

AGENDA ITEM

MAY 124

**Insurance Disclosure
Proposal – Return from
Public Comment**

DATE: April 28, 2008

TO: Members of the Board of Governors
Members of the Board Committee on Regulation Admissions and
Discipline Oversight

FROM: Saul Bercovitch, Legislative Counsel
Jill Sperber, Director, Office of Mandatory Fee Arbitration

SUBJECT: Insurance Disclosure Proposal – Return from Public Comment

EXECUTIVE SUMMARY

In May 2005, State Bar President John Van de Kamp, in consultation with the California Supreme Court, appointed the State Bar of California Insurance Disclosure Task Force. In June 2006, upon recommendation of the Task Force, proposed new insurance disclosure rules were released for public comment. In May 2007, revised proposed insurance disclosure rules were released for public comment. On September 26, 2007, the Board of Governors was presented with the *Insurance Disclosure Task Force – Final Report and Recommendations* – which included the proposed adoption of two new insurance disclosure rules – and began its consideration of the insurance disclosure proposal. On November 9, 2007, the Board continued its consideration of the insurance disclosure proposal, and referred the proposal to the Regulation, Admissions and Discipline Oversight Committee (RAD) and staff for further consideration. On December 13, 2007, RAD considered the insurance disclosure proposal, and voted to release for public comment proposed new Rule of Professional Conduct 3-410, revised from the Task Force proposal. The insurance disclosure proposal was released for public comment for a period of 90 days, ending on March 17, 2008. That proposal is now before RAD and the Board again, to consider upon return from public comment.

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

I. BACKGROUND

A. History of the Board's consideration of the insurance disclosure proposal

In September 2004, Robert Welden, Chair of the ABA's Standing Committee on Client Protection, sent a letter to Chief Justice Ronald M. George, advising him that the ABA House of Delegates had adopted the ABA *Model Court Rule on Insurance Disclosure*, and expressing his hope that the California Supreme Court consider implementing the ABA Model Court Rule or an equivalent rule.

In May 2005, State Bar President John Van de Kamp, in consultation with the California Supreme Court, appointed the State Bar of California Insurance Disclosure Task Force.

In June 2006, upon recommendation of the Task Force, the Board Committee on Regulation Admissions and Discipline Oversight (RAD) approved a request to release proposed new insurance disclosure rules for public comment. In response to those public comments, the Task Force revised its recommendations. In May 2007, RAD approved the Task Force's request to release revised proposed insurance disclosure rules for public comment. After considering the public comments on the revised proposed insurance disclosure rules, the Task Force made final recommendations to the Board of Governors.

On September 26, 2007, the Board of Governors was presented with the *Insurance Disclosure Task Force – Final Report and Recommendations*. The Task Force's recommendations included the proposed adoption of two new rules. New Rule 3-410 of the California Rules of Professional Conduct would require direct disclosure to clients of the absence of insurance.¹ New Rule 9.7 of the California Rules of Court would require attorney certification to the State Bar followed by identification on the State Bar's Web site of those attorneys who certify that they do not have professional liability insurance.² During the September 26 meeting, outside speakers gave oral presentations in favor of and against the Task Force's recommendations. The Board considered the issues, and voted 9 to 8 against the Task Force's recommendations. The Board discussed several alternative proposals, including revisions that would have provided for a more limited public disclosure under proposed Rule of Court 9.7. Further action was tabled to the November 9, 2007 Board meeting.

On November 9, 2007, the Board of Governors continued its consideration of the insurance disclosure proposal. During that meeting, a motion was made to adopt proposed Rule 3-410 of the California Rules of Professional Conduct, in the form that the Task Force recommended. A motion was subsequently made to amend that motion. The proposed amendment to the motion would have required disclosure to clients of the absence of insurance only when a written fee agreement is required under

¹ The full text of the Task Force's proposed Rule 3-410 is attached hereto as Attachment B.

² The full text of the Task Force's proposed Rule 9.7 is attached hereto as Attachment C.

