**Bercovitch, Saul**

**From:** Feedback
**Sent:** Monday, September 24, 2007 9:57 AM
**To:** Bercovitch, Saul
**Subject:** FW: Proposed State Bar Insurance Rule on Disclosure to Clients re Professional Malpractice Insurance

-----Original Message-----
**From:** kirkellis35@sbcglobal.net [mailto:kirkellis35@sbcglobal.net]
**Sent:** Friday, September 21, 2007 6:09 PM
**To:** Feedback
**Subject:** Proposed State Bar Insurance Rule on Disclosure to Clients re Professional Malpractice Insurance

PLEASE PROVIDE THE FOLLOWING INPUT TO THE CHAIRPERSON OF THE COMMITTEE THAT IS DEALING WITH THE PROPOSED RULE REQUIRING LAWYERS TO DISCLOSE THE EXISTENCE (OR LACK) OF MALPRACTICE INSURANCE TO CLIENTS, BECAUSE THIS PROPOSED RULE PRESENTS VERY REAL PRACTICAL PROBLEMS AND SHOULD NOT BE VIEWED LIKE A "MOTHER AND APPLE PIE" SOLUTION TO ANY MEANINGFUL PROBLEM (BECAUSE NO SUCH PROBLEM IN FACT EXISTS):

Those who have recommended this practice aren't taking into proper account the potential adverse impact on quasi retired or other part time lawyers, who may wish to help someone out and earn a few dollars in the process, but who don't want to be forced to incur the substantial expense associated with malpractice insurance coverage in exchange for the ability to do a little bit of legal work. Or the clear fact that disclosure of the type in question won't guarantee anything, and, in fact, might actually serve to mislead and otherwise injure clients.

Indeed, the real issue ISN'T one of the need for disclosure, as anyone with a scintilla of sense would realize, since there IS a fund available in this situation that is funded by ALL California lawyers paying FULL dues instead of pro rata dues, based on the time actually worked.

In addition to the fact that DISCLOSURE OBVIOUSLY IS NOT NEEDED, PARTICULARLY WHEN AN ATTORNEY FUNDED STATE BAR FUND ALREADY EXISTS TO COVER MALPRACTICE IN THESE SITUATIONS, if the rule is to be imposed notwithstanding the fact that it very clearly isn't needed, I have 2 suggestions (and some related comments) if it is to be adopted despite the fact that reason and common sense dictate a contrary result.

First, allow quasi retired and other part time lawyers to pay lesser dues to the State Bar than those who work full time. [For example, suppose someone works

20 hours per year. Clearly, that amount of work would not justify the lawyer incurring the cost of malpractice insurance coverage. So, if the rule were to be imposed, a fairer way of calculating the dues payable by lawyers would be to create a fraction, the numerator of which is 20 (the estimated number of hours that will be worked during the year) and the denominator of which is 2,000 (40 hours per week, multiplied by 50, on the assumption that the lawyer will work full time but take a 2-week vacation annually); multiply that fraction times the current dues charge; and charge the part time lawyer only that lesser amount for continuing membership (from which he/she clearly derives VERY LITTLE TO NO BENEFIT at the present time anyway). The fee reduction that results would help the quasi retired or part time lawyer defray some of the costs of the malpractice coverage.]

Second, if the lawyer discloses that he/she is covered by malpractice insurance, require disclosure of the insurer and its AM Best rating (providing, with the latter, an explanation of what the rating actually means). Accompanied with that disclosure should be disclosure about the policy limits and deductibles, whether the policy in question is a "claims made" or occurrence policy, and whether it has been fully paid for. [Why? Because, absent such disclosure, the client (who could always ask the lawyer before hiring him/her if the client really cares about the answer, one way or the other) will have absolutely no way of knowing how likely the insurance will be to have the resources to pay out if there is a problem. Moreover, my possibly incorrect understanding is that most if not all malpractice insurance is "claims made" coverage. And, if that sort of coverage is all that is maintained, it will do the client absolutely NO GOOD if the client learns about and pursues the problem after the policy expires or is cancelled. Additionally, how often will the lawyer be required to provide such information to the client, since disclosure on one occasion for an on going client obviously will have NO bearing on future periods unless annual or more frequent disclosure is required?]

Please note that my particular concern relates to part time lawyers because I myself am retired but work very occasionally. Clearly, my level of experience and expertise is well beyond that of those who have practiced in similar fields for much less time. However, I am not about to pay for a malpractice policy in light of the very small amount of work I do. In short, this proposed rule, which makes no attempt to ameliorate the financial impact by reducing dues, would deprive clients of a potentially very valuable asset—a savvy "old" lawyer, who knows the ropes but has elected to work only on a very limited basis (almost always because a client has specifically requested his/her help).

Thank you,

G.Kirk Ellis, Esq.

3/20/2008

kirkellis35@sbcglobal.net

## Bercovitch, Saul

**From:** Davidjmurraylaw@aol.com
**Sent:** Sunday, October 14, 2007 1:41 PM
**To:** Bercovitch, Saul
**Subject:** Insurance Disclosure Rule

Dear Mr. Bercovitch:

I am a solo practitioner and have been one for many years. This rule seems so weighted towards medium and large firms. Another rule to discourage and tax solos. Yes, I have insurance even though I have never had a claim of any kind. The coverage is expensive. The proposed rule seems basically unfair. Solos already have their entire life savings on the line if they choose no insurance and that is why they are more careful in general. Finally, it is a written invitation for a dissatisfied client to sue if they know you have insurance.

Sincerely,

**LAW OFFICES OF DAVID J. MURRAY**

David J. Murray SBN 158591

## Bercovitch, Saul

**From:** Roger Chittum [rdchittum@earthlink.net]
**Sent:** Saturday, November 03, 2007 4:31 PM
**To:** Bercovitch, Saul
**Subject:** Re: Proposed New Insurance Disclosure Rules

**Attachments:** Picture (Device Independent Bitmap); Roger D Chittum.vcf

Dear Mr. Bercovitch:

The proposed new Insurance Disclosure Rule (3-410) should not be adopted because it would mandate disclosures that are likely to mislead clients, especially unsophisticated clients.

I agree that some clients might feel better knowing that if his new lawyer does commit malpractice the lawyer, her firm, and/or an insurer will be able to indemnify the client for damages he suffers. A simple statement that the lawyer "has" professional liability insurance (or the absence of a required disclosure that the lawyer does not "have" insurance) tends to give that assurance. But there are several reasons why that assurance is likely to be misleading or even illusory.

Most clients, even sophisticated business clients, do not understand that typical malpractice insurance is claims-made. Unless the lawyer has insurance both at the time of the malpractice and at the time of discovery and presentation of the client's claim, the client's claim will not be covered. The client will have been misled by the threshold disclosure that the lawyer "has" insurance.

The proposed rule that a lawyer must advise an active client if and when she no longer has professional liability insurance would, in theory, give the client an opportunity to shift the representation to an insured lawyer. But this is a largely illusory opportunity because there are usually distinct disadvantages to substituting counsel. And, as stated above, any errors already committed will not be insured.

Most clients do not understand that typical malpractice insurance provides for defense and indemnity within a single limit and that a lawyer with insurance may, therefore, mount a more vigorous, professional, disinterested, and costly defense of a claim than a lawyer without insurance. And a remorseful lawyer is prevented by terms of the insurance policy from quickly negotiating a settlement that satisfies the client and protects the lawyer's reputation. For both reasons, the existence of insurance may make it *less* likely that a claim will be promptly or fully paid or fairly compromised.

If they think about it at all, most clients will assume that the limits of the malpractice policy are high enough to indemnify the client fully, but that may very well not be the case. The proposed rule does not require disclosure of the insurance limits, which can lawfully be a tiny fraction of the potential malpractice exposure. Indeed, we can reasonably predict that members who obtain malpractice insurance because the proposed rule is adopted will opt for the lowest available limits, perhaps just enough to fund a strong defense.

The proposed rules should be rejected and the project to reconsider insurance disclosure tabled for another decade.

Respectfully submitted,

Roger D. Chittum

**Roger D. Chittum**
Legal Affairs Management

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Facsimile (323) 876-5141
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2657 Larmar Road
Los Angeles, CA 90068

Roger D
Chittum.vcf (7 KB)

# J. Grant Kennedy

Lawyer



**RECEIVED**

NOV 16 2007

Office of the Executive Director
The State Bar of California



141 Duesenberg Drive, Suite 10
Westlake Village, CA. 91362
Tel: 805.374.0010
Fax: 805.374.0048


November 6, 2007

Board of the California State Bar
180 Howard ST
San Francisco, CA 94105-1939
sent by Fedex 2 day delivery

Greetings To The Board of the California State Bar:

I recently read in the California Bar Journal, November 2007, that the board is dealing with the issue of malpractice insurance disclosure again. I would like to focus on "burning" insurance policies. I presume you are familiar with these policies, the concept has been around for some time. It simply means, for example, where there is a $100,000 policy it "burns" the insurance money first to *defend* the lawyer, leaving potentially nothing for the client. Dollar by dollar spent the promise or disclosure of an insurance policy becomes false. To tell a client there is "malpractice" insurance as an inducement to the client to feel protected and then to have the reality be that the policy is used to defend the attorney first, potentially leaving nothing for the client, creates an absolute fraud on the client. A quick refresher on the elements of fraud will establish this assertion. It is, a knowingly false statement intended to induce reliance with concealment involved. The injustice of misleading the public into feeling protected by disclosure of insurance that in truth is used to defend the lawyer must be understood by the Board of the State Bar of California.

In the real world this fraud is used as a battering ram against the victim client. Victims have the choice to take pennies on the dollar or take nothing as the policy will "eagerly" be evaporated by the defending attorneys. If the State Bar can do something about this you would be real heros. If not, I am most anxious to put this before a jury. Maybe I will show them this letter. At a minimum, the bench and appropriate experts should know that reasonable efforts for change were made and that a wrong is being allowed. This fraud has been allowed for too long.

Your best efforts to stop this abuse will be appreciated.

Sincerely,

The Law Offices of J. Grant Kennedy
By:______________________
J. Grant Kennedy

## Bercovitch, Saul

**From:** Bsdlaw@aol.com
**Sent:** Friday, December 21, 2007 3:45 PM
**To:** Bercovitch, Saul
**Subject:** Proposed Insurance Disclosure Rule

We believe that the proposed insurance disclosure rule is misleading to consumers. Many consumers would be led to believe that any claim against their attorney would be covered, when in fact if the attorney commits an act of misfeasance or malfeasance the insurance policy limits may not be enough to cover the claim, especially if it is an "eroding defense costs" policy, or if the claim is excluded under the subject policy for one reason or another.

The proposed rule does nothing to make E & O insurance coverage more affordable to attorneys, the vast majority of whom are practicing uninsured because the premiums are prohibitively expensive, especially to small practices or solo practitioners.

The proposed rule immediately puts an adversarial atmosphere interjection into the attorney client relationship. It will increase the filing of legal malpractice suits.

No other profession in this state has a professional liability insurance requirement: there is none for physicians, plumbers, accountants, real estate brokers or any other profession.

This is a "feel good" PR salve concocted by the State Bar to deal with a non-existent problem, that being an erroneous perception that the public needs to be protected or even wants such a requirement.

What is the State Bar going to do to make malpractice insurance more affordable to attorneys if they pass this rule? -- I predict: NOTHING.

Lawrence A. Strid
LAW OFFICES OF BURGE & STRID
23193 La Cadena, Suite 101
Laguna Hills, CA 92653
PH: (949) 699-4160
FAX: (949) 699-4161
e-mail: bsdlaw@aol.com
website: www.bsdlegal.com

**Bercovitch, Saul**

**From:** John D. Harwell [jdh@harwellapc.com]
**Sent:** Friday, December 21, 2007 4:04 PM
**To:** Bercovitch, Saul
**Subject:** 3-410

I have been a solo practitioner since 1991. Not a minute has gone by when I have not had malpractice insurance. I have had a client be told by a previous lawyer (who had done poorly) "so sue me, I don't have insurance."

Not a good image of our profession. I urge adoption of 3-410 so clients may know with whom they choose to work on important matters.
John D. Harwell
Attorney at Law
225 27th Street
Manhattan Beach, CA 90266
Tel: (310) 546-7078
jdh@harwellapc.com

## Bercovitch, Saul

**From:** msnitow@gmail.com on behalf of Martin Snitow [snitow@aya.yale.edu]
**Sent:** Friday, December 21, 2007 4:15 PM
**To:** Bercovitch, Saul
**Subject:** Proposed Insurance Disclosure Rule (Revised)

To the State Bar of California:

I have previously submitted comments opposing the adoption of proposed rules governing disclosure by attorneys of the absence of professional liability insurance. Now I am pleased to say that all of my objections have been resolved by the December 13, 2007 draft of proposed Rule of Professional Conduct 3-410. I support this version of the proposal and commend the State Bar for the efforts devoted to reach this sound result.

--
Martin S. Snitow
State Bar No. 085308
PO Box 90278
San Jose, CA 95109-3278

snitow@aya.yale.edu
www.msslc.com

**Bercovitch, Saul**

**From:** Pierce, Michelle
**Sent:** Friday, December 21, 2007 4:22 PM
**To:** Bercovitch, Saul
**Subject:** FW: insurance disclosure

-----Original Message-----
**From:** Joe Marman [mailto:marmanla@localnet.com]
**Sent:** Friday, December 21, 2007 3:27 PM
**To:** Pierce, Michelle
**Subject:** insurance disclosure

I do not think the State Bar should require this disclosure, since insurance is prohibitively expensive to many sole practitioners. If the State Bar wants insurance for its members , they should work with an insurance company and provide a policy that is affordable to all members.

Joe Marman
(916) 721-3324
Fax 721-3633
marmanla@localnet.com

## Bercovitch, Saul

**From:** Gerald McNally [gm@mcesq.com]
**Sent:** Friday, December 21, 2007 4:47 PM
**To:** Bercovitch, Saul
**Subject:** Comments on Proposed Rule 3-410

Dear Mr. Bercovitch:

I see nothing in the revised draft to change my opposition to this rule. This discriminates against solo and small firms and will have the effect of pricing services to the underserved portion of California residents to a point beyond their reach.

It would have the effect, whether disclosed or not, of putting a giant bulls-eye on the back of every small-firm lawyer in California. The bulls-eye either says,

1. "You don't have to pay your legal fees; you can just allege malpractice (whether justified or not), get the insurance carrier involved and walk from your fees." Turning the small-firm lawyer involuntarily into a pro-bono attorney.

or

2. "I don't have insurance. You better not hire me, because I'm irresponsible."

This proposal is a wonderful way for the big firm lawyers to ensure that the small-firm lawyers STAY small-firm lawyers.

Now if the State Bar devoted the same energy to developing an **affordable** small-firm liability insurance plan, so that every lawyer in the state could afford insurance, this proposal might have some merit.

Gerald McNally, Jr.
Attorney at Law
McNally & Associates, P.C.
206 N. Jackson St. #100
Glendale, CA 9106-4330
818-507-5100, fax 507-5001

## Bercovitch, Saul

**From:** Esqsy@aol.com
**Sent:** Friday, December 21, 2007 5:04 PM
**To:** Bercovitch, Saul
**Subject:** Ins Disclosure

When doctors, accountants, contractors, veterinarians, manicurists, therapists, and other service providers licensed by the State are required to maintain and disclose insurance coverage -- that's when lawyers ought to be required to do so.

Lawyers are held to standards higher and more onerous than any other professionals. We are required to continue to represent our client even when we don't get paid. All this is unreasonable. It creates anxiety and stress, it precludes open discourse and counseling, it creates a conflict between client and lawyer from the start, it makes lawyers spend more time CYA-ing than practicing law. It creates an undue burden on solo practitioners. The disclosure requirement can send a message to the client that the lawyer is incompetent or unsure of himself. You can obtain excellent results and still be sued; so, why invite it by the disclosure requirement.

Stephany Yablow
Studio City, California
(818) 761-7010

**Bercovitch, Saul**

**From:** Robert Mills [rwm@millslawfirm.com]
**Sent:** Friday, December 21, 2007 5:17 PM
**To:** Bercovitch, Saul
**Subject:** Proposed New Insurance Disclosure Rule (Revised)

Dear Saul:

I am passionately opposed to the new insurance disclosure rule. This is one of the most moronic ideas the State Bar has ever come up with. I will forever vote against any running for State Bar Governor who ever voted for or had anything to do with this proposal.

My two man firm handles only class actions. None of our clients has more than a nominal amount at risk, so they don't care about malpractice. Because the lazy State Bar does nothing to help its members get affordable group coverage, when I priced insurance, the quotes were $50,000 a year for a mere $500,000 of coverage with lots of wiggle clauses. That's absurd. I would prefer to self insure.

This unnecessary proposal has been debated to death so I will not belabor the multitude of reasons why it makes no sense and why its dubious benefits are vastly outweighed by its intrusive, coercive, and misleading aspects.

Thanks for the opportunity to express my views.

*Robert W. Mills*
**millslawfirm.com**
145 Marina Blvd.
San Rafael, CA 94901
(415) 455-1326
(415) 455-1327 facsimile

**Bercovitch, Saul**

---

**From:** Davidjmurraylaw@aol.com
**Sent:** Friday, December 21, 2007 5:26 PM
**To:** Bercovitch, Saul
**Subject:** "Revised" insurance rule

Dear Mr. Bercovitch:

The revisions mean nothing. This rule is still aimed right at the solo practitioner. I still say a solo's personal assets are on the line with every case he takes on. So why force him to pay an insurance company. I do not like the rule at all. Of course, I believe at this point "the fix is in" so I have obtained malpractice insurance rather than compete for business clients without it.

Sincerely,

**LAW OFFICES OF DAVID J. MURRAY**

David J. Murray

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## Bercovitch, Saul

**From:** Chris Cockrell [ccockrell@bpclaw.com]

**Sent:** Friday, December 21, 2007 5:28 PM

**To:** Bercovitch, Saul

**Subject:** RE: Proposed New Insurance Disclosure Rule (Revised)

Thank you for updating me on the status fo the proposal(s) regarding discslosure of insurance coverage.

I have a concern relative to 3-410(D) pertaining to a lack of definition of what constitutes an "emergency." If I have a client who comes to my office on a Monday with opposition to a motion due on a Wednesday or the case is lost with all the money lost as well, can I claim I need not disclose the information because I thought it was an emergency? Because there was only 36 hours to file an opposition? Well that is a lot longer than the four hour requirement in (A). Would like to see a better definitino of emergency or every attorney will look to that as an escapel clause.

Chris

Christopher L. Cockrell, Sr.
Borton Petrini, LLP
290 North "D" Street, Suite 500
San Bernardino, California 92401
909-381-0527 Voice
909-381-0658 Fax



---

**From:** Pierce, Michelle [mailto:Michelle.Pierce@calbar.ca.gov]
**Sent:** Fri 12/21/2007 3:16 PM
**To:** undisclosed-recipients
**Subject:** Proposed New Insurance Disclosure Rule (Revised)

We are writing because you previously submitted comments in connection with the proposed new insurance disclosure rules that the State Bar released for public comment. A revised proposal has now been released for public comment, and is available on the State Bar's website (calbar.ca.gov). You can access that proposal by going to the "Public Comment" page, clicking "2008" and then clicking on "Proposed New Insurance Disclosure Rule (Revised)." You can also go directly to the proposal at http://calbar.ca.gov/state/calbar/calbar_generic.jsp?cid=10145&n=90024

The website has the text of new Rule of Professional Conduct 3-410, as currently proposed, along with additional background information and instructions for submitting comments. As noted in the public comment posting, this is the third time that the insurance disclosure proposal is being released for public comment. During the first and second public comment periods, the State Bar received extensive comments that addressed a wide variety of issues, ranging from the basic concept of the insurance disclosure proposal to suggestions for technical amendments. Those comments have been fully considered. This third public comment period is focused on the differences between new Rule of Professional Conduct 3-410, as currently proposed, and new Rule of Professional Conduct 3-410, as proposed by the

Insurance Disclosure Task Force. The proposed changes are summarized in the public comment posting.

Only written comments will be accepted.

Comments should be directed to:

Saul Bercovitch
Staff Attorney
The State Bar of California
180 Howard St.
San Francisco, CA 94105
Fax: (415) 538-2515
E-mail: saul.bercovitch@calbar.ca.gov

The comment deadline is Monday, March 17, 2008.

Thank you for the comments you submitted and for your interest in this proposal.

Michelle Pierce
Administrative Assistant II
The State Bar of California
180 Howard St.
San Francisco, CA 94105
Phone: (415) 538-2053
Fax: (415) 538-2515
E-mail: michelle.pierce@calbar.ca.gov

## Bercovitch, Saul

**From:** William Ramseyer [wmr83@earthlink.net]
**Sent:** Saturday, December 22, 2007 8:26 AM
**To:** Bercovitch, Saul
**Subject:** Proposed new rule 3-410

The revised rule is a major improvement, but the entire issue is still discrimination against small and solo practitioners who cannot provide affordable services with the added burden of expensive insurance. There should be a Bar sponsored insurance pool set up before there are any more attempts to require disclosure.
William Ramseyer

## Bercovitch, Saul

**From:** ddern@dixlaw.com
**Sent:** Saturday, December 22, 2007 11:42 AM
**To:** Bercovitch, Saul
**Subject:** Insurance proposal

When I served of the State Bar Board of Governors I (and others who joined with me) successfully blocked introduction of a proposal such as this, but apparently that was a temporary victory. I have objected to this proposal before and wish to do so again because it basically gives the insurance industry a great weapon to keep their fees as high as they wish. For example, I practice in the entertainment field, but unlike some of my colleagues, do not represent high profile actors and the like (where a high premium might be justified); instead I represent mainly corporations. Yet, I am classified as a high risk, and pay several times what the average practitioner may pay. This proposed rule is just another paycheck for the insurance guys! If it is to remain it should be limited to those situations where real harm might occur, namely individual representation in consumer cases, possibly family law, and the like. Certainly, disclosures to corporations and other business entities are not warranted. From the changes made since the last proposal, it appears that those of us who legitimately oppose this measure are not being heard, but I will try again. Dixon Q. Dern

DIXON Q. DERN, P.C.
1262 Devon Ave.
Los Angeles, CA 90024
Telephone 310-557-2244
Facsimile 310-275-7655
ddern@dixlaw.com

**Bercovitch, Saul**

**From:** Anju Multani [multanilaw@yahoo.com]
**Sent:** Sunday, December 23, 2007 9:02 AM
**To:** Bercovitch, Saul
**Subject:** Fw: Insurance proposal

Anju Multani
Law Offices of Anju Multani
8333 Iowa Street, Suite 201
Downey, California 90241
Telephone: (562) 923-0777; Facsimile: (562) 923-3151
Email: Multanilaw@yahoo.com

----- Forwarded Message ----
From: Anju Multani <multanilaw@yahoo.com>
To: saul.berkovitch@calbar.ca.gov
Sent: Sunday, December 23, 2007 8:49:03 AM
Subject: Insurance proposal

Mr. Berkovitch
The only winners in the envisioned situation, are, once again, the insurers. Small, solo practitioners such as I cannot afford the premiums charged by the insurance industry. I cannot pass on this cost to the low income clients I serve. And, if the proposal passes, it will indeed leave a large gap in the provision of services to those who do not qualify for legal aid, and yet cannot afford the expensive lawyers. Laissez faire!
Thank you

Anju Multani
Law Offices of Anju Multani
8333 Iowa Street, Suite 201
Downey, California 90241
Telephone: (562) 923-0777; Facsimile: (562) 923-3151
Email: Multanilaw@yahoo.com

**Bercovitch, Saul**

**From:** Ronald Blubaugh [roncarola@sbcglobal.net]
**Sent:** Monday, December 24, 2007 10:44 AM
**To:** Bercovitch, Saul
**Subject:** Proposed New Insurance Disclosure Rule (Revised)

Dear Mr. Bercovitch---With the latest revision, I no longer have any objection to the proposed new rule on insurance disclosure. My appreciation to the board for considering the objections of members. Sincerely, Ronald Blubaugh, #065238

**Bercovitch, Saul**

**From:** Frank Hoffman [f.hoffman.esquire@gmail.com]
**Sent:** Wednesday, December 26, 2007 3:03 PM
**To:** Bercovitch, Saul
**Subject:** insurance

I previously wrote to the bar in opposition to any entanglement with the insurance industry. I expressed my view that any Rules promulgated in that category would amount to subsidies to a private business.

