Proposed New Rule 3-410 of the California Rules of Professional Conduct – December 13, 2007
Public Comments

No.	Name	Group (G) or Individual (I)	Identification	Position	Summary of comment	Date of Comment	Comments addressing proposed revisions or specifically acknowledging proposed rule as revised
1.	G. Kirk Ellis	I	Attorney	Oppose	Proposal does not take into account the potential adverse impact on quasi retired or other part time lawyers, who do not want to be forced to incur the substantial expense associated with malpractice insurance coverage, or the fact that disclosure of this type will not guarantee anything and may actually serve to mislead and otherwise injure clients.	September 21, 2007	Not applicable. (Comments received *after* the public comment period on the second insurance disclosure proposal expired, but *before* the current proposal was released for public comment.)
2.	David J. Murray	I	Attorney, sole practitioner	Oppose	Seems weighted towards medium and large firms. "Another rule to discourage and tax solos." Proposed rule is unfair and a "written invitation for a dissatisfied client to sue if they know you have insurance."	October 14, 2007	Not applicable. (Comments received *after* the public comment period on the second insurance disclosure proposal expired, but *before* the current proposal was released for public comment.)

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3.	Roger D. Chittum	I	Attorney	Oppose	Proposed rule would mandate disclosures that are likely to mislead clients, especially unsophisticated clients. Most clients do not understand that the typical policy is a claims-made policy and that defense and indemnity are typically included in a single limit. A lawyer with insurance may mount a more vigorous and costly defense than a lawyer without insurance. The existence of insurance may make it less likely that a claim will be promptly or fully paid. Most clients will assume that the limits of the insurance policy are high enough to indemnify the client fully, but that may not be the case.	November 3, 2007	Not applicable. (Comments received *after* the public comment period on the second insurance disclosure proposal expired, but *before* the current proposal was released for public comment.)
4.	J. Grant Kennedy	I	Attorney	Oppose	"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."	November 6, 2007	Not applicable. (Comments received *after* the public comment period on the second insurance disclosure proposal expired, but *before* the current proposal was released for public comment.)

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5.	Lawrence A. Strid	I	Attorney	Oppose	Proposed insurance disclosure rule a) is misleading to consumers, b) 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, c) immediately puts an adversarial atmosphere interjection into the attorney client relationship, and d) will increase the filing of legal malpractice suits. No other profession in this state has a professional liability insurance requirement.	December 21, 2007	None
6.	John D. Harwell	I	Attorney, sole practitioner	Support	"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."	December 21, 2007	None
7.	Martin S. Snitow	I	Attorney	Support	"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."	December 21, 2007	Previously objections have been resolved. [Previously objected to disclosure to the State Bar and the general public, particularly on the internet.]

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8.	Joe Marman	I	Attorney	Oppose	"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."	December 21, 2007	None
9.	Gerald McNally, Jr.	I	Attorney	Oppose	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. "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."	December 21, 2007	"I see nothing in the revised draft to change my opposition to this rule."
10.	Stephany Yablow	I	Attorney	Oppose	"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." The disclosure requirement can send a message to the client that the lawyer is incompetent or unsure of himself.	December 21, 2007	None

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11.	Robert W. Mills	I	Attorney	Oppose	"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." The proposal makes no sense and its "dubious benefits are vastly outweighed by its intrusive, coercive, and misleading aspects."	December 21, 2007	None
12.	David J. Murray	I	Attorney	Oppose	A "solo's personal assets are on the line with every case he takes on. So why force him to pay an insurance company."	December 21, 2007	"The revisions mean nothing. This rule is still aimed right at the solo practitioner."

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13.	Christopher L. Cockrell	I	Attorney	Concern about proposed amendments Previously supported disclosure	[See comments in column to the right, addressing proposed revisions.]	December 21, 2007	"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 definition of emergency or every attorney will look to that as an escape clause."
14.	William Ramseyer	I	Attorney	Oppose	Discriminates against small and solo practitioners. "There should be a Bar sponsored insurance pool set up before there are anymore attempts to require disclosure."	December 22, 2007	"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."

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15.	Dixon Q. Dern	I	Attorney	Oppose	Proposal "basically gives the insurance industry a great weapon to keep their fees as high as they wish…. 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."	December 22, 2007	"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."
16.	Anju Multani	I	Attorney	Oppose	"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."	December 23, 2007	None
17.	Ronald Blubaugh	I	Attorney	Previous objections withdrawn	[See comments in column to the right, addressing proposed revisions.]	December 24, 2007	"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."