Business and Professions Code Section 6147 or 6148. The Board voted 10 to 9 in favor of the motion to allow for amendment of the original motion. However, the Board did not vote on the motion as amended. Instead, the Board referred the proposal to the Regulation, Admissions and Discipline Oversight Committee (RAD) and staff for further consideration – in light of issues raised during the November 9 Board meeting – deferring Board action on this and other elements of the Task Force’s recommendations.

After the November 9 Board meeting, the Chair of RAD appointed a subcommittee to discuss possible amendments to proposed Rule 3-410. The subcommittee proposed that Rule 3-410 be amended. The proposed amendments would 1) require notice to the client of the absence of insurance 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;” 2) add a provision stating that the “rule does not apply to legal services rendered in an emergency to avoid foreseeable prejudice to the rights or interests of the client;” and 3) add a provision stating that the rule does not apply where the member has previously advised the client that the member does not have professional liability insurance.

On December 13, 2007, RAD met and considered the insurance disclosure proposal. RAD voted to release for public comment proposed new Rule of Professional Conduct 3-410, amended to conform with the RAD subcommittee’s recommendations and to make a drafting correction, consistent with the intent of the proposal, clarifying that the exemptions in the proposed rule for government lawyers and in-house counsel apply “when that member is representing or providing legal advice to a client in that capacity.”³ On December 13, RAD also voted 1) in favor of a motion recommending that the State Bar study a) methods of making professional liability insurance more affordable and widely available to attorneys, and b) additional means of compensating clients who are harmed by uninsured attorneys; 2) in favor of a motion recommending that the State Bar assess the effect of any new insurance disclosure rule, after the effective date of any such rule; and 3) against a motion recommending that the Board of Governors approve new Rule of Court 9.7, as proposed by the Insurance Disclosure Task Force. The proposal was released for public comment for a period of 90 days, ending on March 17, 2008.

B. Status of insurance disclosure obligations in other states

According to a survey compiled by the ABA’s Standing Committee on Client Protection, a total of twenty-three states have now adopted some form of an insurance disclosure rule.

Five of the states with an insurance disclosure requirement have amended their Rules of Professional Conduct to require attorneys to disclose directly to their clients if the attorneys do not maintain a minimum level of professional liability insurance (Alaska,

³ The full text of the proposed Rule 3-410, as released for public comment following RAD’s December 13, 2007 meeting, is attached hereto as Attachment A.

New Hampshire, Ohio, Pennsylvania, and South Dakota). Kentucky was considering a proposed rule with this approach, but the Kentucky Supreme Court rejected that proposal in 2006. A new insurance proposal is currently under consideration in Kentucky.⁴

Eighteen of the states with an insurance disclosure requirement have followed the ABA model, and require attorneys to disclose on their annual registration statements whether they maintain professional liability insurance (Arizona, Delaware, Hawaii, Idaho, Illinois, Kansas, Massachusetts, Michigan, Minnesota, Nebraska, Nevada, New Mexico, North Carolina, North Dakota, Rhode Island, Virginia, Washington, and West Virginia). In fourteen of those states, the information is made available to the public, in some cases by posting on the State Bar website, but in others upon inquiry only. In four of those states, the information is not made available to the public, but is for internal use only. Two other states are considering the approach of the ABA model (New York and Vermont).

Utah has not adopted a rule, but the Utah Supreme Court issued an order, upon a petition filed by the Utah State Bar, that specifies inclusion of malpractice insurance questions on the attorney licensing forms for the 2007-08 and 2008-09 licensing years. Those questions must be answered for the licensing form to be accepted as complete. The information provided will be for the use of the Utah Supreme Court and the Utah State Bar and will not be made public.⁵

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

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

⁴ One issue in Kentucky is whether the state should adopt a mandatory insurance rule, as opposed to an insurance disclosure rule.

⁵ The Utah Supreme Court order states, in part: "The Court is considering possible future imposition of a rule requiring malpractice insurance. The data from the malpractice insurance questions is being collected to assist the Court in its consideration of this issue."

C. Public comments received in response to the most recent insurance disclosure proposal – the December 13, 2007 proposal

When the December 13, 2007 insurance disclosure proposal was released for public comment, the public comment posting noted that 1) this is the third time that the insurance disclosure proposal is being released for public comment; 2) 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; 3) those comments have been fully considered; and 4) the 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.