With respect to the warmed over rules which are now proposed, my objections are all the same.

I do not know how many times we have to hear of insurance industry abuses in the claims category. Despite this very suspect record, despite the suspect and massive nature of insurance industry political contributions, and despite the fact that this industry is given, in California, a free pass to commit violations of Penal Code 550, the state bar still pressures its members to accept some form of insurance industry subsidy. Any disclosure as proposed is a subsidy.

I cannot state it better than I did before; THE INSURANCE INDUSTRY IS NOT INHERENTLY VIRTUOUS. Any disclosure in re insurance will not, I am sure, involve bar monitoring of insurance claims made, to determine if these claims are fairly handled. We are simply to accept that they will be. We are being told to, in essence, represent to potential clients that having insurance is a virtue. It is not. This private sector industry has not demonstrated that it deserves such goodwill. It inherently would result in an untoward bar/industry entanglement.

Such a representation as you would force would violate my right of free speech. As Jefferson stated

***"To compel a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhors, is sinful and tyrannical."*** --Thomas Jefferson: Statute of Religious Freedom, 1779.

I pay bar dues. I insist on my right to make my own political statement. I do not grant the state bar any proxy right to make one for me. In all candor, having a relatively unknown committee behind this makes the whole thing look like a scheme.

RICHARD A. MUENCH
A PROFESSIONAL CORPORATION
ATTORNEY AT LAW
25231 PASEO DE ALICIA SUITE 103
LAGUNA HILLS, CALIFORNIA 92653
TELEPHONE (949) 859-0215
FAX NO. (949) 859-4275

Saul Bercovitch
Staff Attorney
The State Bar of California
180 Howard St.
San Francisco, CA 94105

Re: Proposed New Insurance Disclosure Rule (Revised)

Dear Mr. Bercovitch:

Since the obvious purpose of this insurance disclosure rule is protection of the general public from unwittingly retaining an uninsured attorney, shouldn't the public be entitled to know the specifics of the insurance coverage of an insured attorney? Otherwise, an attorney can take out insurance with a HUGE deductible(to get a reduced premium) which would essentially make that attorney uninsured for all but catastrophic claims.

Please consider this possibility as I've heard many sole practitioners state that this is what They will do in the event this measure is adopted by the State Bar.

Very truly yours,

Richard A. Muench

Richard A. Muench
25231 Paseo De Alicia #103
Laguna Hills, CA 92653

January 1, 2008

Saul Bercovitch, Staff Attorney, State Bar of California
180 Howard Street
San Francisco, Ca 94105

Dear Mr. Bercovitch:

RE: PUBLIC COMMENT AGAINST THE INSURANCE DISCLOSURE RULES, NOW IN THEIR THIRD REINCARNATION

Once again, I'd like to thank your assistant Michelle Pierce who kindly sent me copies of the latest reiteration of proposed rule making on this subject.

I wrote a personal letter to our Bar president, Mr. Bleich, appealing to him to be reasonable on this matter for those of us who spend 1/3 to 1/2 of our time helping the poor and nonprofit organizations pro bono. I do so much pro bono work that I cannot afford expensive malpractice insurance. I note that in the proposed Rule 3-410, subparagraph C, that government lawyers and in-house corporate counsel continue to be free of any obligation under the rule. What about adding pro bono nonprofit counsel, or lawyers who assist the poor knowing their services are pro bono?

Additionally, concerning Rule 3-410, neither subparagraphs A or B, when read together, make any sense. As an attorney, I don't really have any problem with disclosing whether or not I have malpractice insurance to new, paying clients. The time to make the disclosure is at the beginning of the relationship when the client will, usually, say they don't care. During the late 1990's, I can honestly say that I lost 7-10 prospective clients who wanted to hire big firm lawyers, regardless of the cost. They could afford to do that, and they wanted to tell their friends that their lawyer was "so and so" of the "so and so law firm". In a celebrity culture where status is everything, then the issue was not whether the firm had malpractice insurance, but what their address was and how fancy their offices were.

Concerning Proposed Rule 9.7 , and its effect on Rule 9.6, of the California Rules of Court, please incorporate herein by this reference all of my previous criticisms concerning the insurance industry and its heavy-handed lobbying of our Bar. I wrote to you on June 18, 2007, concerning the secret national data bases (ISO and NICB) which are so full of error and slander and violations of individual privacy rights that it makes the President's spying on Americans look harmless.

Essentially, you have rich lobbyists forcing every California lawyer to knuckle under and wear the gold star if that lawyer chooses to live their life without or outside the insurance industry. What is the point of Rule 9.7 if not to oppress and coerce otherwise decent and competent California lawyers into carrying insurance?

As for the fact that some of the rich insurance lobbyists claim that there are few of us who are willing to risk raising our voices against this ill-conceived Rule 9.7, I remind them that if only one person opposes an idea that is harmful and unjust, that is sufficient. If I cared about what the majority thought, I would not do the human rights work that I do because the majority of people do not stand against human rights violations and injustice.

Proposed Rule 9.7 will do NOTHING for California consumers. What it will do is further delineate classes of lawyers in California. The clear inference is that BAR members without insurance are "bad", and that's character assassination without justification. What happened to the Bar's mission of preserving and promoting justice? What assurance does any consumer have that some lawyer's professional liability insurance will actually cover that lawyer?, Or cover the full extent of the damages? What if someone hires a lawyer thinking they have malpractice coverage, and it turns out that the coverage fails to cover the client's actual damages? If a lawyer is required to pay for malpractice insurance, is the BAR going to advertise how much coverage, and what all the exemptions and exclusions are? And, if the BAR fails to do that, then the consumer has been duped.

These gaping holes are typical of insurance industry "reforms". You see, the insurance industry doesn't care if the reform is truthful or works or protects. The whole point is to give the insurance industry more control, and to coerce more lawyers into paying insurance premiums. Oh yes, it's control and profit motive being jammed down our throats under some disingenuous guise. I say "NO". Clean up Rule 3-410, and eliminate Rule 9.7.

Susan Lea

Susan Lea
P.O. Box 792, Salida, Co 81201

## Bercovitch, Saul

**From:** Knapton, Gerald [GKnapton@Ropers.com]

**Sent:** Wednesday, January 02, 2008 12:11 PM

**To:** Bercovitch, Saul

**Subject:** public comment on Insurance Disclosure Rule

Dear Mr. Bercovitch:

I think that we are getting close to something that will work. Thank you and the Task Force and RAD and BOG for all your hard work and rather intense debate (or so I have heard) to reach consensus on a ***workable rule*** for disclosure about insurance.

The new proposed "exceed four hours" requirement is a HUGE loophole that will make the disclosure requirement meaningless in almost all of the matters where it would matter. If you enact this rule as it now reads I predict that almost all lawyers who are cited in violation will say something like this: "At the time I took the case I did not think that it was going to take more a few telephone calls to settle..." This claim will be very hard and very time consuming to evaluate.

PLEASE consider deleting the last 24 words so the first part reads:

"(A) A member who knows or should know that he or she does not have professional liability insurance shall inform a client in writing, at the time of the client's engagement of the member, that the member does not have professional liability insurance."

[Delete the balance of this sub-section: "whenever it is reasonably foreseeable that the total amount of the
member's legal representation of the client in the matter will exceed four hours."]

Then we will have a simple rule that can be easily enforced.

Having this rule in place will not cause the typical client to do anything differently in hiring the attorney. But it will let the client know that the lawyer has chosen to "go bare" as the doctor's once said. Most client's will read this and at least be informed about the availability of insurance if the lawyer falls below the standard of care, causing economic damages to the client.

We had this rule on disclosure for years and it caused no problems.

Don't we owe this sort of information to the public?

Thanks again for hanging in there to get a rule we can use!

/s/ Gerry Knapton

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## Bercovitch, Saul

**From:** Charles Festo [cfesto@wesandsons.com]
**Sent:** Thursday, January 03, 2008 12:02 PM
**To:** Bercovitch, Saul
**Subject:** Proposed New Insurance Disclosure Rule (Revised)

Dear Mr. Bercovitch:

I appreciate the Bar Association's communication to me advising of the revised draft since I had submitted comments to the prior version. I am pleased to see that the rule, as currently drafted, will not apply to in-house counsel when such counsel is representing or providing legal advice to a client in that capacity and I support the adoption of the rule in its current form. Please take whatever steps are necessary to pass along my comments.

Very truly yours,

Charles F. Festo
General Counsel
William E. Simon & Sons, LLC
Member #148040

## Bercovitch, Saul

**From:** Mark Baron [markbaron@charter.net]
**Sent:** Thursday, January 03, 2008 1:54 PM
**To:** Bercovitch, Saul
**Subject:** New Rule 3-410 Personal Comments By A California Citizen

December 25, 2007

Saul Bercovitch
Staff Attorney
The State Bar of California
180 Howard St.
San Francisco, CA 94105
Fax: (415) 538-2515
E-mail: saul.bercovitch@calbar.ca.gov

Dear Mr. Bercovitch,

Thank you for permitting me to comment on Proposed New Rule 3-410 regarding the disclosure of Professional Liability Insurance.

My initial reaction is that your editors have watered down the intent, spirit and letter of the proposed rule. I expect the public and especially the media will agree with me. I feel here are too many loop holes for a lawyer to exploit in order to avoid personal responsibility for his/her professional conduct. Also, I find no penalty provisions provided for those lawyers that violate New Rule 3-410. I do not find a provision indicating past malpractice suites filed against an attorney.

My point is simple: New Rule 3-410 will be a small step in making California lawyers' responsible for their professional and ethical behavior. I take issue with the following provisions:

**Comments**

**Rule A**.... "whenever it is reasonably foreseeable that the total amount of the member's legal representation of the client in the matter will exceed four hours."

**Response:** There should be no time limit inserted in the provision. A four hour time limit is a clever loop hole that lawyers can exploit to avoid personal responsibility for his/her behavior. A lawyer can commit malpractice in the first five minutes of a case as easily as he/she can in the fifth year of a case. The malpractice insurance should be effective from the minute the client signs of the client/attorney agreement.

**Rule C**

"This rule does not apply to a member who is employed as a government lawyer or in-house counsel when that member is representing or providing legal advice to a client in that capacity."

**Comment:** To spotlight my point, permit me use Mike Nifong, the Raleigh-Durham District Attorney, convicted of destroying the lives of innocent Duke students' by intentionally withholding evidence in a rape case triggered by a long standing mentally ill drug addict. Let me ask you a few questions: Could this happen in California? How would you feel if your son's name, reputation and life were ruined by an elected government lawyer with unbridled career aspirations? Does Mike Nifong really pay the price for his behavior? No, the public tax payer pays because the families of the Duke students sue the city/county and state. This results in higher city/county/state insurance premiums that are passed along to the tax payer. The individual lawyer and his malpractice carrier should be held responsible. No exemptions!

How would you feel if you received an unjust prison sentence or an unfair jury award because of an incompetent government public defender? Are you saying that government lawyers are more ethical and competent then private practice lawyers? The public would perceive this as yet another loop hole for government lawyers to exploit to avoid responsibility for their collective professional conduct. This provision should be eliminated.

**Rule D**

(D) This rule does not apply to legal services rendered in an emergency to avoid foreseeable prejudice to the rights or interests of the client.

**Comments**: Seriously, how much more ambiguous can you be in writing a rule? What does this mean? Again, here you have a blanket "get out of jail" card for lawyers to negate the letter and spirit of New Rule 3-410.

Thank you for taking the time to read my comments. I urge the State Bar to do the right thing. Lawyers are not above the law. Make this provision iron clad to protect the public from rampant unethical and unprofessional legal behavior.

Thank you,
Mark Baron

Note: This e-mail letter is intended for personal correspondence with the California State Bar. This letter should not be reproduced or published without the consent of its author.

**Bercovitch, Saul**

**From:** Abdulaziz, Grossbart & Rudman [info@agrlaw.net]
**Sent:** Friday, January 04, 2008 9:12 AM
**To:** Bercovitch, Saul
**Subject:** Rule of Professional Conduct 3-410 & New Rule of Professional Conduct 3-410 as proposed by the Insurance Disclosure Task Force.

January 4, 2008

Sent Via Email Only
saul.bercovitch@calbar.ca.gov

Saul Bercovitch
Staff Attorney
The State Bar of California
180 Howard St.
San Francisco, CA 94105

RE: Rule of Professional Conduct 3-410 & New Rule of Professional Conduct 3-410 as proposed by the Insurance Disclosure Task Force.

Dear Mr. Bercovitch:

This is in response to the above referenced matter. I did in fact write comments previously.

Although myself and members of the firm have been insured forever, my initial comments were that it would be waiving a red flag for some to file a malpractice lawsuit against an attorney if he or she had malpractice insurance. If he did not, there would be no reason to go after him, or at least be less likely. That theory was not accepted on at least two occasions.

I have now reviewed the latest proposal and it is probably as good as it is ever going to get. Therefore, I would endorse the latest proposal.

Respectfully submitted,
ABDULAZIZ, GROSSBART & RUDMAN

SAM K. ABDULAZIZ
SKA:tmw

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Emphasizing Construction Law

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**From:** Jonas M. Grant [jonas@incorporatecalifornia.com]
**Sent:** Monday, January 07, 2008 5:26 PM
**To:** Bercovitch, Saul
**Subject:** Public Comment - Proposed New Insurance Disclosure Rule (Revised)

I remain opposed to the revised rule.

Regards,

Jonas M. Grant
Law Office of Jonas M. Grant, P.C.
3500 W. Olive Ave., 3rd Floor
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818-786-4876 office
http://www.incorporatecalifornia.com

**Bercovitch, Saul**

**From:** denburglaw@earthlink.net
**Sent:** Thursday, January 10, 2008 2:42 PM
**To:** Bercovitch, Saul
**Subject:** Comment on Proposed Rule of Professional Conduct 3-140

Dear Mr. Bercovitch:
I am against any mandatory requirement that all attorneys have malpractice insurance coverage. I an also against the proposal that would require attorneys to disclose to prosepective clients, when the representation is likely to exceed four hours, that they do not carry professional liability insurance.

I have been in solo practice for 26 years and during that time have had malpractice insurance for only a few years. The cost is just too prohibitive considering the other overhead and relatively small net income I make. I keep my fees very reasonable so that middle class clients can have access to legal representaion, and I do lots of pro bono work as well. I run my practice on a shoe string budget. Fortunately, I have never had any claims against me, or complaints, in the 26 years I have been an attorney.

I think that having malpractice insurance would hard hit many solos and small firms. I also think it is an invitation to a litigious, unhappy or unstable client to sue.

I can also state that NOT ONCE in my 26 years of practice has a client ever asked if I had malpractice insurance. There was a time when we were required to reveal the non existence of malpractice coverage in our retainer agreements; during this time no one ever asked me a question about the lack of coverage, even after I pointed it out to them when reviewing the retainer. No one decided not to hire me after learning that I did not have the insurance. Query just how important this is to the public....

Thankyou,
Ruth Denburg
Attorney at Law

denburglaw@earthlink.net

**Bercovitch, Saul**

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**From:** SLLawyer@aol.com

**Sent:** Thursday, January 10, 2008 7:06 PM

**To:** Bercovitch, Saul; jeff.bleich@mto.com

**Subject:** Malpractice Insurance Disclosure

For the pass 5 years and the years to come, I plan on using my law degree for only pro-bono services through the Orange County Public Law Center. The OC PLC Malpractice Insurance policy covers me for any cases I service for them. So even though I do not purchase Malpractice Insurance for myself, I do have Malpractice Insurance as far as my OC PLC clients are concerned.

I believe that any Malpractice Insurance Disclosure solution must address this situation. My pro-bono clients should not be confused by my State Bar Record stating that I do not have Malpractice Insurance when in fact for any matters concerning them I do have Malpractice Insurance.

Sincerely,

Stephen N. Livingston
Newport Beach, CA
Cal. Bar # 216003

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**Bercovitch, Saul**

**From:** Alan L. Williams [awilliams@alwlaw.com]
**Sent:** Friday, January 11, 2008 5:19 PM
**To:** Bercovitch, Saul
**Cc:** menton@pwkllp.com
**Subject:** Insurance Disclosure Proposal

Mr. Bercovich:

I understand you are the focal point for comments on the latest iteration of the proposal to add an errors and omissions insurance disclosure requirement to the Rules of Professional Conduct. From what I have read, this seems to be a solution without a problem. The proposed rule is nothing less than a chimera. If the State Bar is concerned that clients are at risk from lawyers who do not maintain errors and omissions insurance, then the State Bar should make errors and omissions insurance a requirement for active member status in the State Bar. Of course, that would force the State Bar to address the true reason why some attorneys eschew errors and omissions insurance, it is not affordable, particularly for newer and part time practitioners. Perhaps the State Bar could determine a minimum amount of insurance an attorney should carry and offer that coverage as part of the annual (obviously increased) State Bar dues. If an attorney wanted greater coverage, the attorney could secure private insurance for any additional amount he or she wanted.

There are areas where clients rightfully need rules designed to protect their interests; the proposed rule is not one of those. Without a evidence of a pervasive number of clients who have been unable to secure collection of final judgments against negligent attorneys, the proposed rule would be meaningless, harming numerous attorneys while at the same time offering little if any real protection for the public.

I urge the rejection of the proposed rule.

Sincerely,

Alan L. Williams

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......................
Alan L. Williams
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Bar's Insurance-Disclosure Rule Still Misfires

Jan. 15, 2008

The State Bar has revised once more its proposal to require lawyers to tell clients if they don't carry malpractice insurance ("Bar panel alters malpractice proposal," Dec. 14). The bar's new effort (available at calbar.ca.gov) – its fifth version and third released for public comment, with comments now due by March 17, 2008 --- would limit the disclosure requirement to cases where it's "reasonably foreseeable" that a lawyer will represent a client for more than four hours. This latest incarnation of the bar's hapless project not only does little to cure the underlying problems, but adds new difficulties.

First, four hours isn't a reasoned figure, and it isn't much. This threshold might lift the disclosure requirement for legal advice given at a cocktail party or in a single phone call, but it seems unlikely to protect the great majority of representations. Basic objections to the bar's proposal therefore would remain, centering on its splitting the legal profession between big-firm lawyers who can afford malpractice insurance and solos and small-firm lawyers who cannot.

Meanwhile, the proposed rule abounds with ambiguity. As the bar's own Bar Journal has reported, bar staff are "concerned" about the new version "because they said the four-hour requirement is arbitrary and its 'reasonably foreseeable' qualifier is ambiguous." Indeed, what does "reasonably foreseeable" mean? Is the test objective or subjective? Further, the disclosure requirement would apply with respect to "new clients and new engagements with returning clients" -- opening a rich lode of questions about who's a "client" after a merger or acquisition, for example. And there's an exception for legal services "rendered in an emergency to avoid foreseeable prejudice" to the client. What's an "emergency" in this context?

In general, the bar's proposed rule would fuel client-lawyer litigation, not only providing a fresh ground for suits by unhappy clients against their erstwhile attorneys, but supplying  a wealth of uncertainties, ambiguities, and possible legal arguments on which those suits can feed. The clients might well get settlements, payable from the lawyer's own assets.

The bar should drop its benighted idea -- at least until it makes low-cost malpractice insurance available to California's lawyers.

STEPHEN R. BARNETT

Berkeley

**Bercovitch, Saul**

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**From:** ATTORNEYandCPA@aol.com

**Sent:** Sunday, January 20, 2008 2:15 PM

**To:** Bercovitch, Saul

**Cc:** ATTORNEYandCPA@aol.com

**Subject:** Proposed New Rule of Professional Conduct 3-410.

Dear Mr. Bercovitch:

I have the following comments, observations, and [presumably] rhetorical questions concerning the current proposed insurance disclosure requirement:

1). Will lawyers who have a policy deductible (i.e. $10,000) be required to disclose that they are *uninsured* as to that amount? It would seem that they should, because from a legal perspective, the client who obtains a malpractice judgment against that lawyer would be relying on that lawyers personal assets (or the assets of his or her employer) to satisfy that $10,000 part of the judgment. In fact, they are just as uninsured for that first $10,000 as a lawyer who has no malpractice coverage at all. The safe harbor disclosure language in the proposed rule does not seem to even address what surely would be this most common situation. Since the obvious intent of this new rule is to brand uninsured lawyers as inferior, I hereby demand that it be applied equally to ALL lawyers who are in any way or amount uninsured.

2). I seem to recall a requirement that a lawyer, who provides other professional services like I do (i.e. as a Certified Public Accountant or Certified Fraud Examiner) is required to observe the requirements of the California Rules of Professional Conduct in the discharge of that other profession (e.g. the return of client records upon termination). Several years ago, this issue actually came up in a dispute over the requested return of records that had been tendered to me as a CPA gathering *required* documentation for my workpapers regarding the development of a computerized financial model that was completely unrelated to the practice of law. Yes or No ... under the proposed insurance disclosure rule, am I going to be required to inform my non-law related clients of the absence of malpractice insurance? By what authority would the Supreme Court order such a disclosure? To remove any doubt, I hereby demand that the new rule be amended to explicitly state that it applies *only* to clients who are being provided with traditional legal services.