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18.	Frank Hoffman	I	Attorney	Oppose	"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."	December 26, 2007	"With respect to the warmed over rules which are now proposed, my objections are all the same."
19.	Richard A. Muench	I	Attorney	Oppose	Since the purpose of the rule is to protect the public, the public should be entitled to know the specifics of the insurance coverage. Otherwise an attorney can get insurance with a huge deductible, which would essentially make that attorney uninsured for all but catastrophic claims.	December 30, 2007	None
20.	Susan Lea	I	Attorney	Oppose	"I do so much pro bono work that I cannot afford expensive malpractice insurance…. What about adding [an exemption for] pro bono nonprofit counsel, or lawyers who assist the poor knowing their services are pro bono?" Continues to object to proposed Rule 9.7. Concludes that the "whole point is to give the insurance industry more control, and to coerce more lawyers into paying insurance premiums."	January 1, 2008	Comment acknowledges proposed rule as revised.

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21.	Gerald G. Knapton	I	Attorney	Support Favors deletion of limitation in rule relating to four hours of legal representation	"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 clients 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?"	January 2, 2008	"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." If the proposed language is deleted "we will have a simple rule that can be easily enforced."
22.	Charles F. Festo	I	Attorney, in-house counsel	Support	"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."	January 3, 2008	Submitted comments on prior versions of the proposal, and acknowledges the revised proposal.

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23.	Mark Baron	I	Member of public	Supports insurance disclosure Objects to current proposal	"New Rule 3-410 will be a small step in making California lawyers' responsible for their professional and ethical behavior." Commenter takes issue with certain provisions. Opposes exemption for lawyers who are employed as government lawyers or in-house counsel when representing or providing legal advice to a client in that capacity. "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." Opposes "four hour" provision and "emergency" provision. [See comments in column to the right, addressing proposed revisions.]	January 3, 2008	"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 there are too many loop holes for a lawyer to exploit in order to avoid personal responsibility for his/her professional conduct.… 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." With respect to the exemption for legal services rendered in an emergency: "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."

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24.	Sam K. Abdulaziz	I	Attorney	Support	“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.”	January 4, 2008	“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.”
25.	Jonas M. Grant	I	Attorney	Oppose	Reconfirms previous opposition.	January 7, 2008	“I remain opposed to the revised rule.”
26.	Ruth Denburg	I	Attorney, sole practitioner	Oppose	Cost of malpractice insurance is “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 representation, and I do lots of pro bono work as well.” Having malpractice insurance would hard hit many solos and small firms. 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.… Query just how important this is to the public”	January 10, 2008	Comment acknowledges revisions in proposed rule.

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27.	Stephen N. Livingston	I	Attorney	Technical comment only	Commenting attorney provides pro bono services through the Orange County Public Law Center. The OC PLC malpractice insurance policy covers him for any cases he services for them. Even though he does not purchase insurance for himself, he does have insurance as far as his OC PLC clients are concerned. Any disclosure solution should 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.”	January 10, 2008	None

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28.	Alan L. Williams	I	Attorney	Oppose	A solution without a problem. “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.” Without “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.”	January 11, 2008	None

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29.	Stephen R. Barnett	I	Attorney, professor of law	Oppose	Basic objections to the proposal remain, centering on splitting the legal profession between big-firm lawyers who can afford malpractice insurance and solos and small-firm lawyers who cannot. "The bar should drop its benighted idea – at least until it makes low-cost malpractice insurance available to California's lawyers."	January 15, 2008	"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.… Meanwhile, the proposed rule abounds with ambiguity.… [W]hat does 'reasonably foreseeable' mean? Is the test objective or subjective?… 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."

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30.	Michael W. Szkaradek	I	Attorney	Oppose	Lawyers who have a policy deductible should be required to disclose that they are *uninsured* as to that amount. Rule should be applied equally to all lawyers who are in any way or amount uninsured. Attorney is also a CPA. "[A]m I going to be required to inform my non-law related clients of the absence of malpractice insurance?… 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." Proposed rule discriminates against lawyers who don't practice law full-time. 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. No 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." The existence of malpractice insurance encourages clients to make frivolous claims. This requirement "is a joke relative to other more relevant and useful disclosures that an attorney could be forced to make to a client."	January 20, 2008	None.

