

DRAFTING TEAM REPORT AND RECOMMENDATION: RULE 3-410 [1.4.2]

Lead Drafter: Clinch
Co-Drafters: Inlender, Tuft
Meeting Date: March 31 & April 1, 2016

I. CURRENT CALIFORNIA RULE

Rule 3-410 Disclosure of Professional Liability Insurance

- (A) A member who knows or should know that he or she does not have professional liability insurance shall inform a client in writing, at the time of the client's engagement of the member, that the member does not have professional liability insurance whenever it is reasonably foreseeable that the total amount of the member's legal representation of the client in the matter will exceed four hours.
- (B) If a member does not provide the notice required under paragraph (A) at the time of a client's engagement of the member, and the member subsequently knows or should know that he or she no longer has professional liability insurance during the representation of the client, the member shall inform the client in writing within thirty days of the date that the member knows or should know that he or she no longer has professional liability insurance.
- (C) This rule does not apply to a member who is employed as a government lawyer or in-house counsel when that member is representing or providing legal advice to a client in that capacity.
- (D) This rule does not apply to legal services rendered in an emergency to avoid foreseeable prejudice to the rights or interests of the client.
- (E) This rule does not apply where the member has previously advised the client under Paragraph (A) or (B) that the member does not have professional liability insurance.

Discussion:

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

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

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

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

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

[4] Rule 3-410(C) provides an exemption for a "government lawyer or in-house counsel when that member is representing or providing legal advice to a client in that capacity." The basis of

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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.

II. DRAFTING TEAM'S RECOMMENDATION AND VOTE

There was consensus among the drafting team members to recommend a proposed amended rule as set forth below in Section III.

III. PROPOSED RULE (CLEAN)

Rule 3-410 Disclosure of Professional Liability Insurance

- (a) A lawyer who knows or reasonably should know that the lawyer does not have professional liability insurance shall inform a client in writing, at the time of the client's engagement of the lawyer, that the lawyer does not have professional liability insurance.
- (b) If notice under paragraph (a) has not been provided at the time of a client's engagement of the lawyer, the lawyer shall inform the client in writing within thirty days of the date the lawyer knows or reasonably should know that the lawyer no longer has professional liability insurance during the representation of the client.
- (c) This Rule does not apply to:
 - (1) a lawyer who knows or reasonably should know at the time of the client's engagement of the lawyer that the lawyer's legal representation of the client in the matter will not exceed four hours; provided that if the representation subsequently exceeds four hours, the lawyer must comply with paragraphs (a) and (b);
 - (2) a court-appointed lawyer in a criminal or civil action or proceeding with respect to the matter in which the lawyer has been appointed;
 - (3) a lawyer who is employed as a government lawyer or in-house counsel when that lawyer is representing or providing legal advice to a client in that capacity;
 - (4) a lawyer who is rendering legal services in an emergency to avoid foreseeable prejudice to the rights or interests of the client;

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- (5) a lawyer who has previously advised the client in writing under paragraph (a) or (b) that the lawyer does not have professional liability insurance.

Comment

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

[2] A lawyer may use the following language in making the disclosure required by paragraph (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 1.4.1, I am informing you in writing that I do not have professional liability insurance."

[3] A lawyer may use the following language in making the disclosure required by paragraph (b):

"Pursuant to California Rule of Professional Conduct 1.4.1, I am informing you in writing that I no longer have professional liability insurance."

[4] The exception in paragraph (c)(2) does not apply to a lawyer's representation of clients in other actions or proceedings in which the lawyer has not been appointed.

[5] The purpose of this rule is to require written notice to a client if a lawyer is not covered by professional liability insurance. If a lawyer is employed by and provides legal services directly for a private entity or a federal, state or local governmental entity, that entity is presumed to know whether the lawyer is or is not covered by professional liability insurance. The exception in paragraph (c)(3) for government lawyers and in-house counsels is limited to situations involving direct employment and representation, and does not, for example, apply to outside counsel for a private or governmental entity, or to counsel retained by an insurer to represent an insured.

IV. PROPOSED RULE (REDLINE TO CURRENT CALIFORNIA RULE)

Rule 3-410 Disclosure of Professional Liability Insurance

- (Aa) A ~~member~~lawyer who knows or reasonably should know that ~~he or she~~the lawyer does not have professional liability insurance shall inform a client in writing, at the time of the client's engagement of the ~~member~~lawyer, that the ~~member~~lawyer does not have professional liability insurance ~~whenever it is reasonably foreseeable that the total amount of the member's legal representation of the client in the matter will exceed four hours.~~