3). As it now stands, this proposed rule discriminates against lawyers who don't practice law full-time ... because you can't buy part-time malpractice insurance. It also favors lawyers who already have malpractice insurance by branding their competitors as inferior. Insurance is generally bought and paid for by the person who wants the protection, not for the protection of third-parties. Doctors buy malpractice insurance to protect *their* personal assets, not to assure that their patients will have their malpractice judgments satisfied. If you want clients to always be protected with malpractice insurance, then create a system that allows them to purchase malpractice insurance on a case-by-case basis similar to the way that passengers can purchase flight insurance before boarding a plane.

4). Where are the numbers? In this whole debate I have yet to see any statistics regarding the number of times a client ends up as the victim of legal malpractice at the hands of an attorney who doesn't satisfy the malpractice judgment out of his or her own personal assets.

5). In my opinion, the existence of malpractice insurance encourages clients to make frivolous claims, because they know the insurance carrier will want to settle. Any rule that attempts to brand lawyers without malpractice insurance as inferior is ill conceived.

I personally think that this requirement is a joke relative to other more relevant and useful disclosures that an attorney could be forced to make to a client. What about a health status disclosure, to give the client notice of situations where the attorney might die or become seriously ill in the middle of a case? I have actually seen this happen a couple of times, and the client got screwed when there was no malpractice. What about a disclosure of the security practices of a law office to protect confidential information (i.e. locks, alarms, encryption of sensitive data, etc.)? What about the mandatory disclosure of prior malpractice claims and judgments, or prior disciplinary history? Why require a written disclosure of the absence of malpractice insurance, but not the disclosure of past allegations of discipline violations and/or malpractice claims?

In any case, it is simply ridiculous to look beyond what the results of a case may *rarely* be ... *assume* the attorney will commit an act of malpractice in *every* case ... *assume* that the client would eventually seek and obtain an enforceable malpractice judgment, and then rely solely upon the malpractice carrier to satisfy that judgment. It is more likely that there will be no malpractice, that the client will not seek or obtain a malpractice judgment, and that if such a judgment is obtained ... it would be satisfied from the attorney's personal assets. And yet, you're trying to pass a rule that requires a disclosure 100% of the time.

Very truly yours,

/s/

Michael W. Szkaradek,
ATTORNEYandCPA@aol.com
714-730-5880

**************

STEPHEN B. BEDRICK
ATTORNEY AT LAW
1970 BROADWAY, SUITE 1200
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TELEPHONE: (510) 452-1900
FAX: (510) 452-1980

January 23, 2008

Board of Governors
State Bar of California
180 Howard Street
San Francisco, CA 94105

**Re: State Bar proposal to require attorneys to disclose lack of malpractice insurance**

Dear Governors:

I urge you to reject the revised proposal to require attorneys who do not carry malpractice insurance to disclose that to privately retained clients. It would constitute a major financial burden and penalty on many of us who practice law in a non-corporate context.

Much of my law practice constitutes court-appointed appellate work in both state and federal courts. Any possible malpractice (and there has been none in my 33 years of practice) would be covered through the appointing entities. It would be unfair and constitute a hardship to force me either to pay the full cost of insurance to cover a small part of my practice, or to make such a disclosure in those situations where the occasional private client seeks to retain me.

There are thousands of attorneys in similar circumstances. Please do not penalize us.

Very truly yours,

St B. Bedrick

STEPHEN B. BEDRICK

SBB:ls

cc: Saul Bercovitch (staff attorney, State Bar)

*Thomas W. Borden*
ATTORNEY AT LAW
SUITE 324
4529 ANGELES CREST HIGHWAY
LA CANADA, CALIFORNIA 91011

PHONE: (818) 952-0083
FAX: (818) 952-0087

January 23, 2008

Saul Bercovitch
State Bar of California
180 Howard Street
San Francisco, California 94105

RE : Opposition to Proposed Rule 3-410
Disclosure regarding Malpractice Insurance Coverage

Dear Mr. Bercovitch:

Please read and consider my entire letter.

I am among the ranks of many colleagues who are **absolutely opposed** to the poorly conceived idea that the bar can or should mandate that its members notify clients, in writing (or otherwise), about the absence of professional liability insurance. My concerns are enumerated below -- not in any order of importance, because they are all important.

1. The practice of law is not only a *Profession;* it is also a *Business*. The decision to purchase or not purchase expensive insurance is a *business* decision. The bar licensed me as a *professional*. That shouldn't mean it can influence what *business* expenses I must incur.

2. I've been practicing law for over 36 years, and with extremely few exceptions I have always had a mutually trusting and respectful relationship with my clients. Telling a client that I don't carry professional liability insurance would be tantamount to telling a client that in the future our roles could be adverse to one another, i.e., that the client might want to sue me. That is hardly the way to establish a working attorney-client relationship.

3. Many of my clients have been clients for decades. I have handled their small business matters, their estate plans and administration, their real estate issues, some personal injury cases (in the past) and a few related classes of legal issues. It would be a puzzlement for my clients to understand why in the world I would be sending them the notice proposed by the bar. Again, it would be destructive -- not supportive -- of a working attorney-client relationship.

4. I don't accept work which I don't believe I'm qualified to handle. That's a *Professional* decision and a *Business* decision, and that's why I conclude that the huge expense of malpractice insurance isn't warranted in my practice.

5. My current billing rate is $225.00 per hour, which I often discount or I simply don't charge for all the hours I devote to a matter. If the awkwardness of the proposed rule compels me to purchase insurance, I will have to raise my billing rate -- and that will not be in the best interest of the public whom I serve and whom the bar mistakenly thinks it's protecting.

6. With the *committee approach* to formulating a rule for a highly questionable proposal, the so-called "clean version" of proposed Rule 3-410 on the bar's website contains vague guidelines which will cause countless lawyers to spend countless hours arguing about the meaning of the Rule. Obvious deficiencies are:

   A. What is a *reasonably foreseeable*, and to whom is it *reasonably foreseeable?* If a client asks you to write a letter on his/her behalf, is it *reasonably foreseeable* the letter will provoke a reply, and is it *reasonably foreseeable* the reply will require further correspondence, research, phone calls of unpredictable length, etc, etc. Without the benefit of a **crystal ball**, *reasonable foreseeability* of four hours work is an illusory standard.

   B. What does *"professional liability insurance"* mean? Does it mean an attorney has $50,000.00 coverage? $100,000.00 coverage? $1,000,000.00 coverage? Or more or less? And what is the deductible amount? Is the deductible more than the client's possible damages? What other policy provisions apply? What is the policy period? Will it elapse during the time the attorney is working on the client's situation? What then? Have the people who wrote the proposed rule ever looked at the various policies and understood them?

7. I frequently tell clients to beware of what I and many others have called the **"doctrine of unintended consequences"**. Sometimes what you think is a good idea might turn out to have drastic results. (Obviously, the most classic example is the crime spree precipitated by the 18th Amendment to the U.S. Constitution -- Prohibition.) Proposed Rule 3-410 won't have such dire results as a 1920's crime spree, but think back to the 1970's "medical malpractice crisis" when doctors were being sued right and left because they had malpractice insurance and everyone knew it. That prompted the Medical Insurance Compensation Recovery Act ("MICRA" to my recollection) which imposed statutory guidelines on the method and amount of damages a patient might recover in tort litigation. If you open the door by ballyhooing, inferentially, that all lawyers must or should carry malpractice insurance, you will surely effectuate the **doctrine of unintended consequences!**

I am disgusted with the circumstances that have prompted me to write this letter. My time would have been much better spent by attending to client matters. I am supportive of the State Bar, but I must say, emphatically, get off my back and don't tell me what business judgments I should make! THE WISEST THING YOU CAN DO IS TO SCRAP THE ENTIRE IDEA OF PROPOSED RULE 3-410.

Cordially,

Thomas W. Borden
TWB:jb

Law Office of Jed Gladstein
www.jedweb.com
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Tel (707) 894-4747
Fax (707) 894-4777

January 24, 2008

Mr. Saul Bercovitch
180 Howard St.
San Francisco, CA 94105

Re: Proposed Malpractice Insurance Rule 3-140

I wonder if the members of the committee that keep pushing for passage of Rule 3-140 are aware that malpractice insurance carriers will not provide coverage to attorneys if they have been sued even once for malpractice, regardless of the fact that the lawsuit was resolved in the attorney's favor? Proposed Rule 3-140 is impractical, because it doesn't account for the way insurance carriers actually function.

Moreover, it will have unintended and deeply injurious consequences, not only to attorneys, but to the public who rely upon their availability and willingness to continue offering services. Thus, the very constituency the committee hopes to serve will end up being disserved by the proposed rule.

Incidentally, if the committee was really sure of its position on this issue, it would long ago have come to the conclusion that the matter should be submitted to the State Bar membership for a vote. That way, the people most directly involved would have a say in the matter. Is the prospect of a democratic vote on this issue so repugnant to the members of the committee who fancy themselves as protectors of the social weal? If so, perhaps they don't really believe in democracy, or perhaps they think they are possessed of so much wisdom in the area of social affairs that no other opinions should be considered.

Social reformers are necessary and useful, so long as they retain a sense of balance. The proposed rule crosses the line and creates imbalance. It needs to be abandoned before legal services become as prohibitively expensive as medical services.

Very truly yours

Jed Gladstein

JG:hs

From: Otis [mailto:OtisDamslet@Juno.com]
Sent: Sunday, January 27, 2008 9:42 AM
To: 'saul.bercovitch@calbar.ca.gov'
Subject: Proposed New Insurance Disclosure Rule (Revised)

The insurance industry lobbies nationwide to create as many captive markets as possible, selling the utterly false notion that insurance=protection. In fact, as Michael Moore's movie "Sicko" illustrates so vividly, insurance=profits for the insurance industry, at the expense of everyone else.

The proposed disclosure rule is binary: either an attorney has insurance (supposedly a good thing) or not (supposedly such a bad thing that the client needs to be warned in advance). The proposed rule omits entirely the terms of coverage, including limitations, exceptions, exclusions, and deductibles. It also omits the backstops to insurance coverage, i.e. the attorney's and partners' net worth amounts. As such, the result is essentially to force attorneys to advertise for the insurance industry, in a backhanded way (either pay off the insurance companies or be branded with a scarlet letter, "no insurance"). Insurance policies vary so widely that the binary distinction between having insurance and not having insurance provides little meaningful information in terms of client protection.

To the extent that having insurance does provide any information, it is those who have insurance who should be required to warn clients of it.
Insurance policies often require the insured to allow the insurance company to decide which claims to litigate and which to settle, and on what terms.
The insurance company makes those decisions in the interest of maximizing its own profits, not protecting anyone else. (Technically, employees within the insurance company make the decisions in the interest of maximizing their own bonuses and prospects for promotion, which are related to how profitable their decisions are for the insurance company.) In other words, an attorney with insurance may have less ability to protect a client than an attorney without insurance.

I am dismayed that the insurance industry has persuaded so many people to mandate subsidizing insurance company profits and CEO salaries, even at the expense of all other priorities. The bottom line is, if a client wants to know what insurance an attorney has, the client can simply ask to see a copy of the policy.

If you feel that you must implement a rule regarding insurance, then I suggest incorporating it into a disclosure document similar to New York's Statement of Client's Rights:

http://www.nysba.org/Content/NavigationMenu/PublicResources/ClientRightsandResponsibilitiesDeclaracinDeLosDerechosDeLosClientesyResponsabilidades/Rights.pdf

You could add a paragraph, "You are entitled to receive, upon request, a copy of any professional liability insurance policy applicable to the services your lawyer provides you."

You might also create a modest fund similar to Connecticut's, in order to provide relief to those few clients who are injured by malpractice and whose lawyers are unable to make them whole (whether due to inadequate resources or inadequate insurance). The California bar already charges more dues than any other state I know of, so there should be ample revenues to fund such a project without increasing dues further.

Sincerely,

Otis R. Damslet
Attorney and Counselor at Law
4076 17th Street, #505
San Francisco, CA, USA 94114-1992
Phone 1.415.553.8946
Fax 1.309.439.7421
http://OtisDamslet.GooglePages.com

**Bercovitch, Saul**

**From:** Gerald McNally [gm@mcesq.com]

**Sent:** Friday, February 01, 2008 6:20 PM

**To:** Bercovitch, Saul

**Subject:** Prediction and Consequences

Dear Mr. Bercovich,

Regarding the new proposed insurance rule.

The Prediction:

1. I will be forced to purchase liability insurance. I've been sued exactly once in 23 years; nevertheless I will buy it.

2. This "disclosure" is an invitation to clients who are not happy with the result they obtain from the court system (50% of them) to use the threat of an insurance malpractice claim to "negotiate" my bill, especially when I've been foolish enough to extend them credit. In my experience, those who pay in advance for their services very rarely complain after the case is over, win or lose.

Now the Consequences:

3. I will not be extending credit to my clients any more. They will pay in advance, or find some other (possibly unlicensed) legal help. I, however, will not be risking my "insurance quotient."

4. The number of clients who need legal help and who will not get it from lawyers will be increased. Or they will get their help from unlicensed paralegals, "abogados," "Notary publics" (very common in Los Angeles with a large Hispanic population), etc etc.

5. The people whom the State Bar claims it wants to protect are precisely those who are sophisticated enough not to need it. And they will evaluate lawyers by what they know and can do, not on whether or not they're insured. (If a prospective client asked me about liability insurance, I would refer him to the LA County Bar LRS. But I don't know, because no client has ever asked me that question.)

6. There will be ever more strident calls for "pro bono" work, and the associates making $170,000 in their first year at the white shoe firms like Mr. Van de Camp's, will be able to salve their consciences by doing lots of pro bono work.

7. I, however, will continue to direct my pro bono work towards my church, where it will do a lot of good.

8. The rich will get richer and the poor will get poorer. Only the quality of their legal representation will go down.

But that's what was intended, wasn't it?

I think the Board of Governors could find more constructive work to do.

Gerald McNally, Jr.
Attorney at Law
McNally & Associates, P.C.
206 N. Jackson St. #100
Glendale, CA 9106-4330
818-507-5100, fax 507-5001

Pursuant to Internal Revenue Service Circular 230, we are required to advise you that if there is any tax advice contained herein, it is not intended to be used, and cannot be used by the addressee or any taxpayer, for the purpose of avoiding penalties that may be imposed under the Internal Revenue Code.

**Bercovitch, Saul**

**From:** A. Grant Macomber [macnmac@inreach.com]
**Sent:** Monday, February 04, 2008 9:53 AM
**To:** Bercovitch, Saul
**Subject:** Insurance disclosure

Insurance Disclosure objection

I strongly object to the insurance disclosure requirement proposed for rule 3-410 because it looks like a red flag to the client. The requirement is simply a solution looking for a problem that does not exist. The only thing it serves to do is to reduce the amount of business available to lawyers who do not have coverage.

I am 69 and a sole practitioner in a small community. My practice is limited to a few hours a week because of health issues. Most of my work is for a single client, but I have a few other clients that provide a valuable supplement to my income. I do not advertise, and I do not take litigation. I cannot afford malpractice insurance.

The proposed disclosure requirement threatens my limited practice. I view it as a requirement that gives the big firms an advantage. And they should have coverage. Anyone who has associates should have coverage. But the proposed disclosure requirement is prejudicial to the sole practitioner.

A. Grant Macomber

SB #37202

LAW PRACTICE MANAGEMENT
AND TECHNOLOGY SECTION

THE STATE BAR OF CALIFORNIA

February 12, 2008

**BY FIRST CLASS MAIL**

Board of Governors
c/o Mr. Saul Bercovitch, Esq.
The State Bar of California
180 Howard Street
San Francisco, CA 94105

RE: Proposed Rules of Insurance Disclosure

Dear Mr. Bercovitch:

The Law Practice Management & Technology ("LPMT") Section of the State Bar of California strongly opposes the proposed Rule of Professional Conduct requiring that California attorneys disclose that they do not have professional liability (malpractice insurance). The LPMT Section's latest public comment on the issue is set forth in a letter dated February 12, 2008 (Exhibit A). For your convenience, the LPMT Section's prior public comments are also provided (Exhibits B and C).

Upon your request, I will be happy to make myself available for further discussion concerning the points raised by the LPMT Section in its public comments on the issue of mandatory insurance disclosure.

Very truly yours,

James P. Menton, Jr.
Chair, Law Practice Management and Technology Section
State Bar of California

LAW PRACTICE MANAGEMENT
AND TECHNOLOGY SECTION

THE STATE BAR OF CALIFORNIA

February 12, 2008

**BY FIRST CLASS MAIL**

Board of Governors
c/o Saul Bercovitch, Esq.
The State Bar of California
180 Howard Street
San Francisco, CA 94105

RE: Proposed Rules of Insurance Disclosure

Dear Mr. Bercovitch:

Over the last several months, the issue of mandatory insurance disclosure has generated many arguments and counter- arguments in countless meetings, opinions, proposed rules, letters to editors and public comment.

Even if we assume that mandatory insurance disclosure is in concept in the best interest of the public, the implementation of the proposed regulations and/or rules generally ignores the predictable impact of characteristics common to the malpractice insurance products available to lawyers. In fact, the alleged benefits may be illusory and possibly deceiving.

If some of the purported 30,000 uninsured lawyers decide to buy malpractice insurance, it is probably safe to assume that they will select policies with low limits -- such as $100,000 per claim and a $300,000 aggregate for a one-year policy period. The purchasing lawyers, not having been insured in the recent past, will not be able to purchase prior acts coverage. Simply stated, for effective coverage to be available during a policy's first year, the act, error or omission and the client's claim would have had to occur within the policy term --- a generally unlikely scenario.

More importantly, almost all of the insurance available to cover attorneys' malpractice risks imposes a condition known as "costs within limits" or "diminishing limits." For every dollar spent by the insurer to defend the insured lawyer, the policy limit is reduced -- leaving less available to pay settlements or judgments. Therefore, in reality, the attorney sued for malpractice will not have the ability, through remaining insurance limits, to pay a settlement or respond adequately to a verdict. His or her policy will have been depleted by payments for his/her defense. How will the public react to this type of result? Will the State Bar of California ("Bar") be perceived as legislating a scheme that looks good but flies like the Spruce Goose?



EXHIBIT A

What if the newly insured attorney fails to pay the premiums and the policy is cancelled in the course of providing services to a client who relied on insurance coverage in his/her selection decision? How will the Bar monitor the maintenance of coverage? How will the Bar monitor non-renewals and the impact of no coverage, although the retainer agreement and possibly the Bar's website may very well indicate that the attorney has malpractice insurance? The cost of such monitoring, enforcement and updating of the Bar website will likely be staggering and rely in large part on self-reporting by the attorneys who are being monitored.

Assuming for argument that an attorney has a policy of malpractice insurance will merely provide the client/public with an illusory perception of comfort and safety. If the resolution passes, the Bar may face criticism for misleading the public to expect that an aggrieved client will be assured of recovering awarded malpractice damages because the attorney is insured. NOT SO.

As an aside, the benefit associated with having malpractice insurance may only be derived by the attorney who will have his/her defense paid with insurance company funds which then reduce the limits that members of the public probably believed would be available to pay their damages.

Considering the above insurance issues, we ask the Bar to opine on the need to modify all written fee agreements to include a "Disclaimer of Guarantee" stating something like the following:

> Nothing in this agreement and nothing in FIRM's statements to CLIENT will be construed as a promise or guarantee about the availability of insurance coverage adequate to respond in damages to any claim of CLIENT. CLIENT specifically hereby acknowledges that no promises have been made by FIRM's personnel as to the adequacy and quality of FIRM's malpractice insurance.

The Bar should consider whether the potential protection of the public is real or illusory. On paper, the Disclosure Resolution may look good and sound terrific – but will it really accomplish the stated goals of the Bar?

Dr. Seuss' wisdom would try to frame the problem in the following way:

> "You'll (the Bar) look up and down streets. Look'em over with care. About some you will say, 'I don't choose to go there.' With your head full of brains and your shoes full of feet, you're too smart to go down any not-so-good street."

The part of the disclosure concept that by necessity relies on the insurance product will not meet the bright-line test necessary to deliver to the members of the public what they believe the Bar has promised.

Respectfully submitted,

LAW PRACTICE MANAGEMENT & TECHNOLOGY
(LPMT) SECTION EXECUTIVE COMMITTEE (ExCOM)
By:

JAMES P. MENTON, JR.
Chair, LMPT ExCom

# LETTER TO THE STATE BAR BOARD OF GOVERNORS

*The State Bar Board of Governors is poised to implement rules requiring all California attorneys who do not carry malpractice insurance to disclose to their clients that they have chosen not to carry such insurance. The rules would extend to attorneys' state bar profiles, which would indicate publicly—including to all visitors to an online profile—if an attorney does not have malpractice insurance. The Executive Committee (ExCom) of the Law Practice Management & Technology Section strongly opposes implementation of these proposed rules on several grounds. The reasoning was conveyed to the Board of Governors in a July 27, 2007 ExCom letter, reprinted here with permission of the authors.*

The State Bar of California's
Law Practice Management & Technology
(LPMT) Section
Executive Committee (ExCom)

BY MAIL AND EMAIL
July 27, 2007

Board of Governors
c/o Saul Bercovitch, Esq.
saul.bercovitch@calbar.ca.gov
The State Bar of California
180 Howard Street
San Francisco, CA 94105

## Statement of Opposition to Proposed Rules of Insurance Disclosure

Introduction

By branding a "Scarlet M" on all California attorneys choosing not to carry malpractice (professional liability) insurance, the pending proposed disclosure rules are discriminatory, overreaching and unjustified. Among other flaws, the proposed rules disproportionately impact 70% of the state's licensed lawyers, namely sole and small firm practitioners.

Thus, the LPMT ExCom hereby officially joins the 78% of commenting Bar members[1] who have expressed opposition to the proposed new rules. We hereby urge the State Bar Board of Governors to reject the proposed rules.

**Analysis**

**I. Overview**

Collectively, the three provisions at issue[2] would require every licensed California attorney to disclose to each prospective client whether or not the lawyer has malpractice insurance. For each attorney who does not have malpractice insurance, his/her official bar membership record—including the <http://members.calbar.ca.gov/search/member.aspx> online profile—will indicate the nonexistence of such coverage. That scarlet letter would be branded on approximately one-fifth—namely 30,000—of the Bar members.[3]

**II. Harm to Public**

The proposed rules are premised on the presumption that the public will be better protected under a new regime. However, many of the proposed changes, once implemented, would work against the public interest. The principal effects of the proposed rules changes—whether desired or not—will be to compel attorneys to obtain malpractice insurance and to place attorneys lacking malpractice insurance at a competitive disadvantage. Some of the adverse consequences are summarized below:

- **Solo attorneys and attorney at small firms** comprise more than 100,000—over 70%—of our state bar's 150,000+ members. As noted above, approximately 27,000 members—18%—of the



EXHIBIT B

Bar have chosen to go without malpractice insurance. The solo and small firm constituency will be most adversely impacted by the proposed rules changes—even though such practitioners are generally the least capable of affording coverage.