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31.	Stephen B. Bedrick	I	Attorney	Oppose	Much of the attorney's practice consists of court-appointed appellate work. Any possible malpractice 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 disclosure in those situations where the occasional private client seeks to retain me."	January 23, 2008	Urges the Board of Governors to "reject the revised proposal."
32.	Thomas W. Borden	I	Attorney	Oppose	The decision to purchase or not purchase insurance is a professional and a business decision. "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." Many have been clients for decades, and it would a puzzlement for them to understand why attorney would be sending them the notice. Would be destructive of a working attorney-client relationship. If the awkwardness of the proposed rule compels commenting attorney to purchase insurance, he will have to raise his billing rate. Proposal fails to address amount of coverage, deductible, or other terms and conditions of professional liability insurance.	January 23, 2008	"What is *reasonably foreseeable*, and to whom is it *reasonably foreseeable*?… Without the benefit of a crystal ball, *reasonable foreseeability* of four hours work is an illusory standard."

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33.	Jed Gladstein	I	Attorney	Oppose	The proposed rule is impractical because it does not account for the way insurance carriers actually function. The rule will have “unintended and deeply injurious consequences” to attorneys and the public. The matter should be submitted to the State Bar membership for a vote so the people most directly involved would have a say in the matter.	January 24, 2008	None

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34.	Otis R. Damslet	I	Attorney	Oppose	"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').… 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.… 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.… 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.'"	January 27, 2008	None

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35.	Gerald McNally, Jr.	I	Attorney	Oppose	Commenting attorney predicts several consequences. He will be forced to purchase liability insurance. This will be an invitation to clients who are not happy with the result they obtain from the court system to use the threat of an insurance malpractice claim to "negotiate" his bill, especially when he has extended them credit. He will not be extending credit to clients any more. 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 and others. "The people whom the State Bar claims it wants to protect are <u>precisely</u> 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." There will be ever more strident calls for pro bono work. "The rich will get richer and the poor will get poorer. Only the quality of their legal representation will go down."	February 1, 2008	None

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36.	A. Grant Macomber	I	Attorney, sole practitioner	Oppose	Proposed rule "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 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." The proposed rule is prejudicial to the sole practitioner.	February 4, 2008	None
37.	Law Practice Management & Technology (LPMT) Section Executive Committee (ExCom).	G	State Bar Section Executive Committee	Oppose	Alleged benefits "may be illusory and possibly deceiving." Proposal does not take into account low policy limits, "diminishing limits" based on defense costs, cancellation, and other insurance policy terms and conditions.	February 12, 2008	None

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38.	California Judges Association	G	Judges Association	No position on overarching policy decision of insurance disclosure. Potential amendment discussed.	There should be an overt exemption in the rule for ADR neutrals. Concludes, 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 <u>legal representation of the client</u> 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. 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.	February 13, 2008	Notes 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" will 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 for ADR neutrals may be necessary."

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39.	Mark Abelson	I	Attorney	Support	"Clients put their trust in attorneys. Clients expect attorneys to be their fiduciaries…. 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…. 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…. I will be happy to provide greater detail or to testify … 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."	February 14, 2008	None

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40.	Richard S. Leslie	I	Attorney	Oppose	The disclosure is not required of other professionals. The title of the proposed rule is “disclosure of professional liability insurance” but the rule concerns disclosure of the lack of insurance. Why not 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!” This is not a good start to a relationship with an attorney.	February 20, 2008	Acknowledges revised proposal.

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41.	James D. Murray	I	Attorney	Oppose	"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?… 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.… 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.… 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?… [I]n 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."	March 5, 2008	None

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42.	Clayton J. Vreeland	I	Attorney	Oppose	"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."	March 6, 2008	None

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43.	Michael R. Brown	I	Attorney, CPA, MBA	Oppose	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."	March 6, 2008	None

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44.	Derek P. Freyberg	I	Attorney	Oppose	"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…. Second, the proposed rule takes no account of the adequacy (however judged) of the malpractice insurance an attorney may carry… Finally, the proposed disclosure requirement stigmatizes attorneys who choose not to, or cannot afford to, carry malpractice insurance…. 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."	March 6, 2008	None

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45.	Jonathan Weiss	I	Attorney	Oppose	Proposal "will unnecessarily 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."	March 7, 2008	None
46.	Stephen Shepard	I	Attorney, sole practitioner	Oppose	"For the record, I am against the proposed Rule 3-140."	March 7, 2008	None
47.	Kathryn Kirkland	I	Attorney	Oppose	"I do not believe that the proposal would increase the number of attorneys who actually carry malpractice insurance.… I believe that an unintended consequence of this proposal will be a further reduction in the willingness of attorneys to practice family law.… 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 not have malpractice insurance' is to raise doubt in the mind of the client as to the attorney's capabilities."	March 7, 2008	None

No.	Name	Group (G) or Individual (I)	Identification	Position	Summary of comment	Date of Comment	Comments addressing proposed revisions or specifically acknowledging proposed rule as revised
48.	Michael Mahoney	I	Attorney	Oppose	“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…. 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.”	March 8, 2008	“This proposal has been ‘refined,’ but the basic message remains.”