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- (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.~~
- (b) If notice under paragraph (a) has not been provided at the time of a client's engagement of the lawyer, the lawyer shall inform the client in writing within thirty days of the date the lawyer knows or reasonably should know that the lawyer no longer has professional liability insurance during the representation of the client.
- (c) This Rule does not apply to:
- (1) a lawyer who knows or reasonably should know at the time of the client's engagement of the lawyer that the lawyer's legal representation of the client in the matter will not exceed four hours; provided that if the representation subsequently exceeds four hours, the lawyer must comply with paragraphs (a) and (b);
 - (2) a court-appointed lawyer in a criminal or civil action or proceeding with respect to the matter in which the lawyer has been appointed;
 - ~~(G3) This rule does not apply to a member~~a lawyer who is employed as a government lawyer or in-house counsel when that ~~member~~lawyer is representing or providing legal advice to a client in that capacity~~;~~
 - ~~(D4) This rule does not apply to a lawyer who is rendering~~ legal services ~~rendered~~ in an emergency to avoid foreseeable prejudice to the rights or interests of the client~~;~~
 - ~~(E5) This rule does not apply where the member~~a lawyer who has previously advised the client in writing under ~~Paragraph (A)~~paragraph (a) or ~~(B)~~(b) that the ~~member~~lawyer does not have professional liability insurance.

Comment~~Discussion~~

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

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

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"Pursuant to California Rule of Professional Conduct ~~3-410~~1.4.1, I am informing you in writing that I do not have professional liability insurance."

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

"Pursuant to California Rule of Professional Conduct ~~3-410~~1.4.1, I am informing you in writing that I no longer have professional liability insurance."

[4] The exception in paragraph (c)(2) does not apply to a lawyer's representation of clients in other actions or proceedings in which the lawyer has not been appointed.

[45] ~~Rule 3-410(C) provides an exemption for a "government lawyer or in-house counsel when that member is representing or providing legal advice to a client in that capacity." The basis of both exemptions is essentially the same.~~ The purpose of this rule is to ~~provide information directly~~require written notice to a client if a ~~member~~lawyer is not covered by professional liability insurance. If a ~~member~~lawyer 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~~is presumed to know whether the ~~member~~lawyer is or is not covered by professional liability insurance. The ~~exemptions under this rule are~~exception in paragraph (c)(3) for government lawyers and in-house counsels is limited to situations involving direct employment and representation, and ~~does~~ not, for example, apply to outside counsel for a private or governmental entity, or to counsel retained by an insurer to represent an insured.

V. OCTC / STATE BAR COURT COMMENTS

- **JAYNE KIM, OCTC, Date:** A comment on current rule 3-410 is anticipated.
- **RUSSELL WEINER, OCTC, 6/15/2010:**
Rule 1.4.1. Disclosure of Professional Liability Insurance.
OCTC believes Comments 4 and 5 are more appropriate for treatises, law review articles, and ethics opinions.
- **MIKE NISPEROS, OCTC, 9/27/2001:**
Rule 3-410 was not in existence in 2001. It became operative on January 1, 2010.
- **State Bar Court:** No comments received from State Bar Court.

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VI. COMPARISON OF PROPOSED RULE TO APPROACHES IN OTHER JURISDICTIONS (NATIONAL BACKDROP)

There is no counterpart to California rule 3-410 in the ABA Model Rules. However, there is an ABA Model Rule on Court Disclosure. An ABA chart captioned, "American Bar Association Standing Committee on Client Protection, State Implementation of ABA Model Court Rule on Insurance Disclosure," revised as of February 10, 2016 is available at:

- http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/court_implementation_of_mcrd.authcheckdam.pdf

According to the chart, twenty-four jurisdictions require some type of insurance disclosure. Seventeen states require an insurance disclosure on annual registration statements,¹ thirteen of which make that information available to the public.² Seven states, including California, require that the insurance disclosure be provided directly to the client.³ Six states are considering adoption of the Model Court Rule.⁴ Five states studied the ABA rule but decided not to adopt it.⁵ One state adopted an insurance disclosure rule but later withdrew it.⁶ Oregon is currently the only state that requires lawyers to maintain professional liability insurance.

VII. CONCEPTS ACCEPTED/REJECTED; CHANGES IN DUTIES; NON-SUBSTANTIVE CHANGES; ALTERNATIVES CONSIDERED

A. Concepts Accepted (Pros and Cons):

1. Add a new exception for court-appointed lawyers as to those matters in which they have been appointed. The current rule includes exceptions for government and in-house lawyers, but does not provide an exception for court-appointed lawyers as to those matters in which they have been appointed. The first Commission proposed including an exemption for court-appointed lawyers in response to concerns of lawyers who are

¹ The seventeen states are: Arizona, Colorado, Delaware, Hawaii, Idaho, Illinois, Kansas, Massachusetts, Michigan, Minnesota, Nebraska, Nevada, North Dakota, Rhode Island, Virginia, Washington, West Virginia.