Following release of the December 13, 2007 insurance disclosure proposal, the State Bar received 70 comments.⁶ The vast majority of the comments (approximately 77%) opposed the proposal. Almost all of the comments that were received addressed the basic concept of the insurance disclosure proposal, but did not specifically address the difference between Rule 3-410 – as released for public comment following RAD's December 13, 2007 meeting – and the version of Rule 3-410 proposed by the Insurance Disclosure Task Force.

Some of the public comments directly addressed the proposed revisions to proposed Rule 3-410. Other comments acknowledged that they were directed at the revised version of proposed Rule 3-410, but did not directly address specific aspects of the proposed revisions. The comments included the following:

1. Opposition remains

About one-third of the opposition comments acknowledged, in one way or another, that the insurance disclosure proposal had been revised. Several of those comments specifically noted, in substance, that the proposed revisions did not resolve the opposition to the insurance disclosure proposal.

2. Opposition to proposal, including specific comments on proposed revisions

Four of the comments that expressed opposition to the current proposal also contained specific comments about the language of the proposed revisions. The first stated that the provision triggering a disclosure obligation only when "it is reasonably foreseeable that the total amount of the member's legal representation of the client in the matter will exceed four hours" and the provision exempting disclosure in the case of legal services rendered in an "emergency" added new difficulties, uncertainties and ambiguities. The second stated that "*reasonable foreseeability* of four hours work is an

⁶ The State Bar also received four comments *after* the public comment period on the second insurance disclosure proposal expired, but *before* the current proposal was released for public comment. Those comments are included for a complete record. The Board has been provided with all of the comments.

illusory standard.” The third stated that 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. The fourth stated that, if the rule is approved, the language in the provisions relating to short term matters and services rendered in an emergency should be modified to mirror language used in Business and Professions Code section 6148 creating similar exceptions.⁷

3. Opposition resolved

Four comments noted, in substance, that the proposed revisions had resolved opposition to the insurance disclosure proposal. One of those comments was made by an attorney who had previously submitted a public comment stating that he did not favor disclosure to the State Bar, unless it is investigating a specific problem with an attorney, and did not favor disclosure to the general public, particularly on the internet.

4. Support for insurance disclosure, but issues raised about proposed revisions

Five comments supported insurance disclosure in general, but raised issues about one or more of the proposed revisions.

As to the provision that would trigger a disclosure obligation only when “it is reasonably foreseeable that the total amount of the member’s legal representation of the client in the matter will exceed four hours,” the comments expressed the view that the proposed language created a loophole and was arbitrary and vague. One comment objected to the “four hour” provision as written, but suggested that it be reworded to require notice to the client of the absence of insurance 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, or does in fact exceed four hours.”⁸

As to the provision that would exempt disclosure in the case of legal services rendered in an “emergency,” the comments expressed the view that the proposed language created a loophole and was ambiguous. One comment stated that the commenting attorney would “like to see a better definition of emergency or every attorney will look to that as an escape clause.”

⁷ Those suggested revisions would change the “four hour” provision to language triggering the disclosure obligation when it is reasonably foreseeable that *total expense to a client*, including attorney fees, will exceed *one thousand dollars (\$1,000)*. The suggested revisions would *add* language to the emergency provision so that disclosure would also not be required “where a writing is otherwise impractical.”

⁸ The comment proposed the additional language to foreclose a loophole where an attorney’s representation changes from advice of less than four hours (reasonably foreseeable at the time of the engagement) into something more extensive, i.e., more than four hours.

5. Issue raised by ADR neutrals

One individual attorney, and the California Judges Association (CJA), through its ADR Committee, raised an issue relating to attorneys who are acting as ADR neutrals. As noted in previous Agenda Items addressing this issue, clarification that an ADR neutral – who does not represent or provide legal advice to clients – is not subject to the insurance disclosure obligation is consistent with the intent of this proposal. CJA and the individual attorney stated that there should be an exemption in the rule for ADR neutrals.⁹ CJA concluded, however, 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 in the matter will exceed four hours” and that, if “legal representation of the client” is part and parcel of Rule 3-410, no additional language may be necessary.¹⁰

II. PROPOSAL/RECOMMENDATION

In the event RAD decides to recommend that the Board of Governors adopt the insurance disclosure proposal that RAD voted to release for public comment on December 13, 2007, an appropriate resolution is set forth below.