Statistics demonstrate that sole and small firm lawyers earn substantially less money[4] than the larger law firm lawyers, none of whom actually feel the pain of having to purchase malpractice insurance out of their own pockets.

There is no "affordable" malpractice insurance available in California for experienced attorneys. The State Bar of California endorses a private insurance carrier's offering of malpractice insurance and receives a substantial stipend from every policy written under that program.[5]

Malpractice insurance, on average, costs between $4,000 and $7,000; the cost is substantially higher in certain practice areas. It is not reasonable to expect a lawyer to spend 10% of his/her earnings (not gross revenue) for such insurance when he/she can typically barely subsist now. Consequently, under the proposed rules, solo attorneys and small firms would inexorably face the dilemma of either passing the additional cost on to their clients or absorbing it themselves. Neither alternative bodes well for the public.

If, on the one hand, the cost is passed on, clients of these solo attorneys and small firms—often that portion of the public *least* capable of affording legal services in the first place—will face higher legal bills. In turn, the specter of increased legal fees will be a further disincentive for poorer clients to seek the assistance of lawyers.

If, on the other hand, the cost is absorbed, the least prosperous members of the Bar will become even less profitable and some may altogether disappear. Fewer solo attorneys and small firms will mean fewer choices for consumers—hardly serving the public interest or the intent of the proposed rules changes.

- **New attorneys** entering solo practice will find the cost of obtaining malpractice insurance to be an additional barrier to entering the profession. Because they are just starting out (and have yet to establish a predictable cash flow), they are among those least likely to be able to afford malpractice insurance.

  As new entrants into the marketplace for legal services, new solo attorneys are already at a competitive disadvantage. Yet the new rules would force them to navigate between a rock and a hard place. Being unable to afford malpractice insurance and compelled to tell clients they do not have it will further exacerbate that disadvantage. Nothing in the currently proposed rules changes addresses educating new (or experienced) lawyers about the economics of law practice so they would be better equipped to afford such insurance.

  This additional barrier will likely translate into fewer people entering the profession, once again providing consumers with fewer choices. Moreover, the

*continued on page 6*

 CONTINUED FROM PAGE 5

impact will probably fall disproportionately on new attorneys who are *minorities*, a group already underrepresented in our profession. Though certainly not an intended consequence, an undercutting of the Bar's efforts to promote diversity in the practice would apparently ensue if the Board were to enact the proposed rules changes.

### III. Implementation—Fatal Flaws

As practicing attorneys and law practice management specialists, our executive committee members also have grave concerns about *the actual implementation of the proposed new rules and the specifics of attorney disclosure.* Any idea, no matter how well-intended, may falter if it is confusing and difficult to put into practice. In the given context, we anticipate the following problems and dilemmas if disclosure of malpractice coverage becomes mandatory.

- Will attorneys bear the *additional* burden of explaining to clients and prospective clients the *specifics* of their malpractice insurance coverage, such as the amount of coverage, rating of insurer, type of insurance, coverage period, policy expiration date, etc.?
- It is disingenuous to believe that these sorts of detailed conversations will not take place as a result of mandatory disclosure. In turn, such discussions will force attorneys to become insurance industry practice experts just to be able to explain the fine points of malpractice policies to their clients and prospective clients.
- Prospective clients will assuredly ask about the specifics. It is also fair to assume that the accuracy and adequacy of an attorney's explanations about his or her coverage would themselves become a part of any subsequent potential malpractice litigation. The additional burdens on attorneys and insurers in these situations would be significant.
- Furthermore, in and of itself, this intrusion into the attorney-client relationship is entirely inappropriate and overreaching. A client always has been, and remains, free to inquire of the attorney whether or not he or she carries malpractice coverage.[6] Even worse, posting "no malpractice insurance" on an attorney's web bio would go even farther—by, for all intents and purposes, discouraging the potential client from ever contacting the branded attorney in the first instance. If public instruction were truly the rationale, a valid set of rules would, at a bare minimum, specify mandatory education of the public as to the significance—and lack thereof—of a lawyer choosing not to carry malpractice coverage.[7] The Task Force has not delineated any such description for the State Bar website or elsewhere.
- Finally, we are at a loss to understand how the proposed rules will address disclosure requirements for lawyers and firms that self-insure. Adequate self insurance is in the public interest. That alternative approach should be recognized in the proposed rules, rather than leaving the impression that such firms and individuals offer their clients no protection whatsoever.

As practicing lawyers and law practice management specialists, we firmly believe that the proposed changes will *not* do an effective job of protecting and informing the public. Requiring disclosure without better educating the public about malpractice insurance is at best a half-way measure of limited value. It will unfortunately cause much confusion and hardship.

## IV. Ulterior Purpose of Compelled Insurance is not an Appropriate Rationale

Other professions require neither professional liability insurance nor disclosure of the absence of such coverage. Not doctors; not accountants; not architects. Why should the legal profession? In any event, we are also left with the uneasy feeling that the proposed rules changes dance around the core issue and are a half-way measure towards mandatory malpractice insurance.

If compelling California attorneys to obtain malpractice insurance is indeed in the consumers' interest, then why not take a cleaner approach and require it outright—while also, as has Oregon, providing a cost-effective way for all California attorneys to obtain it?

If the Board of Governors is contemplating the compelled purchase of such insurance by lawyers, then it should commission a task force to assess that issue directly, instead of by the "back-door" method implicit in the instant Task Force's pending proposed rule changes.

Absent better, more easily obtainable public information and cost-effective solutions to getting insurance, the proposed rules are piecemeal and severely flawed.

## Conclusion

The Board of Governors is obliged to act in the best interests of all members, including sole and small firm practitioners.[8] It would be remiss in fulfilling that duty if it passed the pending proposed rule changes.

The LPMT therefore joins the overwhelming majority of the Bar's membership that strongly opposes those rules.

Respectfully submitted,

Law Practice Management & Technology (LPMT) Section Executive Committee (ExCom) by:

s/ Lawrence R. (Larry) Meyer
Chair, LPMT ExCom

s/ Robert D. Brownstone
(Active Bar Member # 152231)
Chair, LPMT ExCom Insurance Disclosure Standing Subcommittee

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1. Mike McKee, *Bar Still Wants Insurance Disclosure Rule* (Recorder Apr. 23, 2007), available a www.law.com/jsp/ca/PubArticleFriendlyCA.jsp?id=1177059872833; William Mayo, *INSURANCE DISCLOSURE WILL HURT LAWYERS* Letter to the Editor (Recorder Apr. 27, 2007), available at www.law.com/jsp/ca/PubArticleFriendlyCA.jsp?id=1177578269066.
2. Proposed Amendment to Rule 950.5 of the California Rules of Court (CRC); Proposed New Rule 950.6 of the CRC; Proposed New Rule 3-410 of the California Rules of Professional Conduct (CRPC).
3. In 2001, a California Bar Journal survey found that 18% of private practitioners go "bare" or do not have professional liability (malpractice) insurance. This phenomenon is not unique to California. By way of comparison, Illinois found that 40% of its sole practitioners do not have such insurance.
4. 25% of California's lawyers earn less than $50,000 per year; 49% earn less than $99,999 per year.
5. In contrast, neighboring Oregon has had mandatory malpractice insurance since 1978 and offers an affordable insurance program for its members.
6. If more information for clients is better than less, why do we not require lawyers to disclose their won-lost record or other evidence of the results they have obtained in the past for clients? Furthermore, why not educate citizens about the economics of law practice, so that they truly know what to ask lawyers?
7. One reason for this proposal given at page 9 of the report of the committee suggests that clients may expect that lawyers have professional liability insurance; this conclusion is without support.
8. Indeed, relatively recently, the Board of Governors announced an effort to address the economic concerns of sole and small firm practitioners and to reverse the perception held by many that The State Bar lacks concern about their interests. The current effort flies in the face of such a purported effort.

BY FAX AND EMAIL

September 14, 2006

Mr. Saul Bercovitch
Staff Attorney
The State Bar of California
180 Howard Street
San Francisco, CA 94105

Dear Mr. Bercovitch

This letter is written on behalf of the Law Practice Management & Technology (LPMT) Section of the State Bar of California as public comment on the proposed Rule of Professional Conduct and Rule of Court requiring that California attorneys disclose to their clients that they do not have professional liability (malpractice) insurance. Following robust discussion of this issue, the LPMT Executive Committee has concluded that further study of this complex issue is essential before any of the proposed changes are approved and implemented. The opinions and concerns expressed in this letter have been approved by the voting members of the Executive Committee and have the support of virtually all of our section advisors and liaisons.

While there is no question that serving the public interest is of paramount importance, we have concluded that many of the proposed changes, once implemented, may in fact work against rather than for the public interest. We believe that the principal effects of the proposed rules changes - whether desired or not - will be to compel attorneys to obtain malpractice insurance and to place attorneys lacking malpractice insurance at a competitive disadvantage. It's easy to jump to the conclusion that this is in the public's best interests, but it ignores several unintended secondary consequences.

• Solo attorneys and small firms without malpractice coverage (representing approximately 30,000 members of the bar) will be the ones most effected by the proposed rules changes, even though they are generally the least capable of affording malpractice insurance. When confronted with the added cost of malpractice insurance, they will face the dilemma of either passing it on to their clients or absorbing it themselves. Neither alternative bodes well for the public. If the cost is passed on, clients of these solo attorneys and small firms - often that portion of the public least capable of affording legal services in the first place - will face higher legal bills. This we believe will be a further disincentive for them to seek the assistance of lawyers. If on the other hand the cost is absorbed, these solo attorneys and small firms (generally the least prosperous portion of the Bar) will become even less profitable and some may very well disappear. Fewer solo attorneys and small firms will mean fewer choices for consumers - something which hardly seems to be in the public interest or the intent of the proposed rules changes.

• New attorneys entering solo practice will find the cost of obtaining malpractice insurance to be an additional barrier to entering the profession. Since they are just starting out (and have yet to establish a predictable cash flow), they are among those least likely to be able to afford malpractice insurance. As new entries into the marketplace for legal services, they are already at a competitive disadvantage; not being able to afford malpractice insurance and being forced to tell clients they do not have it will further increase that disadvantage. This additional barrier will likely translate into fewer attorneys entering the profession, once again providing consumers of legal services with fewer choices. The impact of this will probably fall disproportionately on new attorneys who are minorities, a group who are already underrepresented in the profession. Though certainly not an intended consequence, the proposed rules changes may end up undercutting the Bar's efforts to promote diversity through encouraging minorities to join the practice.

We are not aware of any data that would disconfirm these two predictions about the unintended consequences of adopting the proposed rules. That in itself gives us pause - we wonder whether this issue has been adequately studied and reviewed? Why not look at how similar rules changes have and are working in other states that have adopted the ABA model provisions? If there is no data or it's inconclusive, or it's simply too early to tell, this is further reason to defer a decision on the proposed rule changes.

As practicing attorneys and law practice management specialists, our executive committee members also have grave concerns about the actual implementation of these new rules and the specifics of attorney disclosure. Any idea, no matter how well-intended, may falter if it is confusing and difficult to put into practice. We fear this will be the case with the proposed rules changes, and we anticipate the following problems and dilemmas if disclosure of malpractice coverage becomes mandatory.

• Will attorneys bear the additional burden of explaining to clients and prospective clients the specifics of their malpractice insurance coverage, such as the amount of coverage, rating of insurer, type of insurance, coverage period, policy expiration date, etc.?

• We think it is disingenuous to believe that these sorts of detailed conversations won't take place as a result of mandatory disclosure. This, in turn, will force attorneys to become insurance industry practice experts just to be able to explain the fine points of malpractice policies to their clients and prospective clients.

• It's not only fair to assume that prospective clients will ask about the specifics, but also fair to assume that the accuracy and adequacy of an attorney's explanations about his or her coverage will itself become a part of any malpractice litigation. The additional burdens on attorneys and insurers in these situations would be significant.

• Finally, we are at a loss to understand how the proposed rules will address disclosure requirements for lawyers and firms that self-insure. Adequate self insurance is in the public interest, and this should be recognized in the proposed rules, rather than leaving the impression that such firms and individuals offer their clients no protection whatsoever.

As practicing lawyers and law practice management specialists, we firmly believe that the proposed changes will not do an effective job of protecting and informing the public. Requiring disclosure without better educating the public about malpractice insurance is at best a half-way measure of limited value that will unfortunately cause much confusion and hardship. *(continued next page)*



**EXHIBIT C**

We are also left with the uneasy feeling that the proposed rules changes dance around the core issue and are a half-way measure towards mandatory malpractice insurance. As mentioned earlier, we believe the effect of the proposed changes will be to compel California attorneys to obtain malpractice insurance. If this is indeed in the public's interest, then why not take a cleaner approach and require it outright while providing a cost-effective way for all California attorneys to obtain it. Absent better, more easily obtainable public information and cost-effective solutions to getting insurance, the proposed rules are piecemeal and premature.

Rather than merely criticizing the proposed rules changes and raising troubling questions about their implementation and effect, our executive committee would also like to provide the following recommendations.

- Because there are so many important unanswered questions, adoption of the proposed rules should be deferred until the issue has been studied in greater detail. There is little to be lost from taking a cautious approach and much to be gained in getting it right the first time. Further deliberate study will demonstrate the Bar's sensitivity and commitment to solo, small firm, and minority attorneys. Further study could also help the Bar develop a cost-effective way for more (if not all) California attorneys to obtain malpractice insurance.
- Regardless of whether the proposed rules are adopted, public education about malpractice insurance should be emphasized, including expanded information on the State Bar and other websites about the need for and desirability of malpractice insurance. The State Bar should also prepare and publish standardized informational brochures and forms on malpractice insurance that attorneys can provide to clients (and thus avoid controversies about the adequacy and accuracy of their explanations about their malpractice insurance coverage).
- Greater emphasis should also be placed on lawyer education about malpractice and malpractice insurance. Such education is a cost-effective approach to the problem and will likely result in less malpractice and more insurance coverage. It's critical that the Bar increase its commitment to help attorneys learn what constitutes malpractice, when and why it most commonly occurs, how to avoid it, and how to insure against it. It's important for lawyers to recognize how tightly malpractice is tied to other larger problems with practice management. At the risk of beating a dead horse, we once again suggest that the State Bar require one hour of mandatory MCLE in law practice management.
- Lastly, since this issue deals with and impacts the economics of law practice, we suggest that a representative from our LPMT executive committee sit as an advisory member on the Board of Governors' task force and committee on this topic.

Upon your request or that of the Board of Governors, I will be happy to make myself available for further discussion and/or clarification of the points raised in this letter.

Respectfully submitted,

Andrew Elowitt

Andrew Elowitt
LPMT Chair 2005-2006

ESTABLISHED 1929

# CALIFORNIA JUDGES ASSOCIATION

*The Voice of the Judiciary*

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February 13, 2008

Saul Bercovitch, Esq.
Staff Attorney
The State Bar of California
180 Howard Street
San Francisco, CA 94105

Re: Revised Rule of Professional Conduct 3-410.

Dear Mr. Bercovitch,

The California Judges Association ("CJA") through its Committee on Alternative Dispute Resolution has reviewed and considered the revised Rule of Professional Conduct 3-410 which is now subject to public comment.

On July 30, 2007, Judge Scott L. Kays, the president of CJA, wrote expressing the position of CJA on the Rule concerning insurance disclosure as proposed at that time and CJA's reservations concerning the Rule. CJA's position remains that there should be an overt exemption in the Rules for those bar members who work exclusively as ADR providers. This would strengthen the assumption that full time ADR providers do not provide legal representation or give legal advice to clients.

We note that subdivision (A) of revised Rule 3-410 would trigger the insurance disclosure obligation "whenever it is reasonably foreseeable that the total amount of the member's legal representation of the client would exceed four hours." The assumption being that if "legal representation of the client" is part and parcel of the Rule, then a member who is a full time ADR neutral, is not enjoined by the Rule and no additional language may be necessary.

Finally, we wish to restate that CJA does not take a position on the overarching policy decision of disclosures concerning professional liability insurance but raises the drafting issues if such disclosure rules are adopted.

Thank you for your consideration.

Sincerely,

Ira Kauf

Ira R. Kaufman
President

IRK:gk

## Bercovitch, Saul

**From:** Mark B. Abelson [mark@caclaw.com]

**Sent:** Thursday, February 14, 2008 6:13 PM

**To:** Bercovitch, Saul

**Subject:** Proposed Rule of Professional CONDUCT 3-140

I would like to express my support for this proposed Rule of Professional Conduct. I have been an attorney since 1976. I practice plaintiff's tort work, with an emphasis in legal malpractice. I believe that attorneys have a duty to their clients to disclose whether or not they are covered by insurance. Clients put their trust in attorneys. Clients expect attorneys to be their fiduciaries. Clients form this expectation from the moment they meet with and disclose their confidential information to their potential attorney. The client's expression of trust and exchange of confidential information normally occurs prior to the execution of a contract for the attorney's professional services. Often a potential client is interviewing the attorney to determine if the attorney is a good fit for them, is someone they can easily work with, is someone they can trust, is someone they believe can adequately perform the service that they need and is someone who is going to honestly and fully communicate with them. The disclosure of lack of insurance may be a determining factor for that client to make an informed decision about whether or not to hire the attorney. Often times the client is entrusting a matter to an attorney that is extremely important to the client and his/her/its wellbeing or financial security--- the client would want to know whether or not the attorney would have the financial resources to remedy an error or mistake the attorney may make. The client usually does not know how to ask the question or is intimidated about asking such a question.

We as attorneys owe to our potential clients to provide them with the information about our insurance status, whether or not the client is sophisticated enough to ask. As a matter of public policy errors and omissions coverage is available to us and we can more afford the expense of covering the risk. Similar to all of the balancing questions our court have posed about product liability matters and other tort related causes of action on whole the public policy factors weigh in favor of such a disclosure.

I will be happy to provide greater detail or to testify for a legislative body about the number of legal malpractice cases that I have turned down in which I believe the attorney had proximately caused the client damage, however, the attorney did not have insurance. In all of those cases the client did not know at the time they retained the attorney that the attorney did not have insurance and by the time they learn the attorney did not have insurance they are disappointed that the attorney is uninsured and most of these clients state that they would have carefully considered, and in fact may have decided not to hire the attorney, if they knew at the time of the hiring that they attorney did not have insurance.

Thank you for your attention.

Mark Abelson

Campagnoli Abelson Campagnoli

RICHARD S. LESLIE
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February 20, 2008

Saul Bercovitch, Staff Attorney
The State Bar of California
180 Howard Street
San Francisco, CA 94105

Re: Proposed New **Insurance Disclosure Rule** (Revised)

Dear Friends:

This letter is written in opposition to the above-referenced proposal. I am mystified and frankly disappointed with the seeming blinded bias of the proponents of this Rule. They would require, at the outset of a professional relationship, a lawyer to raise the issue of possible malpractice and, in essence, the recourse for the client. Is this what is required of physicians (brain surgeons, e.g.) or psychologists and other licensed health care practitioners? Accountants? Dentists?

The folly of this idea is illustrated by **the title of the proposal. This proposed rule is not about insurance disclosure.** It is a proposed rule concerning **disclosure of the lack of insurance.** Why not change the wording of the content to require disclosure of the fact that one has malpractice insurance? The answer is self-evident: those who have malpractice insurance do not want to disclose that fact – certainly not at the outset of the relationship, AND FOR GOOD REASON!

Merely claiming that this is a consumer issue or that the public needs to be informed and protected doesn't make it so. If it were such an important and fundamental issue, why are the other professions without such a mandate? **The answer, I suggest, may be that it is not good to start a relationship with an attorney or a physician with a discussion or disclosure about possible malpractice! Please reconsider and step back.**

I have practiced law for over thirty years. I have never had a complaint of any kind (to my knowledge) against me. Why now would I be required to talk about malpractice with my client? I would feel compelled, if I did not have insurance, to explain why that was so and how the client should feel safe and protected nevertheless.

Sincerely,

Richard S. Leslie

Richard S. Leslie

**Bercovitch, Saul**

**From:** James D. Murray [jdm.esq@verizon.net]

**Sent:** Wednesday, March 05, 2008 2:17 PM

**To:** Bercovitch, Saul; James D. Murray

**Subject:** Proposed Rule Requiring Mandatory Insurance Disclosure

Dear Mr. Bercovitch:

I have been practicing law since 1961, in USAF as a Judge Advocate, in the Los Angeles, District Attorney's Office, in the U.S. Attorney's Office for the Central District of California and since 1970 in private civil practice. I am AV rated.

Active duty military lawyers regularly give legal advise to military and civilian dependents in the State of California. Reserve civilian lawyers also regularly give legal advice to military and civilian dependents. Will the proposed regulation apply to active duty and/or reservist lawyers. Also, lawyers who are in public practice (Deputy DAs, AUSAs) and judicial officers, also give such legal advice. Does the new rule apply to such lawyers when they give legal assistance to military and/or civilian dependents?

Since being in private civil practice since 1970, I have practiced both covered and not covered by professional liability insurance. I have voluntarily advised clients when there was a written retainer agreement, when I was not covered by professional liability insurance.

As a practical matter, I don't like to state that I am making any such disclosure as required by any rule or regulation. Moreover, if the proposed new rule is adopted, I will use a written agreement with every client regardless of the time that may be involved.

One of the reasons that I have kept my hourly rate below what many lawyers with my experience and ability charge is that I do not currently carry professional liability insurance.

The adoption of the proposed rule may just be the straw that causes me to raise my hourly rates and pour some more overhead into the coffers of the insurance industry. Guess who will have to pay that freight?

If the State Bar is truly interested in protecting the public why not bite the bullet and require professional liability insurance for all lawyers who provide legal services as a condition of licensing? Then everyone will be covered and the insurance industry will be officially grafted to our hips by regulation.

No doubt the proposed regulation is prompted by existing problems that have occurred and is worthy of serious consideration. However, in the future the rich will continue to patronize major firms who will be covered by insurance and pass the costs on to their clients and pro bono clients will not be deterred by the required disclosures as they generally few available choices. In my opinion, the proposed regulation will likely be more of an irritant to lawyers than a cure for any existing problem.

