b. One comments suggests the following alternative language for the rule: “A member who does not have professional liability insurance shall comply with paragraph (A) with respect to the member’s current clients within thirty days after the effective date of this rule.”

The same comment suggests that the following comment be added to the rule: “Paragraph (C) is intended to require written notice to the member’s current clients for whom the member is rendering legal services as of the effective date of this rule. Notice is not required under paragraph (C) if the member has completed the legal services the member was retained to perform; for example, the completion of the preparation of or the incorporation of a client’s business. However, the member must comply with paragraph (A) if the member renders additional services in the completed matter after effective date of this rule or the same client retains the member in another matter.”

10. The deadline to notify existing clients should be extended.

For some lawyers, it may be unduly burdensome or even impossible (given trials or other exigencies) to notify existing clients within 30 days after the effective date of the new rule. Extending the deadline to 60 days may also enable more lawyers to purchase insurance prior to the effective date.

11. The title of Rule 3-410 should be changed to “Disclosure of Professional Liability Insurance” for a more complete description of the subject matter.

12. The first sentence of Rule 3-410 should be changed to read: “A member in private practice shall not accept a representation, if the member does not then have professional liability insurance unless the member first informs the client in writing of that fact.”

It is preferable to identify the class of lawyers intended to be covered by the proposed rule up front (members in private practice). The phrase “accept a representation” tracks current Rule 3-310(C)(1) and is more precise than “at the time of the client’s engagement of the member.”

13. If the client’s acknowledgement of the notice provided by the lawyer is to be included in the proposed rule, the rule should be specific on when the client’s signature must be obtained.
14. Consider adding a provision that requires a lawyer to obtain proof of service of the written notice to the client and retain that proof and a copy of the client’s written acknowledgement for two years following termination of the lawyer’s employment with the client.
15. Amend the provisions relating to the exemption for government and in-house counsel so the rule reads as follows: “This rule does not apply to a member who is employed as a government lawyer and who does not engage in the practice of law in any other capacity. This rule also does not apply to a member who is a corporate or in-house counsel who does not engage in the practice of law in any other capacity and who does not represent a client other than the member’s employer.” Comment also proposes a related change to the rule’s discussion.
16. Add a comment stating: “For purposes of this rule, professional liability insurance means insurance that provides the member coverage for the member’s acts or omissions as a lawyer in the provision of legal services.”

To the extent that the rule and the comments do not relate professional liability insurance to the practice of law, lawyers engaged in a dual profession or ancillary business practice could arguably satisfy the rule by having professional liability insurance that covers the lawyer’s non-legal services without affording coverage for legal services.

17. Modify the language in the comment that refers to permissive disclosure to clients so it refers to “legal malpractice insurance that covers the legal services I am providing you in this matter” instead of “professional liability insurance.”

More often it will be unsophisticated consumers of legal services who will find themselves consulting with uninsured attorneys, and the disclosure should be targeted to that audience.

18. The State Bar website should provide explanations concerning the absence of insurance.

One comment asks whether there will be space on the website for a member to explain why the lawyer chooses not to maintain coverage. Some comments suggest adding to the “official language” or otherwise noting certain information, including the following a) there is no requirement to have insurance; b) there is nothing wrong with having no insurance and no negative inference is to be drawn from an attorney being uninsured; c) lack of insurance is an incentive to better performance; d) by not purchasing insurance, a lawyer is able to keep overhead at a minimum, which enables the lawyer to keep his or her rates and practice available to more people; d) malpractice insurance is rarely called into action, but it is expensive and must be paid for by the clients of those lawyers who have insurance.

B. In addition to proposed drafting revisions, the comments raise several questions that suggest potential drafting revisions or clarifications.

1. When judges appoint private attorneys, typical in criminal cases and some dependency cases, does the attorney have an obligation to notify the client about malpractice insurance?
2. When government lawyers represent private parties, such as in dependency or government tort cases, is disclosure required?
3. Will the rule be violated if an attorney, without overt agreement with the client, is later held to have entered into an attorney client relationship by conduct or implied contract?
4. What happens when part of an attorney’s practice is covered by insurance but other parts are not?

Some lawyers (primarily contract lawyers) purchase professional liability insurance coverage that is limited to particular clients or cases that they handle in conjunction with a law firm. Some lawyers may have insurance coverage for some of their legal work, but not for their entire practice. How would those situations be reported to the State Bar and the public? If they are not reported as an *absence* of coverage, it would potentially be misleading.

5. How does the rule apply to self-insured retentions?

Large firms may have large self-insured retentions that must be paid before insurance is triggered. One comment assumes that the rule would

not require a disclosure of the *absence* of insurance in that case, but states that the issue should be made clear.

6. What about the innocent attorneys who do not place the coverage for their firm and do not know that their coverage has lapsed? What if they are told they are covered and they are not? Is innocent failure to disclose an exception?
7. What about attorneys who have sporadic coverage? Will the website show the periods they had coverage and when they did not have coverage? What happens if they purchase coverage that goes back in time (prior acts coverage)?
8. What if an attorney had coverage and it is exhausted?
9. When contract attorneys are hired by other attorneys to assist on cases, would the other attorney be considered the “client” under the rule? Would either attorney have any obligation to disclose to the actual client the contracting attorney’s insurance status?