AGENDA ITEM

November 701
Insurance Disclosure Task Force – Final Report and Recommendations

DATE: October 24, 2007

TO: Members of the Board of Governors

FROM: Saul Bercovitch, Staff Attorney
Jill Sperber, Director, Office of Mandatory Fee Arbitration

SUBJECT: Insurance Disclosure Task Force – Final Report and Recommendations

EXECUTIVE SUMMARY

On September 26, 2007, the Board of Governors considered the *Insurance Disclosure Task Force – Final Report and Recommendations.* The Board heard oral presentations and discussed the proposal and related issues at length. The discussion was tabled to the November 9, 2007 Board meeting. This Agenda Item presents the issues again, for the Board's further consideration.

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I. BACKGROUND

A. Consideration of the proposed insurance disclosure rules and related recommendations

On September 26, 2007, the Board of Governors was presented with the *Insurance Disclosure Task Force – Final Report and Recommendations*. 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.

To present a full record for the Board's consideration at this Board meeting, the materials from the September 26, 2007 Board meeting (the *Insurance Disclosure Task Force – Final Report and Recommendations* and the related comments and comment charts) are included with this Agenda Item. To the extent the Board considers alternative proposals, along the lines of those discussed on September 26, staff will be prepared during the November 9 meeting with suggested language to implement those alternatives.

B. Developments in other states since the September 26, 2007 Board of Governors meeting

Since the September 26 Board meeting, two more states have adopted an insurance disclosure requirement. The North Dakota rule follows the ABA model, and requires attorneys to disclose on their annual registration statements whether they are covered by professional liability insurance. The information will be disclosed to the public upon request. The Hawaii rule also requires disclosure as part of an attorney's annual registration, but the information is for data collection purposes only, not for disclosure to the public. 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.[1]

C. Issue raised by the California Judges Association during the September 26, 2007 Board of Governors meeting

Representatives of the California Judges Association (CJA) have raised a potential amendment to proposed Rule of Professional Conduct 3-410, seeking to clarify that an ADR neutral – who does not "represent or provide legal advice to clients" – is not subject to the insurance disclosure obligation imposed under that rule.[2] Their proposal is consistent with the intent of the Task Force proposal. Proposed Rule of Court 9.7 addresses this issue by specifically providing that the obligation to disclose the insurance information to the State Bar is triggered only if "the member represents or provides legal advice to clients." But similar language was not contained in the proposed Rule of Professional Conduct.

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[1] In addition, although Utah did not adopt a rule, the Utah Supreme Court issued an order, upon a petition filed by the Utah State Bar, which 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

[2] CJA does not take a position on the overarching policy decisions before the Board of Governors, but has simply raised a drafting issue, in the event insurance disclosure rules are adopted.

CJA representatives have proposed that a member who is not "representing or providing legal advice to a client" be added to the list of *exemptions* in proposed Rule of Professional Conduct 3-410(C), currently covering government lawyers and in-house counsel. Staff recommends against this particular approach, but instead recommends that a Comment be added to proposed Rule of Professional Conduct 3-410, stating that the rule "is not intended to apply when a member is not representing or providing legal advice to a client."

The difference between these two approaches is not simply semantic. An exemption would be needed if an attorney would otherwise be covered by the rule, absent the carve-out language. On the other hand, where there is no intent to *include* an attorney within the scope of a rule, there is no need for a specific *exemption*. Creating an exemption in Rule 3-410 for attorneys who are not "representing or providing legal advice to a client" has potential implications beyond that rule, and may result in needless confusion. Adding a Comment would simply clarify this particular rule, and is consistent with the current approach taken by other Rules of Professional Conduct that clarify in a Comment that a rule "is not intended to apply" to some specific circumstance (e.g., rules 1-600, 3-320, and 3-400).[3]

II. RECOMMENDATION

The original recommendations of the Insurance Disclosure Task Force are set forth in the proposed resolutions below, in the event the Board of Governors approves those recommendations.

III. FISCAL/PERSONNEL IMPACT

The fiscal and personnel impact are unknown at this time. The mere adoption of the proposed Rule of Professional Conduct does not involve an unbudgeted fiscal or personnel impact. The cost associated with the new Rule of Court is largely dependent on the mechanism by which the required attorney reporting is accomplished. If the State Bar is required to mail a form to each active member – likely to be separate and apart from the annual fee statement – and each active member is then required to fill out the form and mail it back to the State Bar, there would be additional postage costs and increased staff costs associated with receipt of the information and data entry. If, on the other hand, attorneys are able to enter the information online through the State Bar's member profile, there would be some programming costs, but they would be relatively minor compared to the costs of manual processing.[4] In either event, there will

[3] CJA representatives have also proposed that the Rule of Court be revised. Instead of providing that the obligation to disclose the insurance information to the State Bar is triggered *only if* "the member represents or provides legal advice to clients," they propose that members who do *not* "represent or provide legal advice to clients" be added to the list of *exemptions*.

[4] On September 26, 2007, the Board approved proposed Rule of Court 9.8 for transmittal to the Supreme Court, to require online registration by attorneys.

also be unknown staff costs that are required in order to perform routine compliance, monitoring, and auditing functions.

IV. IMPACT ON THE BOARD BOOK/ADMINISTRATIVE MANUAL

Operational issues relating to the new rules, if adopted, will need to be incorporated into the Board Book and Administrative Manual.

V. PROPOSED RESOLUTION

Should the Board of Governors approve the recommendations of the Insurance Disclosure Task Force, the following resolutions would be appropriate:

> **RESOLVED**, following release for public comment, consideration of comments received, and upon recommendation of the Insurance Disclosure Task Force, that the Board of Governors approves the proposed amendment to Rule 9.6 of the California Rules of Court and proposed new Rule 9.7 of the California Rules of Court, in the form attached hereto as Attachment A, and directs that the proposed amendment and proposed new rule be transmitted to the California Supreme Court with a request that the Court adopt the same; and it is
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> **FURTHER RESOLVED**, following release for public comment, consideration of comments received, and upon recommendation of the Insurance Disclosure Task Force, 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 B, 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
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> **FURTHER RESOLVED**, that the State Bar will develop public educational material concerning professional liability insurance, to complement any insurance disclosure requirement; and it is
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> **FURTHER RESOLVED**, that the State Bar, as part of an expanded insurance-related package, will study 1) methods of making professional liability insurance more affordable and widely available to attorneys; and 2) additional means of compensating clients who are harmed by uninsured attorneys; and it is
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> **FURTHER RESOLVED**, that the State Bar will assess the effect of the proposed new insurance disclosure rules and prepare a report on that effect within three to five years after the California Supreme Court has 1) adopted the proposed amendment to Rule 9.6 of the California Rules of Court and proposed new Rule 9.7 of the California Rules of Court; and 2) approved proposed new Rule 3-410 of the California Rules of Professional Conduct.

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

(November 9, 2007)

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.

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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.

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

(November 9, 2007)

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 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.