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49.	Russell P. Nowell	I	Attorney	Oppose	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.… Many solo and small firm practitioners cannot pass through the additional cost of insurance to their clients.… [M]any insurance companies often dictate who can receive legal services, by substantially increasing rates in areas of law that are perceived to be at risk."	March 10, 2008	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 <u>billed</u> 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."

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50.	Paul J. Mirowski	I	Attorney	Oppose	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 makes the vast majority of small and solo practitioners “second class citizens.” 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.”	March 10, 2008	None

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51.	Steve Hamilton	I	Attorney	Oppose	"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 its 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."	March 10, 2008	None

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52.	Milton Tennant	I	Attorney	Oppose	There is no basis for the assumption that most of us expect that when we go to a doctor they have insurance 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?"	March 10, 2008	None
53.	Sylvia Keating	I	Attorney	Oppose	Proposed disclosure "does not serve our clients' best interests."	March 10, 2008	None
54.	David Shacter	I	Attorney, sole practitioner	Oppose	"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 the most necessary trust and confidence that we all value so much."	March 10, 2008	None
55.	Kenneth P. Strongman	I	Attorney	Suggests amendment	"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."	March 11, 2008	None

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56.	Kenneth Brans	I	Attorney, sole practitioner	Supports disclosure of whether an attorney does or does not carry malpractice insurance	"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."	March 12, 2008	None

No.	Name	Group (G) or Individual (I)	Identification	Position	Summary of comment	Date of Comment	Comments addressing proposed revisions or specifically acknowledging proposed rule as revised
57.	John Marshall Collins	I	Attorney	Oppose	"Our system of malpractice adjudication is broken, and needs to be fixed.... [W]e 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."	March 12, 2008	None

No.	Name	Group (G) or Individual (I)	Identification	Position	Summary of comment	Date of Comment	Comments addressing proposed revisions or specifically acknowledging proposed rule as revised
58.	Frank Hoffman	I	Attorney	Oppose	We need to decrease entanglements with private businesses. "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."	March 12, 2008	"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."
59.	G. A. Laster	I	Attorney	Oppose	Proposal will elevate insurers to a position equivalent to that of the State Bar in regulating the practice of law.	March 12, 2008	None

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60.	John Paladin	I	Attorney	Oppose	"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."	March 13, 2008	None

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61.	Scott Pesetsky	I	Attorney, sole practitioner	Oppose	Proposed rule provides 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.… 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."	March 14, 2008	None

No.	Name	Group (G) or Individual (I)	Identification	Position	Summary of comment	Date of Comment	Comments addressing proposed revisions or specifically acknowledging proposed rule as revised
62.	Sharon A. Coleman	I	Attorney, sole practitioner	Oppose	"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."	March 14, 2008	Opposition comments refer to provision relating to four hours of legal services.

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63.	Christine A. Chorney	I	Attorney	Oppose	“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.”	March 15, 2008	“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.”

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64.	James K. Poole	I	Attorney. Active member of CA bar, practices out-of-state	Oppose No objection to including his status as insured or not on State Bar profile or other resource available to clients	Commenter is a patent attorney. To add the expense of malpractice insurance would require him to wind up his practice sooner rather than later. Carrying insurance would tend to make him a "target" for lawsuits. Disagrees that clients expect attorneys to carry malpractice insurance, at least for intellectual property attorneys. 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." No objection to including his status as insured or not on the State Bar profile or other resource available to clients.	March 16, 2008	Regarding the four hour limitation, commenting attorney might be able to carry out a trademark search or filing, and probably a patent search, in less than four hours, but meaningful work would exceed four hours. Proposed rule would therefore require him to routinely inform most of his prospective patent clients that he lacks insurance, perhaps dissuading them from engaging him. Opposes proposed rule as written, and would oppose it even if the time limit were greater.

