

DISCUSSION ITEM

RECONSIDERATION OF INSURANCE DISCLOSURE PROPOSAL

DATE: October 15, 2010

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

FROM: Staff

SUBJECT: Reconsideration of Insurance Disclosure Proposal

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: new rule of Professional Conduct 3-410 and new rule of Court 9.7

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 a proposed new Rule of Professional Conduct 3-410, revised from the Task Force proposal. The committee also rejected any further consideration of proposed Rule of Court 9.7. The insurance disclosure proposal was released for public comment for a period of 90 days, ending on March 17, 2008.

In May 2008, the modified proposal was adopted by the Board of Governors and was forwarded to the Supreme Court for approval in November 2008. The Supreme Court approved the Rule of Professional Conduct on August 26, 2009 and became effective January 1, 2010.

In 2010, the State Bar’s fee bill was passed. Within the comment of the legislation, some criticism was levied at the Board of Governor’s decisions regarding public protection issues. The question before this committee is: In light of the criticisms of the legislature, does RAD wish to re-visit the BOGs adoption of the insurance disclosure rule of Professional conduct and consider a more pro-consumer approach?

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 which would require direct disclosure to clients of the absence of insurance; and 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.¹ 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

¹ The full text of the Task Force's proposed Rule 3-410 and proposed new Rule 9.7 is attached hereto as Attachment A.

clients of the absence of insurance only when a written fee agreement is required under 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.”² 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.

On May 16, 2008, RAD and the full Board considered the rule after public comment. The modified Rule of Professional Conduct was approved by both RAD and the Board. In August 2009, the amended Rule of Professional Conduct was adopted by the Supreme Court and made effective January 1, 2010.

² 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 B.

B. Reconsideration of disclosure rule

In 2010, the State Bar's 2011 fee bill was passed by both houses and signed into law by the governor. As part of the bill, the Governance in the Public Interest Task Force was created. The following comment was included with the fee bill regarding the creation of the Governance Task Force: "These provisions were included in this bill in response to concerns that recent actions by the State Bar Board of Governors have not sufficiently taken into account the protection of the public." One of the criticisms addressed the adoption of a "considerably scaled back" version of the insurance disclosure rules as originally recommended.

The question before this committee is: In light of the criticisms of the legislature, does RAD wish to re-visit the BOGs adoption of the insurance disclosure rule of Professional conduct and consider a more pro-consumer approach?

In an effort to provide some additional background, attachment 3 provides the status on insurance disclosure obligations in other states.