III. FISCAL/PERSONNEL IMPACT

The fiscal and personnel impact are unknown at this time. The mere adoption of proposed Rule of Professional Conduct 3-410 does not involve an unbudgeted fiscal or personnel impact.

IV. IMPACT ON THE BOARD BOOK/ADMINISTRATIVE MANUAL

None resulting from the adoption of proposed Rule of Professional Conduct 3-410.

⁹ CJA does not take a position on the overarching policy decision of insurance disclosure, but raised a drafting issue, in the event any insurance disclosure rules are adopted.

¹⁰ State Bar staff has discussed the current proposal with the State Bar’s ADR Committee, which decided that 1) it was opposed to adding *exemption* language relating to ADR neutrals because of the negative implications for this and other rules. (Where there is no intent to *include* an attorney within the scope of a rule, there is no need for a specific *exemption*.); 2) additional language was *not* required in the most recent proposed rule, under which a disclosure obligation would be triggered only if there is “legal representation of the client”; and 3) if the proposed rule reverts back to earlier versions (such as the Task Force’s proposed Rule 3-410) that did not contain the “legal representation” language, there should be some clarification in a comment to the rule noting that the rule is not intended to apply when a lawyer is not representing or providing legal advice to a client. The State Bar’s ADR Committee did not take a position on the overall proposal.

V. PROPOSED RESOLUTIONS

For the Board Committee on Regulation Admissions and Discipline Oversight

In the event RAD decides to recommend that the Board of Governors adopt the insurance disclosure proposal that RAD voted to release for public comment on December 13, 2007, the following resolution would be appropriate:

RESOLVED, following release for public comment and consideration of comments received, that the Board Committee on Regulation Admissions and Discipline Oversight recommends that the Board of Governors, adopt proposed new Rule 3-410 of the California Rules of Professional Conduct, in the form attached hereto as Attachment A, and direct that the proposed new rule be transmitted to the California Supreme Court with a request that the Court approve the same; and it is

FURTHER RESOLVED, that the Board Committee on Regulation Admissions and Discipline Oversight recommends that the State Bar study a) methods of making professional liability insurance more affordable and widely available to attorneys, and b) additional means of compensating clients who are harmed by uninsured attorneys; and it is

FURTHER RESOLVED, that the Board Committee on Regulation Admissions and Discipline Oversight recommends that the State Bar assess the effect of any new insurance disclosure rule, after the effective date of any such rule.

For the Board of Governors

In the event the RAD makes the recommendations above and the Board of Governors concurs, the following resolution would be appropriate:

RESOLVED, following release for public comment and consideration of comments received, and upon recommendation of the Board Committee on Regulation Admissions and Discipline Oversight, that the Board of Governors adopts proposed new Rule 3-410 of the California Rules of Professional Conduct, in the form attached hereto as Attachment A, and directs that the proposed new rule be transmitted to the California Supreme Court with a request that the Court approve the same; and it is

FURTHER RESOLVED, upon recommendation of the Board Committee on Regulation Admissions and Discipline Oversight, that the that the State Bar will study a) methods of making professional liability insurance more affordable and widely available to attorneys, and b) additional means of compensating clients who are harmed by uninsured attorneys; and it is

FURTHER RESOLVED, upon recommendation of the Board Committee on Regulation Admissions and Discipline Oversight, that the State Bar will assess the

effect of any new insurance disclosure rule, after the effective date of any such rule.

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

As released for public comment, following December 13, 2007 meeting of the Board Committee on Regulation Admissions and Discipline Oversight

New Rule 3-410 of the California Rules of Professional Conduct would be adopted, to read:

California Rules of Professional Conduct

Rule 3-410. Disclosure of Professional Liability Insurance

- (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 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.
- (B) If a member does not provide the notice required under paragraph (A) at the time of a client's engagement of the member, and the member subsequently knows or should know that he or she no longer has professional liability insurance during the representation of the client, the member shall inform the client in writing within thirty days of the date that the member knows or should know that he or she no longer has professional liability insurance.
- (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.
- (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.
- (E) This rule does not apply where the member has previously advised the client under Paragraph (A) or (B) that the member does not have professional liability insurance.

