

AGENDA ITEM

MARCH 122

Revisions to Sample Fee Agreement
Forms -Request for Approval

DATE: January 29, 2010

TO: Members, Discipline Oversight Committee

FROM: Jill Sperber, Director, State Bar Office of Mandatory Fee Arbitration

SUBJECT: Proposed Revisions to the State Bar's Sample Fee Agreement Forms–
Request for Approval.

EXECUTIVE SUMMARY

The State Bar of California publishes “Sample Written Fee Agreement Forms” for members of the bar to provide them with guidance on writing enforceable fee agreements that comply with the applicable statutes. The sample fee agreement forms were last revised in 2005. The Mandatory Fee Arbitration (MFA) Committee recommends that revisions are warranted to help members comply with a new rule of professional conduct.

Effective January 1, 2010, Rule of Professional Conduct 3-410 imposes on members a duty to inform a client in writing if the member lacks professional liability insurance when it is reasonably foreseeable that the client's matter will exceed four hours, subject to exemptions provided in the rule. Although any required disclosure under rule 3-410 need not be made in the member's attorney fee agreement, in the member's discretion, such disclosure may be so included. To assist members, the MFA Committee recommends that an explanation of this rule of professional conduct be added to the sample fee agreement forms in the Overview section, including the sample written disclosure language, and that reference to the rule appear in the “Additional Provisions” section.

This agenda item seeks the Board of Governors' approval of the proposed revisions.

Questions concerning this item may be directed to Jill Sperber (415) 538-2023 or jill.sperber@calbar.ca.gov.

I. BACKGROUND: New Rule of Professional Conduct 3-410

The State Bar of California publishes three “Sample Written Fee Agreement Forms.” These forms provide an overview of the statutory requirements in Business and Professions code section 6147-6148 for written retainer agreements and three sample agreement forms and sample optional provisions for use by bar members. The most recent revision to the Forms was effective June 23, 2005. To assist members in complying with a new rule of professional conduct requiring written disclosure if a member lacks professional liability insurance, further revisions are recommended.

Effective January 1, 2010, a new Rule of Professional Conduct RPC 3-410 was adopted to require a member to inform a client in writing if the member does not have professional liability insurance and if the client's matter will likely exceed four hours. The rule contains specific exemptions, such as members employed as government lawyers or in house counsel, services rendered in an emergency, if the client was previously informed in writing.

Any written disclosure required by the rule need not appear in the member's written fee agreement, but members may include such disclosure in their fee agreements. To assist members with complying with Rule 3-410, the Mandatory Fee Arbitration (MFA) Committee recommends that the Overview section of the forms include a section explaining this new rule of professional conduct, including the sample written disclosure language. Reference to this rule should also be made in the Form's "Additional Provisions" section. At its November 20, 2009 and January 15, 2010 meetings, the MFA Committee drafted proposed language for the Board's consideration as set forth below and contained in Attachment A.

II. PROPOSED REVISIONS TO THE SAMPLE FEE AGREEMENT FORMS

The proposed revisions would include a new section C under Roman Numeral Section II Overview (page 1 *et seq.*) with an explanation of the rule as follows:

"C. SUMMARY OF RULE OF PROFESSIONAL CONDUCT 3-410

California Rule of Professional Conduct 3-410 requires that California attorneys who know or should know that they do not have professional liability insurance must inform a client in writing, at the time the client engages the attorney, that the attorney does not have professional liability insurance whenever it is reasonably foreseeable that the total amount of legal representation in the client's matter will exceed four hours.

An attorney who must give a client the written disclosure has the option of doing so in the fee agreement. Rule 3-410 suggests the following language for inclusion in the fee agreement 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."

Rule 3-410 provides limited exemptions to the disclosure requirement. The written disclosure is not required of attorneys when they are government lawyers or in-house counsel and representing a client in that capacity; when they provide legal services in an emergency to avoid prejudice to the rights or interests of a client; or when they have already advised the client in a fee agreement or separate writing that the attorney does not have professional liability insurance. Attorneys are urged to use caution in relying on the exemptions. Attorneys also should be

aware that Rule 3-410 contains a separate written disclosure requirement if the attorney does not provide written notice to the client at the time of the client's engagement of the attorney.

Attorneys are urged to review Rule 3-410 in its entirety. "

In addition, Roman numeral section V (page 10 *et seq.*) entitled "Additional Provisions" is an appropriate place to house an optional written disclosure. Since a Rule 3-410 written disclosure is not required to be set forth in the member's written fee agreement, it is suggested that sample disclosure language appear in the Additional Provision section as follows:

"9. Professional Liability Insurance Clause.

See California Rules of Professional Conduct Rule 3-410. An attorney who knows or should know that he or she does not have professional liability insurance at the time of the client's engagement of the attorney must make a written disclosure to the client, subject to limited exemptions listed in the rule. Rule 3-410 suggests the language of this clause for inclusion in the fee agreement or in a separate writing. "

III. PUBLIC COMMENT

Because the sample written agreement forms are not mandatory forms for members, and the proposed revisions regarding Rule 3-410 are made to comport with new law effective January 1, 2010, public comment is not required.¹

¹ In relevant part, the State Bar's public comment rule provides:

Rule 1.10 Public comment

(A) Proposals for the Rules of the State Bar of California are circulated for public comment before adoption, amendment, or repeal by the Board of Governors. The State Bar also makes available for public comment its proposals for the California Rules of Court. Proposals are circulated for a forty-five day period, which can be shortened to a minimum of 30 days or extended to a maximum of 90 days, as designated by the board.

(B) Public comment is not required

(1) to correct clerical errors; clarify grammar; improve organization; conform to specific changes in a law; update references or citations; or make similar editorial changes;

(2) to modify a proposal that has been circulated for public comment when the board deems the modification non-substantive or reasonably implicit in the proposal; or

(3) to add or modify an appendix to these rules.

IV. FISCAL AND PERSONNEL IMPACT

No fiscal impact is anticipated

V. BOARD BOOK/ADMINISTRATIVE MANUAL IMPACT

None.

VI. EFFECTIVE DATE OF APPROVAL

The proposed revisions to the Sample Fee Written Agreement Forms would become effective upon final consideration and approval by the Board of Governors, after review and recommendation by the Discipline Oversight Committee.

VII. PROPOSED RESOLUTIONS

Should the Discipline Oversight Committee concur with the proposed revisions to the Sample Fee Agreement Forms, the following resolution would be appropriate:

RESOLVED, that the Discipline Oversight Committee hereby recommends that the Board of Governors approve the proposed revisions to the Sample Written Fee Agreement Forms, in the form attached hereto as Attachment A.

Should the Board of Governors concur with the recommendation of the Discipline Oversight Committee to approve the proposed revisions to the Sample Written Fee Agreement forms, the follow resolution would be appropriate:

RESOLVED, upon recommendation of the Discipline Oversight Committee, that the Board of Governors hereby approves the proposed revisions to the Sample Written Fee Agreement forms, in the form attached hereto as Attachment A.