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65.	Robert C. Fellmeth	G	Executive Director, Center for Public Interest Law (CPIL) and University of San Diego School of Law	Supports insurance disclosure Offers clarifying and supplemental adjustments to current proposal	Supports required disclosure by attorneys to clients of absence of insurance coverage, but the current proposal "still falls short of attorney fulfillment of counsel's well-established fiduciary duty to clients." Proposes several amendments. Rule 3-410(B) should require notice of the loss of insurance within 48 hours, instead of 30 days. The rule should require receipt of the notice of non-coverage to be acknowledged in writing by the client. The rule should specify minimum coverage scope and amount in order to justify nondisclosure. The proposed rule may actually operate to cut back on the underlying fiduciary duty of an attorney to make disclosures to a client. "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."	March 17, 2008	Prefers that the disclosure be made without the "four hour" exemption as written. Suggests that it be revised to require disclosure 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, <u>or does in fact exceed four hours</u> "
66.	Patrick Steinfeld	I	Attorney	Oppose	Questions whether sufficient numbers of the public have been harmed to warrant such a costly burden on solos, and whether the disclosure will result in a significant benefit to the consumer.	March 17, 2008	None

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67.	William Mayo	I	Attorney	Oppose	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."	March 17, 2008	Offers continuing comments on "the most recently revised" proposed Rule 3-410. Comments do not specifically address proposed revisions.
68.	David Cameron Carr	G	President, Association of Discipline Defense Counsel	Not opposed to requiring disclosure of insurance status. Opposed to proposed enforcement mechanism.	The former provisions of Business and Professions 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 rule is adopted, it "should merit no more than a private reproval."	March 17, 2008	None

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69.	Aditya Prasad	I	Member of the public	Supports 1) mandatory insurance for all attorneys, 2) public disclosure of the amount of insurance, 3) direct written disclosure to current and new clients of the amount of insurance, with client signing the disclosure confirming they received it; and 4) disbarment and $500,000 fine for practicing law without carrying insurance.	Attorneys “like to sue and harass innocent people” because the attorneys know they will compromise because it is cheaper to do than to go to trial. 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.… 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).”	March 17, 2008	None

No.	Name	Group (G) or Individual (I)	Identification	Position	Summary of comment	Date of Comment	Comments addressing proposed revisions or specifically acknowledging proposed rule as revised
70.	Craig P. Alexander	I	Attorney	Oppose	Proposed rule is not good public policy and discriminatory toward small practitioners. If the Bar is serious about wishing to create better relations with solo and small firm practitioners, it can do something about the affordability of insurance. The State Bar can propose new laws and regulations to help insurance carriers decrease the cost of insurance – through tort reform. No reports or statistics cited that show that attorneys not carrying insurance have resulted in numerous cases of non-recovery by members of the public.	March 17, 2008	Notes that the Board of Governors is again considering the proposal.

No.	Name	Group (G) or Individual (I)	Identification	Position	Summary of comment	Date of Comment	Comments addressing proposed revisions or specifically acknowledging proposed rule as revised
71.	Committee on Professional Responsibility and Conduct (COPRAC)	G	State Bar Standing Committee	Oppose [In 2006, COPRAC commented on an earlier version of proposed new Rule 3-410. At that time COPRAC generally supported the proposed new rule, but not all members of COPRAC agreed.]	"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.… 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.… [P]roposed new rule 3-410 as revised does not 'protect the public' because the disclosure is limited and potentially misleading.… 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.… 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 … it does not mandate disclosure of the existence, substance, and extent of malpractice insurance coverage.	March 17, 2008	If the proposed rule is approved COPRAC recommends that the language used to create two exceptions to the disclosure requirement be modified to mirror language used in Business & Professions Code section 6148 creating similar exceptions. 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)*, instead of four hours. The suggested revisions would *add* language to the emergency provision so that disclosure would also not be required "where a writing is otherwise impractical."

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72.	Patricia Brown	I	Attorney, sole practitioner	Supports insurance disclosure Objects to current proposal	"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.… 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."	March 18, 2008	"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."

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73.	Diane L. Karpman	I	Attorney	Oppose	Comments attach Resolution ELF-1-2006, which was almost unanimously passed by the Conference of Delegates of California Bar Associations in opposition to these concepts nearly two years ago. "[M]ost of the constituents whom you represent are opposed to these ideas.… 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."	March 25, 2008	None

No.	Name	Group (G) or Individual (I)	Identification	Position	Summary of comment	Date of Comment	Comments addressing proposed revisions or specifically acknowledging proposed rule as revised
74.	Freda D. Pechner	I	Attorney	Oppose	Opposed to any such rule until such time as all licensed professionals must disclose this information. Cannot see any reason for the legal profession alone to be singled out for this requirement.	March 31, 2008	None