Discussion

[1] The disclosure obligation imposed by Paragraph (A) of this rule applies with respect to new clients and new engagements with returning clients.

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

“Pursuant to California Rule of Professional Conduct 3-410, I am informing you in writing that I do not have professional liability insurance.”

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

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

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

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

Insurance Disclosure Task Force Proposal

New Rule 3-410 of the California Rules of Professional Conduct would be adopted, to read:

Rule 3-410. Disclosure of Professional Liability Insurance

- (A) A member who knows or should know that he or she does not have professional liability insurance shall inform a client at the time of the client's engagement of the member that the member does not have professional liability insurance. The notice required by this paragraph shall be provided to the client in writing.
- (B) If a member does not provide the notice required under paragraph (A) at the time of a client's engagement of the member, and the member subsequently knows or should know that he or she no longer has professional liability insurance during the representation of the client, the member shall inform the client in writing within thirty days of the date that the member knows or should know that he or she no longer has professional liability insurance.
- (C) This rule does not apply to a member who is employed as a government lawyer or in-house counsel and does not represent or provide legal advice to clients outside that capacity.

Discussion

[1] The disclosure obligation imposed by Paragraph (A) of this rule applies with respect to new clients and new engagements with returning clients.

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

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

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

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

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

**Proposed Amendment to Rule 9.6 of the California Rules of Court
and
Proposed New Rule 9.7 of the California Rules of Court**

Insurance Disclosure Task Force Proposal

Rule 9.6 of the California Rules of Court would be amended to read, in relevant part:

California Rules of Court

Rule 9.6. Roll of attorneys admitted to practice

- (a) State Bar to maintain the roll of attorneys.

The State Bar must maintain, as part of the official membership records of the State Bar, the Roll of Attorneys of all persons admitted to practice in this state. Such records must include the information specified in Business and Professions Code sections 6002.1 and 6064, rule 9.7 of these rules, and other information as directed by the Supreme Court.

...

New Rule 9.7 of the California Rules of Court would be adopted, to read:

Rule 9.7. Disclosure of Professional Liability Insurance

- (a) Each active member who is not exempt under subdivision (b) must certify to the State Bar in the manner that the State Bar prescribes:
- (1) Whether the member represents or provides legal advice to clients; and
 - (2) If the member represents or provides legal advice to clients, whether the member currently has professional liability insurance.
- (b) Each active member who is employed as a government lawyer or in-house counsel and does not represent or provide legal advice to clients outside that capacity must certify those facts to the State Bar in the manner that the State Bar prescribes. Members who provide this certification are exempt from providing information under subdivision (a).
- (c) Each member who transfers from inactive status to active status must provide the State Bar with the certification required under subdivision (a) or (b), as

applicable, within thirty days of the effective date of the member's transfer to active status.

- (d) A member must notify the State Bar in writing of any change in the information provided under subdivision (a) or (b) within thirty days of that change.
- (e) The State Bar will identify each individual member who certifies under subdivision (a) that he or she does not have professional liability insurance by making that information publicly available upon inquiry and on the State Bar's website or by a similar method.
- (f) A member who fails to comply with this rule in a timely fashion may be suspended from the practice of law until the member complies. If a member knows or should know that the information supplied in response to this rule is false, the member will be subject to appropriate disciplinary action.

Comment

Rule 9.7(b) provides an exemption for a "government lawyer" or "in-house counsel" provided the member does not "represent or provide legal advice to clients outside that capacity." The basis of both exemptions is essentially the same. The purpose of this rule is to make information available to a client or potential client, through the State Bar, if a member is not covered by professional liability insurance. If a member is employed directly by and provides legal services directly for a private entity or a federal, state or local governmental entity, that entity presumably knows whether the member is or is not covered by professional liability insurance. The exemptions under this rule are limited to situations involving direct employment and representation, and do not, for example, apply to outside counsel for a private or governmental entity, or to counsel retained by an insurer to represent an insured.