Very truly yours,

James D. Murray
[SBN 36959]

## Bercovitch, Saul

**From:** Clayton Vreeland [clay@vreelandlawfirm.com]

**Sent:** Thursday, March 06, 2008 10:18 AM

**To:** Bercovitch, Saul

**Subject:** proposed malpractice insurance rule

This proposed rule is purely and simply an attempt to give attorneys in medium to large firms (who all carry malpractice insurance) an additional competitive advantage over attorneys in small firms or in solo practice (many of whom do not carry malpractice insurance). The real purpose of this proposed rule is not to protect clients and prospective clients by giving them information they can use to protect themselves against the possibility of future malpractice. If that were the intent the disclosure that would be required would be whether, when, how many times, and for what, the attorney or firm has been sued for malpractice, or threatened with suit for malpractice, in the past. Attorneys who have screwed up in the past are more likely than the rest of us to screw up in the future. There can be no dispute about that. But there is no way the State Bar would ever consider requiring attorneys to disclose past malpractice claims to clients or prospective clients, because that would primarily affect the large law firms that the State Bar is trying to help. Instead of giving large law firms an additional competitive advantage a rule requiring disclosure of past malpractice claims would give a competitive advantage to the vast majority of solo practitioners and small firms who have never had a malpractice claim made against them. If I were a potential client seeking an attorney, to the extent that the risk of malpractice was on my mind at all, the information I would be most interested in knowing is the attorney's and her firm's history with respect to malpractice claims. Have there been any, and if so when and what for? If I am talking to an attorney and she tells me she has never had a malpractice claim made or threatened against her, what do I care whether she has malpractice insurance? Suppose that you were interviewing someone to drive you around; would you be more interested in knowing his accident history or in what kind of insurance he had? It is ridiculous to require an attorney to disclose to every prospective client whether the attorney has malpractice insurance while at the same time not requiring the attorney to disclose past malpractice incidents. So don't tell me this is about protecting clients. If it were about protecting clients attorneys would be required to disclose their past malpractice history.

Clayton J. Vreeland
State Bar No. 110086

## Bercovitch, Saul

**From:** Michael R. Brown [mike@browntaxlaw.com]
**Sent:** Thursday, March 06, 2008 2:27 PM
**To:** Bercovitch, Saul
**Subject:** malpractice insurance disclosure

Dear Mr. Bercovitch:

I am not in favor of the malpractice insurance disclosure proposal. As far as I know, no other profession or industry has an insurance disclosure requirement. Clients are welcome to inquire. I think requiring an attorney to disclose their decisions regarding whether to carry insurance or not implies that not carrying it is inferior to carrying it and places a stigma on that attorney. I don't think that disclosure is necessary, but if it is, place the burden on those who carry it to disclose that they do. Clients of attorneys who feel the need to carry insurance may be much more likely to be harmed and need that insurance. The attorney who goes bare may be much more cautious and not harm the client in the first place. I don't think it helps the bar to imply to the public that there is, or ought to be, a deep pocket behind every attorney that can be sued for a large windfall claim.

Sincerely

Michael R. Brown, JD, CPA, MBA
Michael R. Brown, A Law Corporation
23041 Mill Creek Drive, Laguna Hills, CA 92653-1257
Phone (949) 452-0412 x226; Fax (949) 380-1128
mike@browntaxlaw.com

**From:** Derek Freyberg [dfreyberg@telik.com]
**Sent:** Thursday, March 06, 2008 3:37 PM
**To:** Bercovitch, Saul
**Subject:** Proposed New Rule 3-410 of the California Rules of Professional Conduct - Comment

Dear Mr. Bercovitch:

As a member of the California State Bar for the past 25 years, I respectfully urge the Board of Governors not to enact proposed Rule 3-410.

I do not believe the benefits of the proposed rule outweigh the costs of compliance (and presumably the discipline system to enforce that compliance).

I note that the disclosure is not required until "the time of the client's engagement", so that it can be placed in an engagement letter.
Surely this is too late in the process if the idea is that a client shall know whether his or her chosen attorney is insured and have that fact rationally be part of the client's choice - to meet that need an attorney would have to make the disclosure essentially at the time of first contact with the client.
But what is proposed is a disclosure that is essentially punitive - it forces the client who has invested time with an attorney to think at the last minute whether to proceed with the engagement of an uninsured attorney, and it forces an attorney who has invested time with a proposed client to make a disclosure that may cause the engagement to be terminated or not entered.

Second, the proposed rule takes no account of the adequacy (however
judged) of the malpractice insurance an attorney may carry - all it says is "I'm insured" or "I'm not insured". If malpractice insurance were always to be sufficient to make any client whole, perhaps there would be a better argument for disclosure; but as it is attorneys can meet the "I'm insured" test by buying the cheapest and least effective insurance available, leaving the client not necessarily significantly any better protected than if the attorney were not insured at all. Consider, for example, an attorney who carries only a "claims made" policy: a client harmed by such an attorney would not be protected in any meaningful way if the malpractice were to be recognized after termination of the attorney-client relationship and lapse of the policy, yet that attorney would be able to represent to the client that he/she was insured, or at least not have to make the "I'm not insured" disclosure.

Finally, the proposed disclosure requirement stigmatizes attorneys who choose not to, or cannot afford to, carry malpractice insurance.
I see the State Bar President's comment in the March "California Bar Journal" that "Most of us expect that if we go to a doctor they have insurance in the event they make a mistake and injure us" and we expect the same of our attorneys and that our attorneys, unlike our doctors, will tell us if they are not insured. It may well be true that we by and large expect our doctors to be insured, and even our attorneys; but: (i) doctors are not required to disclose the absence of malpractice insurance - and I have yet to meet a person who has asked a doctor whether they are insured before deciding to use them, and (ii) medical malpractice is likely to be far more damaging to the person injured by it than is legal malpractice - the former may involve death or physical harm, the second generally only money.
It seems to me that this requirement will hit most heavily on the attorneys who provide legal services to those least able to afford expensive lawyers (and their expensive malpractice premiums), and will cause the clients of these attorneys to improperly doubt the competence of those attorneys who provide services at rates that do not include malpractice premiums.

I add in closing that I have been in either corporate or large law firm practice for my entire career, and have only once represented a client as a sole practitioner (a brief, long since terminated, engagement), so that the proposed rule will have no effect on me in my present position.
I am simply of the view that the rule is wrong and an unnecessary burden, and I urge that it not be enacted.

Yours sincerely,
Derek P. Freyberg
CA Bar #104439

## Bercovitch, Saul

**From:** Jonathan Weiss [jw@lojw.com]
**Sent:** Friday, March 07, 2008 9:51 AM
**To:** Bercovitch, Saul
**Subject:** Proposed New Insurance Disclosure Rule (Revised)

I am against the proposal.

It will unnecesarily lead to the sort of additional problems that caused the disclosure requirement to be repealed in the past. It will then lead to disciplinary actions and possibly malpractice suits, all to do what? It is a solution looking for a problem.

Thank you,

Jonathan Weiss
SBN 143895

## Bercovitch, Saul

**From:** Stephen Shepard [stephen@stephenshepard.com]

**Sent:** Friday, March 07, 2008 3:12 PM

**To:** Bercovitch, Saul

**Subject:** Proposed Rule 3-140

I am a solo practitioner. For the record, I am against the proposed Rule 3-140. Thank you for your consideration.

Stephen Shepard
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KATHRYN KIRKLAND

CERTIFIED SPECIALIST - FAMILY LAW
THE STATE BAR OF CALIFORNIA
BOARD OF LEGAL SPECIALIZATION

March 7, 2008

Saul Bercovitch, J.D.
Staff Attorney
State Bar Of California
180 Howard St.
San Francisco, CA 941005

RE: malpractice insurance proposal

Dear Mr. Bercovitch:

The following are my comments on the proposal to require disclosure to a client that the attorney carries malpractice insurance.

1. I do not believe that the proposal would increase the number of attorneys who actually carry malpractice insurance. Those of us who consider malpractice coverage as one of those necessities of doing business already have coverage. Those who do not will not be likely to obtain coverage simply because there may be State Bar disciplinary action some time in the future. The requirement for a written fee agreement (something that does not cost the attorney any money) has not resulted in all attorneys having written fee agreement with clients, even when the attorney knows that he or she will be at a serious disadvantage in a fee dispute with that client.

2. I believe that an unintended consequence of this proposal will be a further reduction in the willingness of attorneys to practice family law. Of all the areas of practice, family law is the most vulnerable to allegations of malpractice, simply because no one comes out of a divorce proceeding happy. Unhappy spouses often look for a scapegoat and knowing that the family law attorney who represented the unhappy spouse has insurance can be an incentive to file a malpractice claim (especially if fees are owed) as a way to recoup what the unhappy spouse felt he or she lost. Telling the spouse at the beginning of family law representation, when emotions are running very high may simply increase this tendency. Most insurance companies will pay some recovery because it is cheaper than litigation. The unhappy spouse then is rewarded for making an

unsustainable claim. The net result is to increase the number of claims and to drive the price of insurance up. Many policies are "claims made", unlike automobile insurance which is "claims paid". One or two claims made, even when entirely unfounded, can put malpractice insurance premiums out of reach of the solo practitioner, and most family law practitioners are solos.

3. A less-definable, but still important effect of the conversation between the prospective client and the attorney, in which the attorney openly and affirmatively says "I do have malpractice insurance" is to raise doubt in the mind of the client as to the attorney's capabilities.

It is difficult for me to understand why an attorney would not have malpractice insurance( just as it is difficult for me to understand why an attorney would not have a written fee agreement with a client), but a rule which says that the attorney must tell the prospective client whether he or she has malpractice insurance is not an effective solution to address the problem.

Very truly yours,

Kathryn Kirkland

Kathryn Kirkland

KK/hs

**Bercovitch, Saul**

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**From:** mmahoney@aceweb.com
**Sent:** Saturday, March 08, 2008 3:13 PM
**To:** Bercovitch, Saul
**Subject:** Insurance disclosure

**Dear Mr. Bercovitch:**

**This proposal has been "refined," but the basic message remains. The wealthy lawyers who run the State Bar wish to punish solo and small firm practitioners by imposing upon them a requirement that does not apply to the large firm lawyers.**

**However, they may be mistaken. When you create a duty, you create a cause of action for breach of that duty. At present, there is no duty to dislose insurance coverage (nor is there for doctors, dentists, or accountants). Therefore, a lawyer commits no tort by failing to disclose.**

**Under the proposed rule, a lawyer who sends an engagement letter containing no reference to coverage is, in fact, "disclosing" that coverage exists. All men are presumed to know the law, and a client who receives this engagement letter will assume that coverage exists.**

**Suppose, then, that the lawyer negligently causes the client to lose $3 million. Upon pressing a claim, the client learns that the lawyer only has $500,000 in coverage. The client, after exhausting the policy limits, will sue the lawyer for the other $2.5 million, and in addition, will file a fraud complaint against the lawyer, alleging failure to disclose a material known fact, namely, the insurance policy limits, and seeking punitive damages. An attempt by the lawyer to escape into bankruptcy will be futile, because punitive damages are not dischargeable in bankruptcy.**

**The first lawyer to get sued after the disclosure rule is enacted may be the insured attorney, not the uninsured attorney.**

**Michael Mahoney, CSB No. 97337**

**San Francisco**

**(415) 693-9361**

## Bercovitch, Saul

| | |
|---|---|
| **From:** | Russ Nowell [russnowell@earthlink.net] |
| **Sent:** | Monday, March 10, 2008 11:45 AM |
| **To:** | Bercovitch, Saul |
| **Subject:** | Public Comment on proposed Cal RPC Rule 3-410 |

Dear Mr. Bercovitch:

Thank you for this opportunity to comment to the State Bar Board of Governors.

I object to the proposed rule of disclosure Cal. RPC 3-410.

First, the language of disclosure proposed carries a stigma: "Pursuant to California Rule of Professional Conduct 3-410, I am informing you in writing that I do not have professional liability insurance." The reference to ethics rules makes it appear that the attorney is in violation of ethics rules, and under some sort of practice limitation. The safe harbor should merely require the following written statement:
"I do not have professional liability insurance" or "I no longer have professional liability insurance."

It can be argued that any disclosure requirement carries a stigma that will disproportionately affect solo and small firm attorneys. In addition, since the major assumption that insurance disclosure is required is client expectations, is there any reputable scientific research (as opposed to anecdotal evidence) at all that shows that clients of uninsured attorneys expect that their attorney carries professional liability insurance before a liability claim arose.

Second, the four hour requirement assumes that there is no flat fee billing. There should be a flat rate exception as well as an hourly exception. Thus, the rule of disclosure should only apply if the total bill is reasonably likely to exceed $1000 or the */_billed_/* hours are reasonably likely to exceed four hours. Without a limitation to billed hours, the bar will discourage attorneys from spending sufficient time on low value cases, which often involves unbilled time in solo and small firms.

Third, I have over 20 years experience, including both large firm practice, at Gibson, Dunn & Crutcher, and Milbank, Tweed, Hadley & McCloy, and solo practice. The clients for whom we worked at these large firms could easily afford to pay for administrative overhead and malpractice insurance, passed through in higher bills. Additional bar regulations with disciplinary consequences fall disproportionately on the least represented in society. Many solo and small firm practitioners cannot pass through the additional cost of insurance to their clients.

Finally, many insurance companies often dictate who can receive legal services, by substantially increasing rates in areas of law that are perceived to be at risk. I have a recent client who contacted an insured attorney for estate planning services, who declined to represent her because her estate exceeded $2 million. She then contacted a relatively new attorney, and had her estate prepared by that attorney.
Numerous significant mistakes were made by the new attorney, because a malpractice insurer discouraged the experienced attorney from handling taxable estates. Thus, accountants and non-lawyers are deciding what legal services can be provided, rather than attorneys. In fact, piling an ethics violation on top of professional negligence and forcing more practitioners out of under served areas of the law may lead to more uncompensated malpractice complaints rather than less. It may have the additional effect of further discouraging attorneys from serving the poorest clients, pushing more of them to entirely unlicensed, untrained legal service providers, such as those passing out paralegal cards at our local family law courts, the numerous "notarios" who specialize in "immagracion," and non-attorneys advertising low rates for trusts every day in the local newspaper and in direct mail campaigns.

For these reasons, I oppose the proposed rule.

Sincerely yours,

Russell P. Nowell, Esq.
(SBN 132280)

Law Office of Russell P. Nowell
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russnowell@earthlink.net

**Bercovitch, Saul**

**From:** Paul J. Mirowski [pmirowski@mirlaw.com]
**Sent:** Monday, March 10, 2008 1:34 PM
**To:** Bercovitch, Saul
**Subject:** Disclosure of Malpractice Insurance

March 10, 2008

Dear Bar Association

RE: Proposal To Amend Bar Rules Requiring Disclosure of Malpractice Insurance.

Our current State Bar President notes that it is his "sense" that "new State Bar Policies provoke greater resentment among lawyers at small firms than at larger ones. . . . (and that the Bar) hasn't always been as sensitive as it should to those concerns." This is what we call an *understatement.*

I have been a small or solo practitioner for approximately 24 years and in that time I have never had a disciplinary problem nor a problem with a client that I was not able to resolve. Yet I continue to have a problem with the *State Bar of California* (SBC). I am convinced that this is because the SBC really only represents the interests of the larger firms and considers small and solo practitioners fodder. This might seem odd because I believe that the vast majority of the Bar can be classified as small and solo practitioners. On the other hand, I suspect that those who sit on the SBC Board of Governors, and those that have the luxury of time to work on SBC's committees, are either from the larger firms, or from an income bracket that allows for such "charitable" work.

You see, I wish I had time to sit on one of your committees, go on meeting junkets and pontificate about what is good for the "consumers" of this State, but unfortunately, I am too busy representing those people and being paid far too little for helping out the smaller economic interest in this State. You see my charity actually goes to the people I represent. The *"pro bono"* actually comes out of my paycheck.

Unfortunately, this explains why we keep seeing proposals such as this renewed effort to *Amend Bar Rules Requiring Disclosure of Malpractice Insurance.* Although this is being sold as a "protection" for consumers, it is really a way to avoid doing something about the malpractice insurance crisis that plagues the profession and, just out of coincidence (*read facetious here*), makes the vast majority of small and solo practitioners *second class citizens.*

Mr. Bleich's assertion that the proposal "reflects his active devotion to assuring fairness to solo and small firm practitioners . . . ," is a farce. This proposal is blatant attack on solo and small firm practitioners who, as a whole, are more cost effective to the consumers of this State than our members at the larger firms who already command the lion's share of the market.

Unfortunately, this has come at a price to the solo and small firm practitioners of this State who, the last time I saw figures, represent a large percentage of Bar in California going "naked." This is not because we are ignorant, rather, it is because the Malpractice Insurance monster is out of control in California. Solo and small firm practitioners cannot afford the exorbitant premiums demanded by the few insurers who still offer policies in this State. In response thereto, the SBC (which has an operating budget of a small third world nation) would rather abuse their own (under represented) members than take on the insurance industry. This is not about consumers, this is about the realities of practice in California.

As a sample case study, I myself paid the exorbitant and geometrically growing insurance premiums for years while every year the actual coverage dwindled to become almost laughable. Yet, after numerous years of coverage, and even though I never had any claims nor disciplinary issues, I was suddenly denied coverage. The reason was because I practice what is loosely called "entertainment" law. I regret to admit that I do not have the litigious Brittanys and Madonnas as my clients. Rather, I spend the majority of my time with the plethora of often under represented creative types who need basic contracts, copyrights, trademarks and the like. Unfortunately, this is an area normally reserved for the big firm and the big stars they represent and as a result, I am universally declared to be in a category which is uninsurable. At this point I have no option.

So please advise Mr. Bleich and the rest of the Board of Governors of the SBC that we small and solo practitioners are not just resentful of what the Bar is once again attempting to do here, we are actually quite angry at the SBC who once again has decided wage war against us and the "consumers" we represent. I am taking important time out of my day to protest this measure. Hopefully, this provokes the Board to be more "sensitive" to those who pay dues for this bloated organization.

Paul J. Mirowski
SBN 106042

**Paul J. Mirowski**

***Creative Representation***
757 West Ivy Street, San Diego CA. 92101
**Telephone** (619) 702-5300 **Facsimile** (619) 702-4666
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## Bercovitch, Saul

**From:** Steven J. Hamilton [shamilton@stevehamiltonlaw.com]
**Sent:** Monday, March 10, 2008 2:31 PM
**To:** Bercovitch, Saul
**Subject:** Proposed New Rule 3-410-Insurance

I maintain insurance and have an unblemished record with The State Bar.
However, I believe the proposed insurance disclosure rule misses the objective.
My clients are already overwhelmed with Fee Agreements and Conflict Letters, and I seriously
Doubt any of them read or truly understand them. And my clients are fairly sophisticated.
Does this rule really solve any problems? Will the uninsured get insurance? I doubt it!
Will the disclosure cause a prospective client to look elsewhere? I really doubt it (since they
Probably don't read the disclosure anyway!)
The only benefit is to give the State Bar another bullet to use against an attorney under
Investigation. Those members who have committed bad acts will not be deterred by this rule
And it's enactment will only add an additional count. But what about the good members who
are referred for investigation who might fail to meet silly disclosure rules and receive a reprimand
for it!
If the Bar spent more time helping us get good, affordable coverage and focused resources on the
Members whose actions are obvious violations of important rules, the public would be better protected and the
Members
Would be better served as well.

Thanks,
Steve hamilton

---

Steven J. Hamilton, Esq.
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## Bercovitch, Saul

**From:** Milton B. Tennant [milt@jrschilling.com]
**Sent:** Monday, March 10, 2008 4:18 PM
**To:** Bercovitch, Saul
**Subject:** Proposed New Insurance Disclosure Rule

The bar president's opinion piece in the Bar Journal is disingenuous in his analogy re "Most of us expect that when we go to a doctor they have insurance...". In fact, there is no basis for such an assumption as doctors are not required to disclose upfront that they do or do not have insurance.
Why would the public expect such disclosure from their attorney?

I have never received such a disclosure from a doctor, accountant, psychologist, barber, cosmetologist, manicurist or any of the other myriad service providers required to be licensed by the state. Why lawyers? The bar is nothing more than a trade association which is supposed to represent the members interest. Why is always taking an advocates' interest against its members?

This is simply another attack on the solo/small firm practitioner. I say no.

Milton Tennant #89488

~~JULIE E. KEATING~~
~~103 GREAT RUSSELL STREET~~
~~WC1B 3LA LONDON, ENGLAND~~

To Sue Berkovitch
Staff Attorney - State Bar
180 Howard St
San Francisco, CA 94105

Re: Comment: Liability Insurance - Malpractice - OPPOSED

I am opposed to such disclosure because such disclosure does not serve our clients' best interests.

Regarding the above address cross out - I'm recycling beautiful hand made paper. Hope you don't mind - our planet is fragile.

Thanks.

Sylvia Keating
PO Box 506 553
San Diego, CA 92150

Fla 716900
CA 226428

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March 10, 2008

Board of Governors
State Bar of California
180 Howard Street
San Francisco, CA 94105

Re: Proposed Rule on Malpractice Insurance

Gentlemen:

As a 39 year member of the bar, this is the first time that I have written to you to share my opinion on anything you have been contemplating doing.

I must object to your proposed new rule that would make disclosure of anyone's malpractice insurance status public. As a solo practitioner, this would place me and all others in the position of being "second class lawyers" in the public's mind. It would undermine that most necessary trust and confidence that we all value so much.

I did read the exhaustive Opinion Page in the California Bar Journal (March 2008) by bar president Jeff Bleich, and found it detailed and well-intentioned. However, it fails to adequately deal with the main issue, noted above. For a better critique, please see Diane Karpman's column in the same issue.

For all of my years in practice, I have been involved in local bar activities, the Conference of Delegates, etc. , and have always defended the bar against all challenges. This time, I must speak out on the other side. You need to consider that great number of lawyers who would be impacted by this rule change and their clients.

Very truly yours,

David M. Shacter

DMS/d

## Bercovitch, Saul

**From:** Kenneth P. Strongman, Esq. [kpst@kpstrongman.com]
**Sent:** Tuesday, March 11, 2008 12:46 PM
**To:** Bercovitch, Saul
**Subject:** Comments: Proposed New Rule of Professional Conduct 3-410

Dear Mr. Bercovitch:

A specific exemption should be made for Alternative Dispute Resolution. Professional Conduct 3-410 does not hint as to whether a disclosure must be made, or does not need to be made to the clients in regard to ADR. When clients engage a member for ADR, there is no attorney/client relationship established.

Kenneth P. Strongman, Esq.

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**Bercovitch, Saul**

**From:** Kenneth Brans [kbrans@sbcglobal.net]

**Sent:** Wednesday, March 12, 2008 7:21 AM

**To:** Bercovitch, Saul

**Subject:** Insurance Disclosure

I am a sole practitioner (for 34 years) and have always had malpractice insurance. It is essential for the integrity of the Bar given the sloppy admissions policies we have and relative lack of enforcement of misconduct due to budget restraints. I am in favor of disclosure whether an attorney carries malpractice insurance (yes or no) in any fee agreement or in signage within the attorney's office. Ken Brans

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**Bercovitch, Saul**

**From:** John Collins [johnolaw@gmail.com]
**Sent:** Wednesday, March 12, 2008 3:40 PM
**To:** Bercovitch, Saul
**Cc:** Towery, James E.
**Subject:** Insurance Disclosure Rule

Dear Mr. Bercovitch:

I am flatly and unalterably opposed to the proposed new rule. I am a 35+ year California attorney, graduate of UCLA Law, former local bar president, AV rated by Martindale Hubbell. I have never had a claim against me personally. I have carried malpractice insurance and spent probably $150,000 on it over the years, to no purpose except to sleep nights and be protected from vultures.

Our system of malpractice adjudication is broken, and needs to be fixed. The statute of limitations is too long, and has too many exceptions; the standards are too difficult to meet; the rules are impossible; the protection against false or unmeritorious claims is non-existent. Normal, sensible, competent lawyers commonly acknowledge the terror of the groundless or not-very-well-grounded malpractice lawsuit? How about a cap on liability (like the doctors)? Or a system of required pre-lawsuit mediation? In any event, we should be doing something to protect the lawyers, not worrying about whether a few of them will be uninsured against claims.
If clients care about this, they can negotiate it for themselves. Lots of lawyers would simply reply -- if this was raised by a client -- that it is none of their business, any more than a lawyer ought to have to disclose his or her personal assets to a client when being engaged.

Where will it end? Do you have to disclose that you have malpractice insurance, but it is inadequate to cover the possible losses? That if my carrier goes under, my personal assets won't be sufficient to pay your claim? That I'm with a carrier that has a long history of denying claims?

Whether a lawyer chooses to endure the burden of paying for insurance coverage is a matter of personal choice. Some have adequate personal reserves and choose to rely on their own skill. Some can't afford it. Some don't care to. It is quite simply NONE OF THE BAR'S BUSINESS. It is also not the client's business. It is simply another invasion of privacy by a Bar Association that cares nothing for the members.

Please just let this go. It is way beyond the Bar's proper function.

John Marshall Collins

John Marshall Collins
John Marshall Collins, P.C.
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**Bercovitch, Saul**

**From:** Frank Hoffman [f.hoffman.esquire@gmail.com]
**Sent:** Wednesday, March 12, 2008 4:59 PM
**To:** Bercovitch, Saul
**Subject:** insurance disclosure

The only thing this again-resurrected measure proves is that the insurance industry has its tentacles in the bar and you are going to keep presenting
it until we are worn out.

I don't care how the bar president spins it, we need to decrease entanglements with private businesses. The only reason some members of the public might be concerned
is exactly because governments and quasi-governmental agencies have succumbed to the moneyed influence and have presented their spin as fact. If people looked at the kinds of corruption and fraud perpetrated by this insurance industry, they would not be so quick to think it beneficial to have insurance. If legislators were not in such a greedy rush to cash in on the insurance PACs campaigh funds, they would not repeat the false spin.

The insurance industry is not inherently virtuous. This measure gets constantly resurrected because the insurance industry is seeking to control the lawyers arrayed against them and
because they are looking for yet another "subsidy", meaning pressure to buy it, pressure that we pay for and not the industry.

It is already a disgrace that you have a section of MY bar website that has a "buy malpractice insurance" link.

The bar just can't resist, can it?

Francis X. Hoffman 108399

LAW OFFICE
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March 12, 2008

**BY EXPRESS MAIL**

Board of Governors
The State Bar of California
180 Howard Street
San Francisco, CA 94105
Attn: Saul Bercovitch

Re: Proposed New Rule 3-410 of the California Rules of Professional Conduct, December 13, 2007

Honorable Board:

What's wrong with the State Bar requiring lawyers to state that they do not have professional liability insurance? The answer is on the face of the statement. The State Bar will have elevated insurers to a position equivalent to that of the State Bar in regulating the practice of law. The State Bar will effectively be saying that while we've licensed lawyers to practice law, the insurers have not, so take our license with a grain of salt.

That's a strange position for an integrated bar such as California's to take. The State Bar is the only official licensing body, yet as an official matter it will effectively be saying to clients of lawyers that there's this other group over here of insurers whose "license" we also recommend be obtained. Yes, we believe that the lawyers we license are qualified to practice law, and we realize that this other group, the insurers, evaluate lawyers in much the same but not identical way, but we believe that you should also take their evaluation into account, for without it, our evaluation will be incomplete.

As an integrated bar shouldn't the State Bar take all relevant practice facts into account in licensing lawyers? Insurers have a limited perspective: they must make a profit, which they can do most readily by "licensing" only lawyers who have no claims record, in other words, only lawyers whose record reflects that they do not need insurance.

That's not the mission of the State Bar. The State Bar is a public service institution, charged to regulate all aspects of a great public service, the practice of law. The public service requires that some lawyers undertake service when the applicable law is less than clear, when facts are in dispute, when proceedings must be conducted in highly contentious situations, and in which there may well be clear winners and losers, the losers of which may ascribe their losses to the incompetence and malpractice of their lawyers and turn around and sue them. Insurers customarily take a jaundiced view of lawyers who undertake such service.

The insurers can do as they please with such lawyers for they are under no public service obligation, they are not required to insure any lawyer, and customarily limit their policies and the lawyers who they insure, and charge such premiums, as to assure themselves of making a profit.

Thus, while relying on many of the same facts, it is not surprising at all that insurers and the State Bar can reach diametrically opposite conclusions on the qualifications of lawyers to practice law and to be insured. Insurers have no public service obligation while the State Bar, and the lawyers it licenses, do.

It seems to me that the State Bar has every obligation to regulate all aspects of the practice of law as a public service, and hence no right to abnegate any portion of that obligation to private insurers that are not also regulated by the State Bar and do not have any such public service obligation.

The implications are that the statement that the State Bar is considering imposing on lawyers is itself unlawful, and that the State Bar should broaden its own regulation of lawyers so as to take account of any matters currently assumed by insurers that are relevant to the practice of law. A good example of such a broadening is the programs that a number of insurers offer their policyholders on preventive practice to minimize malpractice claims. The State Bar should consider undertaking its own programs of that nature, and other programs directed toward assuring the visible competency of lawyers, whether or not they have insurance.

Very truly yours,

G. A. Laster
Bar No. 31363

**JOHN PALADIN**
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March 13, 2008

Saul Bercovitch
State Bar Of California
180 Howard Street
San Francisco, CA 94105

Fax: 415 538 2515
saul.bercovitch@calbar.ca.gov

Re: Proposed new insurance disclosure rules for attorneys

Dear Mr. Bercovitch:

I am opposed to a rule which would require attorneys to disclose the existence or absence of legal malpractice insurance to clients.

Legal malpractice insurance is not relevant to the representation of the client. Having to say that you do not have legal malpractice insurance will be a possible obstacle to being hired by some clients. The proposed rule would put sole practitioner attorneys and small firms at a disadvantage in obtaining clients by possibly creating a negative impression of the attorney during the hiring process.

There has not been enough information made publicly available to attorneys and to the general public about the annual cost of uncompensated legal malpractice judgments. There should be a better explanation given about the motivation for this proposed rule with a better explanation of how it will help the public.

If it is important for attorneys to have legal malpractice insurance because of uncompensated judgments, the average annual amount of the judgments should be reviewed.

The possibility of having a legal malpractice insurance pool through the State Bar should be evaluated, with a modest policy limit being provided for each attorney through an increase in State Bar dues.

Sincerely,

John Paladin

John Paladin

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**Bercovitch, Saul**

**From:** Scott Pesetsky [scott@pesetsky.com]
**Sent:** Friday, March 14, 2008 11:40 AM
**To:** Bercovitch, Saul
**Subject:** Proposed New Rule of Professional Conduct 3-410

Dear Saul,

I am writing comment on the proposed rule 3-410.

As a solo practitioner, I see this proposed rule as an unfair advantage to larger firms. I am currently not insured. If I pay for liability insurance, my rates and the rates of other solos will rise. More of the public, already suffering from a bad economy, will be even less likely to seek an attorney. I have seen the consequences of the fear of he costs of professional advice: potential clients who, for lack of an hour or two of good advice, have become entangled in the results of preventable unwise decisions.

If the proposed rules pass, disclosure, calling attention to the lack of such insurance, will likely give potential clients the impression that I am either non-compliant, not a "real lawyer", or somehow a shady character.

I find this change unwise and unnecessary, and the consequences bad for both practitioners and the public. I urge the board to not pass this rule.

Sincerely,

**Scott Pesetsky**

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## Bercovitch, Saul

**From:** SAColemanLaw@aol.com

**Sent:** Friday, March 14, 2008 8:15 PM

**To:** Bercovitch, Saul

**Subject:** Proposed New Rule of Professional Conduct 3-410

Re: Proposed New Rule of Professional Conduct 3-410

I am a sole practitioner with less than full time practice representing nonprofit organizations from a limited interest group for very low flat fees or sometimes pro-bono. It is often impossible to estimate how many hours of legal work would be needed, because of the time required to communicate with the volunteers who are responsible for these client organizations and investigate status issues that often elude the clients. Because of the limited nature and risk of my practice, I do not carry malpractice insurance, yet this proposed rule would apparently require me to make this disclosure to all clients before even embarking on any evaluation of their organization's needs, simply because it is so difficult to estimate how much time will be involved. This seems an unnecessarily intrusive requirement at this level of practice.

**Sharon A. Coleman**
**Attorney at Law**
**P.O. Box 168**
**Millbrae CA 94030**
**Telephone 650-692-0126**
**SAColemanLaw@aol.com**

## Bercovitch, Saul

**From:** Christine Chorney [chrissycatlaw@yahoo.com]

**Sent:** Saturday, March 15, 2008 2:08 PM

**To:** Bercovitch, Saul

**Subject:** Comment on Proposed Insurance Disclosure Rule

The Proposed New Rule 3-410 (December 13, 2007 version) differs from the earlier Insurance Disclosure Task Force's proposed Rule 3-410 by eliminating the disclosure requirement when legal services are expected to require fewer than four hours, or are rendered in an emergency, or are rendered to a returning client who was previously advised. While this new proposal purports to lessen the burden of disclosure, it is fairly meaningless since few actual situations are likely to arise where these exceptions will apply. By attempting to lessen the burden, the proposal implicitly acknowledges that the disclosure requirement works to the disadvantage of the small firms and solo practitioners who do not have insurance.

Like its predecessor, the proposed new rule will create two classes of attorneys, insured and not insured. The large, wealthy firms will have no difficulty stating that they are insured, whereas the small firms and solo practitioners will either have to pay for expensive insurance to keep up or lose clients. In either case, they will suffer financial detriment. This proposal should be rejected.

Christine A. Chorney
SBN 70439

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James K. Poole, Esq.
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March 16, 2008

Mr. Saul Bercovitch
State Bar of California
San Francisco, CA VIA FAX: (415)538-2515

Re: Proposed RPC 3-140 (DISCLOSURES RE MALPRACTICE INSURANCE)

Dear Mr. Bercovitch:

This comment opposes the requirement that attorneys disclose their lack of professional liability insurance, under any circumstances. I have been an active member of the California bar since 1981, but have never had the pleasure of establishing a practice in the state. I am a patent attorney with over 25 years experience. I have worked for three corporations and four law firms, but have been independent as a solo practitioner for most of the past ten years. While I am occasionally fortunate enough to assist corporations, government labs or law firms in patent prosecution and opinion work, most of my clients are individual inventors and/or small companies. Since it is generally very difficult to find financing for seeking patents, these clients are very budget conscious, and I try to minimize my overhead so as to charge very modest fees. Many things are happening in the patent field now, including pending federal legislation, proposed rule changes by the Patent Office (a large batch of which have been enjoined by a federal court!), and several significant decisions by the U.S. Supreme Court. I have had to increase my billing rate because of the time and effort required to keep up with these changes, plus the increasing technology demands by the PTO and some clients.

A recent article noted that malpractice claims, and hence the premiums for insurance, are increasing for patent attorneys. Since I have retirement income and an adult disabled son at home to care for, I would have to characterize my practice as "part time". To add the expense of malpractice insurance would require me to wind up my practice sooner rather than later, thus depriving independent inventors in this very entrepreneurial area of my services. Also, I feel that carrying insurance would tend to make me a "target" for suits by the rare client who may be disappointed in the results of his quest for patent. In my many years of independent practice, I have rarely been asked whether I carry insurance, and mostly by law firms seeking contract assistance. I worked for about 18 months in 1997-1999 for a small local firm, and somewhere in that period I believe that the California State Bar imposed a disclosure requirement. When I informed the founder of this firm, which employed me as essentially a contract attorney, he indicated that such disclosure would be unacceptable. I solved the problem by leaving and relying on my solo practice.

The article by Jeff Bleich in the current *Bar Journal* suggests that legal clients expect attorneys to carry malpractice in the same manner as medical practitioners. I disagree, at least for intellectual property attorneys. (Trial lawyers may be in a different category.) I feel that most lawyers are more likely to carry professional liability insurance in the same proportions as other business-related professionals such as accountants.

The most important factor re this rule is that informing a prospective client in the early stages of establishing a relationship that one does not carry insurance would tend to direct the discussion in the wrong direction. I would of course answer any questions on the subject, but I have not found that many clients ask. I would have no objection to including my status as insured or not on the state bar profile, Martindale-Hubbell or any other resource available to clients who wish to research attorneys whom they might seek to employ, but do not want to have to raise the subject in initial consultations or discussions with prospective clients.

Regarding the four hour limitation, I might be able to carry out a trademark search and/or filing in less than four hours, and probably a patent search, but engagement for meaningful work such as preparing and filing patent applications or rendering opinions would clearly exceed four hours. Hence, the proposed rule would require me to routinely inform most of my prospective patent clients that I lack insurance, perhaps dissuading them from engaging me.

In conclusion, I oppose the proposed rule as written, and would oppose it even if the time limit exception were greater. I would be happy to elaborate if anyone cares to call me.

Sincerely,

James K. Poole

James K. Poole

University of San Diego

Saul Bercovitch
State Bar of California
180 Howard Street
San Francisco, CA 94105

March 17, 2008

Re: Comments on Malpractice Insurance Disclosure Rule — Rule 3-410 of the California Rules of Professional Conduct

Dear Mr. Bercovitch:

The Center for Public Interest Law (CPIL) at the University of San Diego School of Law again writes to support the required disclosure by attorneys to clients of malpractice insurance non-coverage.[1] However, as revised on December 13, 2007, the proposed rule still falls short of attorney fulfillment of counsel's well-established fiduciary duty to clients. Accordingly, we offer clarifying and supplemental adjustments as discussed below.

**Change #1: Close the "Time of Engagement" Loophole**

We would prefer that the disclosure be made without the "four-hour" exception as written. I note that the previous version required the disclosure to be placed in written fee agreements — and those written agreements are triggered only after $1,000 is anticipated in fees (see Business and Professions Code Section 6148) or where contingent fees are involved. The four-hour rule appears to relate reasonably to the usual medium for such disclosures — the fee agreement with the client. However, I respectfully suggest the rewording of the qualifying clause of Rule 3-410(A) to read:

> A member who knows or should know that he or she does not have professional liability insurance shall inform a client in writing, at the time of the client's engagement of the member, that the member does not have **such** ~~professional liability~~ insurance whenever it is reasonably foreseeable

[1] CPIL has submitted comments twice previously in this rulemaking proceeding — on September 13, 2006 and on August 3, 2007.

Center for Public Interest Law ■ Children's Advocacy Institute ■ Energy Policy Initiatives Center
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Reply to: ☐ San Diego ☐ Sacramento

that the total amount of the member's legal representation of the client in the matter will exceed four hours, **or does in fact exceed four hours.**

The first change is grammatical. The substantive addition is intended to foreclose an unintended loophole, as follows: "Well, it started out as a three-hour commitment for advice, but then someone served my client and we ended up working 2,500 hours. But at the *time of engagement* it was *reasonably foreseeable* that it would be only four hours." The implication is that members are excused from making any disclosure because the provision only covers the "reasonably foreseeable" hours at time of retention. Nor is the requirement to disclose here saved by paragraph (B) requiring someone who loses coverage during representation to notify the client of that fact, because — in the more troublesome cases — the attorney does not have and never has had coverage. The change suggested resolves the problem consistent with Bar intent so that where representation changes from a moment of advice without a fee agreement and into something extensive, *i.e.*, more than four hours in fact, disclosure is properly triggered.

**Change #2: Require Timely Notice Where Coverage Is Lost or Dropped**

Proposed Rule 3-410(B) allows the member who loses liability insurance to wait thirty days to inform his or her client. Why? That is thirty days of possibly critical litigation or transaction time — during which time an attorney runs naked and without practical remedy for his or her actionable negligence. The time line should be "**within 48 hours.**" That notice should go out without any substantial delay whatever. Every attorney presumably knows the mailing address of clients and has the ability to automate a written note to each within hours. This information is not *pro forma* bureaucratic red tape; see discussion of underlying rationale below.

**Change #3: Require Client Written Acknowledgment**

The proposed rule requires "notice in writing." As drafted, such notice can be easily hidden among voluminous documents provided to clients. Under the previous rule requiring disclosure in fee agreements, we have the Bar's model fee documents that include this information where applicable as a matter of course and in a location and format allowing its reasonable cognition by a client. Where such a fee agreement is signed by the client and returned, as is normally the case, this issue is resolved. But the wording of the proposed rule is weaker than its historical precedent. It would allow small-print burying of the notice. And the Bar should be aware that this is not information that is likely to be ostentatiously featured by an attorney who has chosen to practice without liability coverage. In virtually all cases of compelled consumer disclosure, applicable rules guard against such perfunctory loopholing. Hence, truth-in-lending APR disclosures, gasoline mileage performance by automobiles, and numerous other required consumer disclosures must meet minimum type sizes and/or be featured in specified locations on documents normally read. The Bar is avoiding those safeguards, regrettably calling into question its good faith. A group of lawyers regulating lawyers should know better than to give colleagues an obvious loophole to evade the consumer protections purportedly advanced.

The rule properly requires written acknowledgment by the client that he or she has been informed of the required disclosure. Inclusion on the fee agreement and its signature should qualify; however, if an attorney seeks some other vehicle for that disclosure, the Bar properly safeguards the bona fide nature of its requirement by then obligating counsel to provide affirmative evidence that the notice has occurred. Accordingly, language should be added to both subsections (A) and (B), as follows: **"Receipt of the notice of non-coverage shall be acknowledged in writing by the client. Signature of the client on a fee agreement including such a disclosure shall satisfy this requirement."**

**Change #4: The Disclosure Trigger is Unclear**

The proposed rule requires disclosure where a member "does not have professional liability insurance." What does this mean? Does it mean that perfunctory coverage for "malicious neglect" with a coverage limit of $5,000 will excuse notice? The rule should specify minimum coverage scope and amount in order to justify nondisclosure.

**The Underlying Problem and Obligation**

The discussion of the disclosure issue to date largely misses the underlying legal and ethical context. Contrary to the *tabula rasa* setting for these proposed rules, we would respectfully argue that the proposed format amounts to substantial license to avoid disclosure vis-a-vis the default rule of law absent any rule at all. As we stated in earlier comments, the proposed rule may actually operate to cut back on the underlying fiduciary duty of an attorney to make such disclosures to all clients. And it fails to reach the larger issue: the lack of recovery for persons injured by negligence caused by persons licensed — by us. As discussed below, practicing attorneys effectively control the State Bar, particularly as to entry barriers and the initiation of discipline. Supreme Court review is limited in practical application. The private interest control of our profession by its own membership is unique among all public regulatory bodies. CPIL argues that the Bar properly goes substantially beyond the disclosure here proposed — even as we would strengthen it. **Liability insurance should either be required by the State Bar for any attorney relied upon by consumers for legal representation and advice, or the Client Security Fund should be substantially expanded in amount and scope to provide indemnification for such judgments up to no less than $500,000 per claim.**

We have a special interest in the subject matter of this rule. The Center for Public Interest Law (CPIL) has monitored the State Bar's regulatory activities for 27 years, publishing the CALIFORNIA REGULATORY LAW REPORTER. From 1987 to 1992, I served as State Bar Discipline Monitor, by appointment of the Attorney General and reporting to the Chief Justice. CPIL served as the staff of the Monitor. Our five-year inquiry into Bar discipline produced eleven reports, some twenty rule changes, and two new statutes — with the important partnership of five successive State Bar Presidents. Those statutes created the current State Bar Court and made other changes. Those changes included fee agreement and disclosure requirements — among them the disclosure of liability insurance status. The regrettable sequence of events leading to its excision need not be recounted here. Two years ago, I was asked by then-Bar President John Van de Kamp to perform a review of the discipline system as it recovered from its unfortunate defunding in the late 1990s. I gave an oral report to the RAD Committee in March 2005. I urged then the importance of full disclosure of liability insurance status to consumers.

CPIL notes the following background relevant to Bar's consideration of this rule: One seminal purpose of professional regulation is the irreparable harm that befalls the public from dishonest or incompetent practice. To prevent that harm, agencies set up licensure systems and barriers to entry — and then monitor practice to excise those who visit such harm on consumers. The State Bar does not do a credible job at this fundamental task. It gives applicants a single examination — usually at age 25. The test likely fails to examine competence in the actual area of law practiced by attorneys and relied upon by consumers. The exam is, rather, a retention/writing ability examination on a few general law subjects. The Bar's license is general, allowing any attorney to essentially practice in any area of law desired — regardless of competence. And the Bar lacks the kind of private checks present in the medical profession to effectively bar entry of the incompetent (by hospital admission and certification that is effectively necessary for medical practice). The current system of law specialty certification has value, but the overall system does not prevent an attorney from taking a criminal defense case one day, advising on an estate or tax matter the next, helping with a patent on the third day, and then finishing the week by filing a Subdivision Map Act application for a new housing development — while also advising tenants, debtors, and perhaps immigrants seeking green cards. To top it off, the Bar then does not require any retesting or demonstration of competence — whatever — for the next fifty-plus years of a professional career.

This is the regulatory system allegedly preventing the irreparable harm coming from incompetent practice. But it gets worse. The Bar's discipline system does not generally react to one — or even several — acts of serious incompetence, whatever the price paid by consumers relying on the Bar's alleged assurance of such competence. Our discipline system, perhaps understandably, eschews coverage of "mistakes" unless they become a radically documented, persistent pattern. And even then, disciplinary actions are rare. Meanwhile, the Bar has a Client Security Fund — allegedly intended to provide security to .... clients. But it has a rather low ceiling per claim, and more importantly, only covers dishonest acts by attorneys — not incompetence, not even gross and repeated incompetence.

We know that about 20% of our licensees operate naked — without any coverage whatever. Most of them have small practices with few colleagues as a check. We know that serious consumer harm from negligence disproportionately occurs from this group among us. And most of this 20% are effectively judgment-proof. Quite apart from the irreparable harm that occurs because after your death your estate goes to the wrong person, or you are deported to Bangladesh, or you are sitting in Lompoc prison – even where the remedies at law (damages) are relevant – you have none as to this population of over 20,000 attorneys. No malpractice attorney will even take the case if it lacks money recovery at the end. Usually, nobody will even know about it. There will be no

Client Security Fund payout. There will be no discipline. There will be nothing but the loss and its likely repetition.

To top it all off, members of the State Bar are arguing that a licensed attorney need not even disclose to a client that he or she has no coverage — which means there will be no practical money remedy for negligence damage. The logic is apparently that uncovered attorneys save money and therefore charge less and serve clients at lower cost — which will be lost if they have to disclose. The loss will allegedly occur because some clients may prefer attorneys with insurance. None of them seem to be suggesting Client Security Fund coverage for the protection of these clients. Rather, the focus is on the baffling proposition that client preference for insured counsel may disadvantage them. We suspect that uncovered practitioners are not universally passing their malpractice coverage savings along to consumers.

Add to the relevant background the oft-stated truism about the fiduciary duty of an attorney to his or her client. It is not just any fiduciary duty. Since the 19$^{th}$ century case of *Cox v. Delmas*, it has been consistently held to be a fiduciary duty "of the very highest character." Presumably, that means something. CPIL suggests that this duty standing alone requires disclosure of insurance status — and not just technical small-print inclusion in a fee agreement form. If an attorney is running naked (and is usually effectively judgment-proof), the client needs to know that specifically and to sign off on it with informed consent. Under what theory of fiduciary duty is such a requirement excused? How is such dispensation stated? "I have a fiduciary duty of the highest order to you — a duty of fidelity and trust. I know that although many attorneys are covered for liability, I am not — and if I commit a negligent act that falls below the applicable standard of care and you suffer damages, I know you will recover nothing. But I need tell you nothing about it." Why is such a failure of disclosure not already a breach of fiduciary duty appropriate for Bar discipline?

And the Bar's position is even more untenable. For it will not discipline an attorney for such a failure of disclosure as a breach of fiduciary duty. It never has. As noted above, we already fail to really assure competence in the actual area of practice relied upon. We fail to retest — ever. We fail, really, to excise the incompetent. We fail to cover incompetence in our disciplinary system except at the extreme, occasional end. We exclude negligence-caused misconduct from Client Security Fund coverage. And now we propose a disclosure that (a) does not detail what coverage we do or do not have, and (b) does not require acknowledgment that the client understands counsel's status — which probably cuts back from the proper underlying fiduciary duty of disclosure that should apply absent any rule.

CPIL supports disclosure and, as noted, contends that it is required anyway as part and parcel of an attorney's fiduciary duty to his or her clients — future *and* present. But the Bar needs to own up to its real responsibility here. If we are serious about being an "honorable profession" (and it is no accident we suffer a regrettable level of public revulsion), we need to start walking the walk. Everyone knows we can talk the talk. That walk requires some attention to competence assurance. And it requires coverage (and some assumption of responsibility) where actionable negligence damages our clients. That means either requiring liability coverage, or providing at least some measure of indemnification through our offices. We all may have to pay another $50 or $100 or $200 per year into a Client Security Fund to provide it. But we are the ones who decide who gets to practice law and who continues to practice law. Uniquely among public agencies — absolutely uniquely — ours is controlled by our own profession. We elect persons exercising the power of the state to determine entry and to initiate exit from the practice of law. We, above any other trade or profession, properly assess ourselves to make sure there is some recovery when we fail to optimally do our job.

CPIL suggests that the State Bar begin the process of living up to its responsibility by going substantially beyond the current proposed rule to honestly provide the assurances properly assumed by us in exercising regulatory powers and understandably relied upon by the public.

Respectfully submitted,

Robert C. Fellmeth

Robert C. Fellmeth, Executive Director
Center for Public Interest Law
Price Professor of Public Interest Law
Former State Bar Discipline Monitor

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March 17, 2008

Saul Bercovitch
Staff Attorney/State Bar of California
180 Howard Street
San Francisco, CA 94105

Facsimile No. (415) 538-2515

*RE: Public Comment Rule 3-410*
*Insurance Disclosure*

Dear Mr. Bercovitch,

I am opposed to the insurance disclosure rule. I question whether sufficient numbers of the public have been harmed to warrant such a costly burden on our solo's… and whether such disclosure will result in a significant benefit to the consumer.

According to Jeff Bleich's article, Opinion – Solos and the Insurance Debate, (California Bar Journal, March 2008) the bar has "heard from dozens of victims of malpractice" since 2000. Furthermore, Mr. Bleich offers that the disclosure issue is in "response to numerous complaints" by members of the public. Is that what this is all about? Dozens? Numerous? I don't believe that "dozens" over seven years, or "numerous" complaints warrant imposing such a costly financial burden on our solo practitioners.

Bleich says this is not an insurance proposal but is "a direct response to genuine concerns from the public." Considering California has about 154,000 practicing lawyers (State Bar Annual Report, 2006) and is arguably the most litigious State in the most litigious country in the world I think the fact that there have only been a few dozen complaints over six years is commendable and is indicative of the quality of legal services consumers obtain from our members.

It seems that the State Bar has been a little less then forthright on the impact that non-disclosure has had on the public. I have remained silent on this subject because I trusted the State Bar would not consider this proposal unless there was a genuine issue wherein a significant number of consumers had been harmed as a direct result of non-disclosure. I submit that many of my colleagues would be outraged to learn that out of California's 35 million residents, this proposal is over a few dozen complaints. Accordingly it makes the State Bars proposal look specious and I can only conclude that the bar is caving into the pressures of the insurance industry.

Bleich says these victims were shocked to learn their lawyer was uninsured. I submit that the average consumer is often shocked at the realities of litigation… period. *Every* patient who is seriously injured due to a doctor's negligence is shocked to learn how tort reform has limited his or her non-economic damages. And every driver who is injured by an uninsured or underinsured motorist is shocked to learn that they have no financial recourse against the tortfeasor.

To say that every consumer assumes his or her lawyer has malpractice insurance is without merit. I've been in law offices where it appeared the lawyer couldn't even afford paper clips.... let alone insurance.

Finally, I don't believe that disclosure will necessarily benefit the consumer. The unethical and incompetent lawyer will refuse to provide disclosure or misrepresent the status thereof and the consumer will continue to be "shocked" by the actions of a few bad apples. However, the ethical and competent lawyers such as myself will absorb this unnecessary cost and wonder why the bar feels it's necessary to impose another overly burdensome restriction on it's 150,000 members over a few dozen complaints.

Very truly yours,

PATRICK STEINFELD
Attorney at Law

*P.S. If Mr. Bleich sincerely thinks that the current resolution is going to get "insurance carriers to reduce the cost of malpractice insurance" than I've got a bridge to sell him!*

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March 17, 2008

*VIA U.S. POST AND*
*FACSIMILE: (415) 538-2515*

Saul Bercovitch, Staff Attorney
The State Bar of California
180 Howard Street
San Francisco, CA 94105-1617

Re: *State Bar Insurance Disclosure Rule*

Dear Mr. Bercovitch:

We understand that the State Bar is once again requesting public comment regarding the most recently revised proposed new insurance disclosure rule – proposed amendment to Rule 3-410: Disclosure of Professional Liability Insurance. As such, please accept the following as our continuing comments, as well as our notice of legal opposition (and projected action) to this proposed rule.

In the "Background" preamble to this further revised rule, the State Bar states that all of the previous public comments (first and second) have now been "fully" considered by RAD and the State Bar staff. Of course, we must beg to differ, as no where do we see any analysis by either RAD or the State Bar as to the legality of this proposed rule. As we attempted to point out to you, the State Bar and to RAD in our May, 2007 correspondence, the proposed rule runs afoul of both the 1st Amendment to the U.S. Constitution, as well as to Article I, §2, of the California Constitution, inasmuch as the rule proposes to make lawful government compelled communication (speech) of specific factual content between an attorney and a potential client of that attorney. Because we consider that government compelled speech under such circumstances is patently illegal, we attempted to have both RAD and the State Bar focus on this most important issue. Unfortunately, both RAD and the State Bar simply ignored this fundamental constitutional issue.

Accordingly, we are taking the liberty of writing to you in order to put you and the State Bar, as well as the California Supreme Court on notice, that should the State Bar in conjunction with the California Supreme Court, be so imprudent as to pass this illegal rule, we are prepared to immediately file suit against president Jeff Bleich and the State Bar, as well as the Chief Justice and the California Supreme Court, in order to seek and obtain federal injunctive relief against all parties attempting or threatening to enforce Rule 3-410 (or any similar further revised rule).

Obviously, we are saddened that both RAD and the State Bar have taken such a "blind-eye" approach to proposing and legislating illegal rules such as Rule 3-410, but we also understand that, as president Jeff Bleich recently wrote, over the past 150 years the State Bar has "heard ***from dozens of victims of malpractice*** that they were shocked to learn that a lawyer who made a serious mistake in their case was uninsured, and now there is no way for them to be compensated for their injury short of bankrupting their lawyer." Geez, that really sounds like quite a crisis to us.........

Sincerely,

MAYO LAW CLINIC

Will Mayo

By: WILLIAM MAYO

WTM/mf

cc: Jeff Bleich, Esq. and John Dutton, Esq.

**LAW OFFICE OF**
**DAVID CAMERON CARR**
3333 Camino del Rio South, Suite 215
San Diego, California 92108
(619) 696-0526 voice
(619) 696-0523 fax

March 17, 2008

*Via First Class Mail and Facsimile to (415) 538-2515*

Saul Bercovitch
The State Bar of California
180 Howard Street
San Francisco, California 94104

Re: Proposed Insurance Disclosure Rules

Dear Mr. Bercovitch:

The Association of Discipline Defense Counsel (ADDC) offers the following comment to the insurance disclosure rules, specifically proposed new rule of professional conduct, rule 3-410.

ADDC does not opposed requiring disclosure of an attorney's insurance status. ADDC does opposed the proposed enforcement mechanism for compelling such disclosure, making failure to make such disclosure a matter of discipline. Our view is that the former provisions of Bus. & Prof. Code sections 6147 and 6148, mandating disclosure in the fee agreement, the remedy being voidability of the fee agreement, is the appropriate mechanism to enforce any such requirement.

If the proposed new rule of professional conduct is approved, the Board of Governors should amend the Standards for Attorney Sanctions for Professional Misconduct to add a new Standard providing that a violation of proposed new rule 3-410 should merit no more than a private reproval.

Very truly yours,

David Cameron Carr
President
Association of Discipline Defense Counsel

cc: ADDC Members (via e-mail)

Comment on insurance proposal 031708.wpd

# Fax

| | | | |
|---|---|---|---|
| **To:** | Saul Bercovitch | **From:** | Aditya Prasad |
| **Fax:** | (415) 538-2515 | **Pages:** | 4 (including cover sheet) |
| **Phone:** | (415) 538-2306 | **Date:** | 03/17/2008 |
| **Re:** | | **CC:** | |

☑ **Urgent** ☑ **For Review** ☐ **Please Comment** ☐ **Please Reply** ☐ **Please Recycle**

• **Comments:**

I am faxing my comments regarding the new rule of Professional Conduct 3-410,

Should you have any questions, please call me at (626) 282-4307

Thank You

Aditya Prasad

March 10, 2007

Mr. Saul Bercovitch
The State Bar of California
180 Howard St
San Francisco, CA 94015

**<u>REFERENCE:</u> PUBLIC COMMENTS ON PROPOSED RULE OF PROFESSIONAL CONDUCT 3-410**

Dear Mr. Bercovitch:

I am the true believer that whats good for the goose is good for the gander. The attorneys like to sue and harass innocent people because they the attorneys know they will compromise because it is cheaper to do then to goto trial. The attorneys should be forced to carry malpractice insurance and make it available for the public to view on the state bar web site as to how much insurance they carry. This should apply for everybody (government, law firms, corporations, LLP, partnership or sole proprietor. All attorneys should disclose this in writing to present and current clients and the clients must sign the disclosure saying that they have received this. The attorneys should not worry about cost because when they file a law suit they could care less about cost. I think the attorneys should absorb all this cost. After all if they can charge $150.00 to fax documents (shame on the attorneys and the state bar for allowing this) why should they worry about cost (especially since the state bar not only endorses these outrageous charge but encourages it). This will keep the attorneys in line and let them taste what it feels like to be sued all the time for nothing. This will be an incentive for the attorneys to do things by the law because if they don't another attorney is waiting to sue them for mistake they make. Currently all attorneys know that they will receive nothing if they sue another attorney. But if they were forced to carry insurance the attorneys would understand how the average public feels. This is a way for the public to have recourse against a lousy attorney (we have a lot of them in the state of California). The attorneys also know the state bar is a useless organization that serve the attorneys and could care less about the public. **<u>YES I HAVE HEARD THIS FROM THE PUBLIC AND ATTORNEYS ALL OVER THE STATE</u>**. The state bar is their in name only and nothing else. I will give you a tragedy that happened to me but nobody would help me to prosecute this attorney. I went through a divorce and during the middle of my divorce my ex's attorney was involved in the kidnapping of my 3 minor children (ages 6, 7, and 8) with my ex. These children still have nightmares even though 18, 19, and 20 now. The attorney picked my ex and 3 children and drove then to the airport (35 miles from where the children were picked up). Then upon arriving at the airport the attorney gave them airplane ticket (I have a copy of the airline ticket and the attorney even signed the children's name on it) to fly out of state to Minnesota and put them on the plane. The place where they were hiding the lady in Minnesota said that my ex's attorneys were aware of everything to the police the same day they were kidnapped. The children were hidden in Minnesota for over month but the attorney was in contact with them on a daily basis. One of the correspondences from her attorneys to mine said "if we keep looking for the children then his client would go into hiding so that we would never find them again. Yes their was a court order prohibiting that but the attorney said nobody will do anything to me (not the judge, or the state bar). His exact quotes were as follow: The judges are attorneys so they won't do anything to me and the state board is a useless organization and they are only there for name. He was laughing the whole time he was talking to me. But he was right because no attorney would take a case against him and the other attorneys also advised me to not waste my time with the state bar because they will not do anything **("THE GOOD OLD BOY CLUB")**. This attorney is still laughing about this incident. This attorney broke every law in the book but he is still practicing and laughing at me everyday. This attorney not only boldly tells his colleges what he did but his colleges tell him it's a good thing we practice law in California because the state bar will not do anything to us. But the state bar fools the public into thinking that they actually do something. I have the attorneys name, police report, airline ticket, my son telling me it was him and the car he went to the airport in. Yes it was the attorney's car. This all started from my home and then to the airports (cameras being recorded at LAX and Minneapolis airport). If you were to interview everybody involved it would all lead back to ex's attorney as the one that arranged all the details for the kidnapping of my children (at least 6 witnesses). There is also written documents proving that the attorney was very instrumental in the kidnapping of my children. If the state bar is truly working for the people then they should work with me and remove this attorney from ever practicing law any where in the United States again. I will be happy to meet with you and provide the state bar with everything I have so that you can proceed to strip him of his bar license for life. I am trying to prevent this from happening to another family again. **Just for your information I saw him three month ago and he was still laughing at me over this incident,**

As I said earlier all the attorneys I talked to said if the attorney in the kidnapping had insurance they would have sued him and collected a hefty fee for them and a hefty fee for me. They all said what he did put a bad name on all attorneys.

Therefore I am vehemently recommending that all attorneys be required to do the following if they want to practice in the state of CA:

1. Carry liability insurance (no attorney is to be exempted, emergency or not)
2. Amount of insurance be of public records (minimum of $500,000.00)
3. Have all clients sign (current and new) an acknowledgement stating that they have received from the attorneys concerning liability insurance and how much the attorney is carrying in insurance.
4. Should they practice law and fail to carry malpractice insurance they will be immediately disbarred and fined $500,000.00.

**Do you realize that tax preparers need to carry insurance in order to practice in the state of California so why not the attorneys.**

Also the state bar should seriously look into removing the following:

1. The immunity for judges, as they have also started suing plaintiffs and respondents from cases that was heard in their court room.

2. Judges should not be allowed to award attorney fees as it is a conflict of interest since they are attorneys too (I am writing the governor, and our representatives to pass tougher laws and make it easier to disbar and prosecute attorneys by public prosecutor in cases like I described above.

3. Also form an independent committee immediately that does not consist of attorneys to determine the attorney fees **(after all you can't have the mice guarding their own cheese).**

Since I don't have much faith in the bar I am collecting signatures to put these matters on the ballot for the public to vote. The feed back I am getting tells me I should have no problem passing these measures.

Should you have any questions, please call me at (626) 282-4307 and I look forward to hearing from real soon

Thank you,

Aditya Prasad
294 Barranca Drive
Monterey Park, CA 91754

*Law Offices of Craig P. Alexander*
*P.O. Box 3321*
*Dana Point, CA 92629*
*Office: 949-636-1003 Facsimile: 949-434-4185*
*E-mail:* cpalexander@cox.net

VIA FACSIMILE 415-538-2215

March 17, 2008

Honorable Members of the California Supreme Court and
Honorable Members of the Board of Governors
State Bar of California
180 Howard Street
San Francisco, CA 94105
Attention: Omar

To the Honorable Members of the California Supreme Court and the Board of Governors,

I read with interest in the *California Bar Journal* that the Board of Governors is again considering reinstituting the former rule to require members of the State Bar to disclose to clients whether or not they carry professional malpractice insurance. I have also read with interest our State Bar President's comments on this subject. The proposed rule is not good public policy and is discriminatory towards small practitioners.

As you know, the cost of attorney's malpractice insurance has risen several hundred fold since the 1980s and more so since the general hardening of the insurance market after September 11, 2001. This rise in E&O premiums coupled with the outright declination of renewals and carriers leaving the California market for this type of insurance have forced many practitioners to go without E&O coverage. Obviously larger law firms with greater resources are able to shoulder the rising cost of E&O coverage, largely by passing on this cost in the form of increased hourly rates. The implementation of the proposed disclosure rule would give larger firms a competitive advantage over smaller firms and solo practitioners.

Mr. Jeff Bleich argues that the affordability of errors and omissions coverage is a separate matter from these proposed rule. That is simply not the case. The affordability of E&O coverage is exactly the reason that many solo practitioners and small firms simply decide to go without this coverage. If Mr. Bleich (and the State Bar) is serious about the Bar wishing to create better relations with solo and small firm practitioners, it can do something about the affordability of E&O insurance.

While the State Bar can not (and should not) control the pricing of attorneys professional liability insurance, it can propose new laws and regulations to help insurance carriers decrease the cost of this insurance – through genuine tort reform. Insurance companies raise their premiums for many reasons but the most direct reason are the risks the carrier undertakes in issuing a policy to an attorney (or any other professional) in California. I know this because I spent ten years inside the professional liability insurance claims industry and many more as a practicing insurance coverage attorney.

As a modest proposal, the State Bar could seek to have the legislature pass a bill providing a similar Certificate of Merit that must be filed when a party wishes to sue a licensed architect and engineer (C.C.P. section 411.35). Another proposal would be a gatekeeper statute similar to C.C.P. section 425.15 for a complaint against volunteer Directors and Officers of Nonprofit Corporations. There the plaintiff must obtain a court order to even start the litigation process against a volunteer director or officer. Another possible tort reform would be to apply the anti-SLAPP statute (C.C.P. section 425.16, et seq.) more specifically to attorneys – especially when they are sued by the opposing party after the first round of litigation.

There are numerous methods of passing tort reform that would still allow for the alleged aggrieved client to bring a claim or lawsuit against their attorney but would also provide for some protection for attorneys from frivolous lawsuits. This, in turn, would allow carriers to re-evaluate their risks and, hopefully, pass on the savings to their insured's in the form of lower premiums. If the real goal of the State Bar is to cause more attorneys to have E&O coverage, and not to give larger firms an economic advantage, then the Bar should hold off enacting this proposed rule and aggressively seek tort reform on behalf of its members so that E&O coverage is more affordable.

I also recognize that the goal of this proposed rule is to protect the public. However, Mr. Bleich's article in the *California Bar Journal* did not cite any reports or statistics that attorneys not carrying E&O coverage has resulted in numerous cases of non-recovery by members of the public. If there is no crisis then I suggest enacting this proposed rule will only serve to solve a problem that does not exist and alienate the State Bar from many of its own members. If there is a documentable problem – publish the facts (not the names of innocent parties) and work to make the cost of E&O coverage more affordable. For these reasons I urge you to reject this proposed rule.

Thank you for considering my views on this subject.

Very truly yours,

Craig P. Alexander
CSB #132017

**THE STATE BAR OF CALIFORNIA**

COMMITTEE ON PROFESSIONAL RESPONSIBILITY AND CONDUCT

180 HOWARD STREET, SAN FRANCISCO, CALIFORNIA 94105-1639 TELEPHONE: (415) 538-2163

March 17, 2008

Saul Bercovitch, Staff Attorney
The State Bar of California
180 Howard Street, Sixth Floor
San Francisco, CA 94105

Re: Public Comment to Proposed New Rule of Professional Conduct 3-410 (Revised) on Insurance Disclosure

Dear Mr. Bercovitch:

The State Bar's Standing Committee on Professional Responsibility and Conduct ("COPRAC") appreciates this opportunity to comment regarding proposed new rule 3-410 of the Rules of Professional Conduct as revised.

By letter dated October 5, 2006, COPRAC commented publicly on an earlier version of proposed new rule 3-410. As reflected in that comment letter, at that time COPRAC generally supported the proposed new rule with the view that clients and prospective clients should be informed whether or not an attorney practices without malpractice insurance coverage. As noted in the October 5, 2006 letter, not all members of COPRAC agreed. With the invitation for public comments on the proposed new rule as revised, COPRAC has revisited the issue, and expresses its opposition.

COPRAC opposes proposed new rule 3-410 as revised for a variety of reasons, not all of which are embraced by all members of COPRAC.

As an initial matter, COPRAC is unaware of any other profession that requires a member to disclose to his or her clients that the member lacks malpractice insurance. It does not know of any rational basis for creating an exception for attorneys.

Unlike companies issuing securities, an attorney does not have a legal or ethical obligation to disclose material facts about him or herself to a prospective client. In COPRAC's view, it is inappropriate to create such a rule, including proposed new rule 3-410 as revised, on this basis. Also, if such a duty did exist, there are other types of information that are probably more important to a potential client than lack of malpractice insurance—*e.g.*, the attorney's experience handling the potential client's type of matter, the attorney's trial experience (if the client has a litigation matter), any history of malpractice claims against the attorney, any history of discipline against the attorney, any history of substance abuse, etc. There is no rational basis for mandating a disclosure of lack of malpractice coverage, but not mandating disclosures on other arguably more important types of information.

COPRAC believes that it is inappropriate to single out the lack of malpractice insurance coverage for mandatory disclosure. The Rules of Professional Conduct are designed "to protect the public and to promote respect and confidence in the legal profession." Rules of Prof. Conduct, rule 1-100(A). In COPRAC's view, proposed new rule 3-410 as revised does not "protect the public" because the disclosure is limited and potentially misleading. The proposed new rule requires certain attorneys to advise clients, "Pursuant to California Rule of Professional Conduct 3-410, I am informing you in writing that I do not have professional liability insurance." A client may erroneously conclude, based on the proposed disclosure, that he or she is better protected by retaining an attorney with malpractice insurance coverage or that malpractice insurance coverage will somehow protect the client from a bad result. Neither is necessarily the case. Malpractice insurance coverage is principally designed to protect the attorney. It protects the attorney on a claims-made basis by making available the policy limits for the defense of any covered claim, subject to any applicable deductible or self-insured retention. It benefits the client secondarily by providing a fund from which damages may be paid or a settlement made, if it is not otherwise exhausted by defense costs. Whether malpractice insurance coverage might ultimately be a source of malpractice recovery by the client is speculative, turning on such contingencies as whether the attorney continues to maintain such coverage in the future, whether the claim is covered, and whether the limits are exhausted prior to judgment. Thus, in COPRAC's view, the proposed new rule fails to provide information that would serve to protect the public.[1]

If an attorney's malpractice insurance coverage is deemed important enough to single out for disclosure, proposed new rule 3-410 as revised does not go far enough. For example, as noted above, it does not mandate disclosure of the existence, substance, and extent of malpractice insurance coverage.

For these reasons, COPRAC does not support proposed new rule 3-410 as revised or any similar rule requiring an attorney to disclose to a client that he or she lacks malpractice insurance coverage.

But if proposed new rule 3-410 as revised or any similar rule is approved, COPRAC recommends that the language used to create two exceptions to the disclosure requirement—for short term matters and for services rendered in an emergency—be modified to mirror language used in Business & Professions Code section 6148 creating similar exceptions.

Proposed new rule 3-410(A) as revised provides that an attorney must disclose to a client in writing that he or she does not have malpractice insurance coverage "whenever it is reasonably

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[1] COPRAC is aware that the State Bar's Insurance Task Force has concluded that a disclosure rule would "advance the important goal of consumer protection and that the benefits outweighed the concerns expressed against adopting any such requirement." See September 14, 2007 Agenda Item for Board of Governor Meeting, at page 21. COPRAC respectfully disagrees with this conclusion.

foreseeable that the total amount of the [attorney's] legal representation of the client in the matter will exceed four hours." Business & Professions Code section 6148, subdivision (a), requires an attorney to send a client who is a natural person a written fee agreement in hourly engagements in any case "in which it is reasonably foreseeable that total expense to a client, including attorney fees, will exceed one thousand dollars ($1,000)." Both the proposed new rule and the statutory provision create exceptions from written disclosure requirements for short term engagements not involving substantial time and therefore expense. Given the shared objective, and the existing statutory requirement that has been in existence now for nearly a decade, if the proposed new rule or any similar rule is approved, COPRAC recommends that it follow the same approach.[2]

Similarly, proposed new rule 3-410(D) as revised provides that the rule "does not apply to legal services rendered in an emergency to avoid foreseeable prejudice to the right or interests of a client." Business & Professions Code section 6148, subdivision (d)(1), exempts from the requirement to memorialize a fee agreement in hourly engagements for "[s]ervices rendered in an emergency to avoid foreseeable prejudice to the rights or interests of the client or where a writing is otherwise impractical." Because there may be legitimate circumstances where a written fee agreement is "otherwise impractical," COPRAC recommends that if the proposed new rule or any similar rule is adopted, the clause "or where a writing is otherwise impractical" be added to the rule.

Thank you for your consideration of COPRAC's comments and concerns.

Respectfully submitted,

Dennis Peter Maio

Dennis Peter Maio, Chair
Committee on Professional
Responsibility and Conduct

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[2] COPRAC recommends a consistent approach be taken even though the dollar threshold of Business & Professions Code section 6148, subdivision (a), which was enacted nearly a decade ago, is probably now outdated.

**Bercovitch, Saul**

**From:** Kin Law [Kin_Law@comcast.net]
**Sent:** Tuesday, March 18, 2008 11:36 AM
**To:** Bercovitch, Saul
**Subject:** Comment re Malpractice Insurance

Dear Mr. Bercovitch:

I have been a sole practitioner in California in Family Law for the last 16 years. After clerking for a federal judge and working for a firm, I went out on my own in 1994. I have had a home based law practice before it became fashionable. I have never had staff. Now that I am drawing Social Security, my law income is capped at below the poverty line. I have never had, and cannot afford, malpractice insurance. Because of my low overhead, however, I have helped a tremendous amount of middle- or lower- class people get legal services during the last 16 years. I have lost count of the pro bono work I have done.

When required previously, I had a disclosure clause in my standard retainer agreement that clearly stated that I had no insurance. I took it out when it was no longer required. I think the new proposal should be black and white: either you have insurance or you don't. The trigger that the disclosure should only be disclosed when it hits a four-hour threshold is arbitrary. If I make a 3-hour special court appearance, does that cover my traveling time or the time I will spend drafting an Order After Hearing? Unlike many attorneys, I do not charge for an initial ½ hour consultation. If they do retain me, should that be included in the 4-hour window? I am not sure the 4 hours makes any difference in the disclosure. And I have no qualms disclosing that I do not have it. If a client is concerned about malpractice insurance before retaining an attorney (and, I have never had one), I'm not sure I want them as a client anyway.

Thank you for considering my comments.

Yours truly,

Patricia Brown SBN 158310
Attorney at Law & Certified Mediator
P.O. Box 344
Clovis, California 93613
(559) 252-9551
Kin_Law@comcast.net

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Associates Lawyers

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March 25, 2008

State Bar Board of Governors
c/o Office of the Secretary
State Bar of California
180 Howard Street, 10th Floor
San Francisco, CA 94105-1639

**Re: Mandatory Insurance Disclosure**

Dear Governors:

Attached to this letter is Resolution ELF-1-2006, which was almost unanimously passed by the Conference of Delegates in opposition to these concepts nearly two years ago. The Los Angeles County Bar has opposed these concepts since 1972. The Beverly Hills Bar has also taken positions in opposition to these concepts, and sponsored this resolution. Thus, most of the constituents whom you represent are opposed to these ideas.

Small and solo practice lawyers are opposed, criminal defense lawyers are opposed, and many class action lawyers and patent lawyers cannot obtain coverage because of huge verdicts in their areas of practice.

The American Bar Association's Ethics 2000 Commission, tasked with updating the rules that govern our profession, rejected a Model Rule of Professional Conduct, because the Rules are an articulation of our fiduciary duties. There is an ABA Model Rule of Insurance Disclosure, but that is far different from enacting a Rule of Professional Conduct. This is why the American Bar Association never adopted a rule like the one you are considering.

Although mandatory insurance disclosure may facially appear to be a consumer protection rule, in actuality, lawyers will be forced to obtain coverage. In errors and omissions coverage, the first dollar goes toward defense. In other words, those lawyers who would have likely settled claims will now have the resources to litigate these claims, to the detriment of the injured client.

This proposed rule also involves a certain level of consumer deception. These policies are on a "claims made" basis. Therefore, having coverage today has nothing to do with having coverage when the claim is made. That will lull the consumer into a false sense of security, in that coverage disclosed today may be non-existent when the claim is made.

I have written a great deal about this issue, and look forward to debating Jim Towery at the American Bar Association's National Client Protection Forum in Boston in May. At this point in the dialogue in California, I don't know what else there is to say. Lawyers are against it, and it does not help consumers.

Thank you once again for the opportunity to share my views.

Very truly yours,

Diane L. Karpman

**RESOLUTION ELF-1-2006**

Opposition of Conference of Delegates of California Bar Associations to Proposed Mandatory Insurance Disclosure Rules

RESOLVED, that the Conference of Delegates of California Bar Associations urges the Board of Governors of the State Bar of California not to adopt proposed Rule 3-410 of the Rules of Professional Conduct, which would mandate the disclosure, by a lawyer to the lawyer's client, the fact that the lawyer is not covered by lawyers' professional liability insurance.[1]

FURTHER RESOLVED, that the Conference of Delegates of California Bar Associations urges the Board of Governors of the State Bar of California not to recommend to the California Judicial Council that it adopt proposed Rule 950.6 of the California Rules of Court, which would mandate that an active member of the State Bar of California certify to the State Bar whether the member represents clients and, unless the member is employed as a government lawyer or as in-house counsel to the exclusion of all other clients, whether or not the member is covered by lawyers' professional liability insurance.[2]

FURTHER RESOLVED, that the Conference of Delegates of California Bar Associations urges the Board of Governors of the State Bar of California not to recommend to the California Judicial Council that it adopt the proposed amendment to Rule 950.5 of the California Rules of Court, which would mandate public disclosure of the information certified under proposed Rules 950.6.[3]

FURTHER RESOLVED, that the Conference of Delegates of California Bar Associations urges the California Judicial Council not to adopt the proposed amendment to Rule 950.5 and proposed Rule 950.6, of the California Rules of Court.

FURTHER RESOLVED, that the Conference of Delegates of California Bar Associations urges the State Bar of California to determine why over 18% of the active members of the State Bar in private practice do not maintain lawyers' professional liability insurance coverage; to evaluate whether the establishment of a captive lawyers' professional liability insurance carrier would achieve coverage of all active members in private practice; and, if so, to propose the enactment of appropriate legislation.

Proponent: Beverly Hills Bar Association

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1. The language of the proposed rule is included as an attachment to the Report of the Insurance Disclosure Task Force (June 2, 2006), a copy of which is attached to this resolution for delegates' convenient reference.

2. *Ibid.*

3. *Ibid.*

STATEMENT OF REASONS:

Existing Law:

There currently is no requirement that an active member of the State Bar maintain lawyer's professional liability insurance ("LPL") coverage or that he or she disclose to anyone whether or not he or she maintains LPL coverage.

By amendment to Sections 6147 and 6148 of the Business & Professions Code effective January 1, 1993, the Legislature mandated disclosures of the existence or absence of LPL coverage and, in certain circumstances, the policy limits of that coverage, in lawyers' engagement agreements. (Stats. 1992, ch. 1265, §§ 3-4.) In 1993, the Conference of Delegates approved a resolution proposed by the Beverly Hills Bar Association, joined by the Los Angeles County and Long Beach Bar Associations, calling for the repeal of the then-existing statutory disclosure requirements, because those disclosures were inherently deceptive to consumers. The Legislature tinkered with the disclosure requirements in an effort to remedy their inherent deficiencies, but added a sunset provision. (Stats. 1993, ch. 982, §§ 4-6.) After extending the sunset provisions at the behest of the State Bar, the Legislature ultimately repealed the disclosure requirements effective as of January 1, 2000. (Stats. 1996, ch. 1104, §§ 8-11.)

In 2004, the ABA House of Delegates narrowly adopted a *Model Court Rule on Insurance Disclosure*, mandating annual disclosure, by a lawyer to his or her licencing authority, whether or not the lawyer maintains LPL coverage. In response, in 2005 the State Bar established its Insurance Disclosure Task Force to consider the propriety of adopting the ABA model rule. The Task Force proposes not only that the State Bar and the Judicial Council do so, but that the State Bar re-adopt by rule a variation of the discredited client disclosure requirements previously imposed, and then repealed, by the Legislature.

The Board of Governors of the State Bar has circulated the proposed rules for public comment without recommendation. The State Bar has agreed to extend the comment deadline to permit this Conference to express its views on the proposed rules.

This Resolution:

Consistent with the position taken by the Conference of Delegates of the State Bar in 1993, this resolution urges the State Bar and the Judicial Council not to adopt the proposed rules. Instead of the proposed rules, this resolution urges the State Bar to determine why active members of the State Bar in private practice do not maintain lawyers' professional liability insurance coverage; to evaluate whether the establishment of a captive lawyers' professional liability insurance carrier would achieve coverage of all active members in private practice; and, if so, to propose the enactment of appropriate legislation.

The Problem:

These mandatory malpractice insurance proposals will disproportionately burden recently admitted attorneys and the attorneys who serve minorities, the legal aid-eligible population, and that segment of the population ineligible for legal aid but generally unable to afford counsel. The reporting requirements in proposed Rule 950.6 accomplish little more than establishing a two-tiered bar and, absent full disclosure of the limitations and exclusions on coverage in the relevant policy or policies applicable to each attorney, will afford consumers of legal services cold comfort. Similarly, the negative disclosures to current and prospective clients proposed by Rule 3-410 are as likely to cause misinformation as to provide useful information to those clients.

Although the proposals would facially appear to be consumer oriented, in effect they will increase the costs of legal services. Lawyers will have little choice but to obtain coverage or be branded. This negative branding has little relationship to competent delivery of legal services and will unduly impact small-firm and solo practitioners, whose practices may be unable to support the premiums required by carriers for meaningful professional errors and omissions coverage.

In effect, the proposals will impair the ability of those lawyers least able to afford coverage to continue in practice, possibly driving some out of the practice of law. Those are the very lawyers who are most likely to provide legal services to minority clients and the otherwise unserved and underserved segments of the population. Therefore, these disclosure proposals will adversely affect access to justice. A bar with almost 155,000 active members (lawyers eligible to practice without restriction) should be able to mandate a policy for all its members, rather than a policy which functionally exempts large firms and powerful attorneys and targets small firms and solo practitioners.[4]

These proposed reporting and disclosure requirements will be unduly burdensome and misleading. In addition to the initial report and disclosures upon adoption of the rules and the initial negative disclosure at the time the lawyer is engaged, if a lawyer who originally is covered subsequently ceases to be covered, the lawyer must inform each client of the loss of coverage, in writing, within 30 days of the loss of coverage.

The mechanics of this proposed rules will be a severe shock to those lawyers who are currently without coverage. There not only will be the time and cost involved in notifying clients, but also the backlash when clients, receiving a notification that their attorney is not covered by insurance, decide to seek new counsel. The process becomes more onerous when initial or replacement malpractice coverage is difficult to obtain or is accidently dropped and additional notices need to go out to the client.

If this weren't enough of a burden on the lawyer without malpractice insurance, the lawyer must also be concerned about the possibility of a gap in coverage – either when obtaining coverage and failing to obtain "nose" coverage[5] or when switching carriers. The failure to notify clients of such a gap,

4. In addition, the proposal applies without exception to every member who is representing clients, wherever the member may be located, without regard to where the client may be located. Thus, the proposal applies to the 18.3% of the State Bar membership who practice outside California and may be subject to different and/or inconsistent obligations in their "home" jurisdictions.

5. Coverage for errors and omissions occurring before the effective date of the policy, which requires an endorsement and a potentially substantial additional premium.

which may not be clear to the practitioner at the time it occurs, may subject the lawyer to suspension as called for by the rule. It also may give the malpractice plaintiff an unexpected bonus (the violation of the rule and a breach of fiduciary duty claim for failure to disclose the limitations on coverage) when suing.

The most important obligation lawyers owe their clients is honesty. The proposed mandatory disclosure of the mere existence or non-existence of malpractice coverage is antithetical to the fundamental fiduciary duty of honesty. The proposed mandatory disclosures fail to explain the intricacies of insurance coverage, and "public education" groups will not solve the problems created by the current proposal. Further, the proposed mandatory disclosures may create a false sense of security that will engender a host of unintended consequences.[6]

Is the public going to understand that policies typically are issued on a hybrid "claims made/occurrence" basis, so that coverage is triggered only when a client complains – but even then exists only if the claim also arises when the policy is in force absent "nose" coverage [a prior-acts endorsement]? What about exclusions, deductibles, "PacMan" Clauses,[7] and other issues involving policy lapses? Professional errors and omissions coverage is an extremely complicated issue. Although the proposal may look good on the surface, what assistance does it really provide to the consuming public? Simply mandating disclosure begs these and a number of other important questions.

It is important to remember that coverage has nothing to do with the acts of dishonest lawyers, because intentional misconduct cannot be covered by insurance.[8] For example, the media recently has been fixated on allegations of illegal wiretapping at the behest of members of the legal community. Obviously, those acts will not fall within the penumbra of a law firm's coverage, but will the carriers also disclaim coverage for innocent partners of the firms, who knew or should have known what their miscreant partners were doing?

While efforts to mandate these types of disclosures are in vogue, it is important to note that the Rules Revision Commission (Ethics 2000) of the American Bar Association rejected the concept of

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6. Given the principle in fiduciary duty law that any disclosure, if made, must be sufficiently complete as not to be misleading, a requirement that a lawyer disclose to a prospective or continuing client the "absence" of LPL insurance, if there is no coverage for any part of the lawyer's engagement, despite the existence of an LPL policy otherwise covering the lawyer, the lawyer arguably would have to disclose that fact as well, with a discussion of the reasons for the exclusion (which may be beyond the particular lawyer's competence, thus arguably necessitating the engagement of coverage counsel for the purpose of making the disclosure). Those are unnecessary and unwarranted burdens to impose on any lawyer.

7. Clauses permitting costs of defense of a malpractice claim to diminish liability coverage limits.

8. This is an express public policy position of the State of California, stated in the Insurance Code. That said, injuries from intentional misconduct already are addressed by the Client Security Fund, which will not be affected by this proposal.

mandatory disclosure in its proposed amendments to the Model Rules of Professional Conduct.[9] The existence of coverage has little to do with a lawyer's recognition of fiduciary obligations, with which the organized bar is supposed to be concerned. Lawyers are one of the few remaining self-regulating professions.

A secondary, less vetted, level of lawyer regulation is effectuated independent of the statutes and rules governing lawyers; it is imposed by carrier exclusions.[10] For example, serving on a board of directors or as an officer of a client or even a non-profit organization can be excluded, as can joint client/lawyer investments or acquisitions. Under the Rules of Professional Conduct, those activities are permissible, so long as certain formalities are satisfied. Nevertheless, carriers can deny coverage to policy holders if they engage in them. Is it good for our clients for carriers to be increasingly involved in the regulation of the legal profession? Generally, the states that have regulations involving disclosure and/or coverage are small and have relatively homogeneous lawyer populations. By contrast, states with large populations of lawyers, with varied types of legal practice, do not mandate disclosure.[11]

Annual premium rates range anywhere from around $4,000 to $7,000 or more per lawyer, depending on a lawyer's practice area and the amount of coverage requested. Some areas of practice, such as patents and class actions, are almost uninsurable.

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9. After that proposal was rejected, at its 2004 Annual Meeting, the ABA House of Delegates did adopt (by the very narrow margin of 213-202) the proposed Model Rule on Insurance Disclosure(Recommendation 108), revised "to harmonize the rule with respect to states which already have such a rule," over the objection of the ABA Standing Committee on Lawyers' Professional Liability (the "LPL Committee") and the objection of various members of the California Bar. (*See* Report on the ABA Annual Meeting (August 23, 2004) at 13, available at http://www.abanet.org/leadership/2004/annual/SelectCommitteeReportFINAL.doc.) As stated in the Executive Summary of the Report accompanying Recommendation 108:

> The LPL Committee . . . believes that the topic of lawyers' professional liability insurance is complex and unfamiliar territory for most of the public and many lawyers. Given the nature of claims-made coverage, the LPL Committee believes it is likely that the general public's idea and expectations of what "insurance coverage" means at the time a client hires a lawyer is much different than actual reality. Therefore, simply telling a client that insurance coverage exists at the time of hiring can be tantamount to telling the client nothing.

(Available at http://www.abanet.org/leadership/2004/execsumm04.pdf.) In January of this year, the Arkansas Bar rejected adoption of the Model Rule.

10. *See* Davis, Anthony E., *Professional Liability Insurers as Regulators of Law Practice*, 65 FORDHAM L. REV. 209 (1996).

11. New York, Texas, Florida, New Jersey, et al. (*See* chart detailing state implementation of Model Rule (8/11/06), available at the website of the ABA Standing Committee on Client Protection; *see also* Report of the Committee on Professional Responsibility of the Association of the Bar of the City of New York to the Chair of the ABA Task Force, available at www.abcny.org/pdf/report/victor_report2-b.pdf.

Because California has an enhanced disciplinary system, with full time State Bar Court judges, which is funded at a cost of more than $40,000,000 a year, issues of lawyer misconduct are vetted at the State Bar and are fully resolved in that system. The issues investigated by the California disciplinary system include the leading predicates for claims of professional negligence, such as poor communication, calendering problems, and suing a client over a bill -- issues unrelated to the existence or absence of LPL insurance coverage. The proponents of these proposals offer no evidence that the same conditions exist in California, with its unique disciplinary system, as may justify these requirements in other states.

Simply stated the proposed rules will do nothing more than invite malpractice suits by dissatisfied clients, who will view their suits as nothing more than a way to extract money from an LPL carrier without regard to the consequences to the lawyer. We, on behalf of the lawyers of California, should resist this effort to paint targets on each of our backs.

IMPACT STATEMENT:

This resolution, if adopted, will not affect any other law, statute, or rule.

AUTHORS:

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RESPONSIBLE FLOOR DELEGATES: J. Anthony Vittal and Diane Karpman

**Bercovitch, Saul**

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**From:** Freda Pechner, Esq. [ourlawyer@hughes.net]

**Sent:** Monday, March 31, 2008 8:30 AM

**To:** Bercovitch, Saul

**Subject:** Proposed Insurance Disclosure Rule

Dear Mr. Bercovitch: Can you let me know the status on the proposed rule? I have previously commented on it, and remain opposed to any such rule until such time as ALL licensed professionals must disclose this information. When doctors and dentists must tell their patients and accountants tell their clients and contractors tell their customers whether or not they have liability insurance, then it would be appropriate for attorneys to do so, as well. However, I can't see any reason for the legal profession alone to be singled out for this requirement. Thank you.

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