² The thirteen states are: Arizona, Colorado, Idaho, Illinois, Kansas, Massachusetts, Minnesota, Nebraska, Nevada, North Dakota, Virginia, Washington, West Virginia.

³ The seven states are: Alaska, California, New Hampshire, New Mexico, Ohio, Pennsylvania, South Dakota.

⁴ The six states are: Maine, New Jersey, New York, South Carolina, Utah, Vermont.

⁵ The five states are: Arkansas, Connecticut, Florida, Kentucky and Texas.

⁶ The state is North Carolina.

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regularly appointed as counsel for indigent clients that disclosure of the lack of insurance may impede the development of a lawyer-client relationship.⁷

- Pros: Requiring such appointed lawyers, many of whom do not maintain professional liability insurance, to notify their clients at the outset of the representation that they do not have insurance could well impede the development of a functioning lawyer-client relationship. This concern, together with the public policy of encouraging lawyers to serve as court-appointed counsel, warrants including these lawyers, along with government lawyers and full-time in-house counsel, as the exception to the rule.
 - Cons: Indigent clients who receive representation by appointment should not be regarded as “second-class” clients in regards to a lawyer’s duty to provide information relevant to the establishment of trust and confidence in the attorney-client relationship.
2. Implement various non-substantive organizational changes and minor language changes for brevity and clarity.
- Pros: The current rule was drafted by a special task force that might not have been given the same stylistic instructions (e.g., Garner style manual) and other resources that the Commission is using. These non-substantive changes will avoid inconsistency in organization and style throughout the rules.
 - Cons: None identified.

⁷ On September 9, 2009, Commission member Robert L. Kehr received an email message from a criminal defense practitioner serving on the Los Angeles County Bar Association Professional Responsibility and Ethics Committee raising concerns with the application of current rule 3-410 to court-appointed lawyers in criminal matters. In part, the email message observed:

This is going to be an issue for many hundreds of criminal defense lawyers who are appointed in federal and State courts in California.

Most of them do not have liability insurance, and they do not use written retainer agreements with the clients. ¶ What will these lawyers do -- hand the client a one-line notice saying they don’t have liability coverage? I don’t think that will go over well with clients who already are in the position of having a lawyer they don’t know assigned to represent them! ¶ The federal CJA (“Criminal Justice Act”) under which CJA Panel attorneys are appointed in federal cases does not requires counsel to have insurance, and one of my colleagues thinks the same is true of State law.

Although insurance is relatively cheap for criminal defense lawyers, most do not have it because of the many hurdles to recovering from criminal defense lawyers – the popular thinking is that “happy clients” generally have nothing to sue about, and unhappy clients generally have admitted guilt or were proven guilty”

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B. Concepts Rejected (Pros and Cons):

In recognition that the current rule is a recently adopted rule by the Board and the Supreme Court (operative January 1, 2010), the drafting team considered but ultimately concluded that the basic policy and duty imposed was not ripe for comprehensive re-evaluation. The team was not aware of any relevant material changes in circumstances or in California law that have occurred since the adoption of the rule.

C. Changes in Duties/Substantive Changes to the Current Rule:

The only substantive change to the current rule is the addition of an exception for court-appointed lawyers as to those matters in which they have been appointed. (See A.1, above.)

D. Non-Substantive Changes to the Current Rule:

1. Paragraph (a). This paragraph has been revised to substitute “reasonably should know” for “should know.” The substituted phrase is a defined term in the Commission’s proposed terminology rule 1.0.1 and the drafting team believes this phrase implements the intent of the current language.⁸ In addition, the exception for services that will not exceed four hours has been moved to new paragraph (c) (see #2 below).
 - Pros: Use of a defined term will avoid confusion.
 - Cons: None identified.
2. Reorganization of structure and non-substantive revisions for brevity and clarity. All provisions in the current rule that provide for an exception to the general requirement to inform a client regarding professional liability insurance have been consolidated in a new paragraph (c).
 - Pros: This reorganization is consistent with the style of the other rules and facilitates ease of understanding and compliance.
 - Cons: The change in structure is not a necessary change. There is no known evidence of misunderstanding by lawyers.
3. Streamline rule comments in accordance with the Commission’s charter that mandates that comments be used sparingly. Comment [5] has been revised to delete the first two sentences because they simply restate the black letter rule. The remaining language has been slightly revised for brevity and clarity.
 - Pros: These changes will adhere to the charter and promote consistency in style with the other rules.
 - Cons: None identified.
4. Substitute the term “lawyer” for “member”.
 - Pros: The current Rules’ use of “member” departs from the approach taken in

⁸ Proposed rule 1.0.1(j) provides that: “Reasonably should know” when used in reference to a lawyer means that a lawyer of reasonable prudence and competence would ascertain the matter in question.

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the rules in every other jurisdiction, all of which use the term lawyer. The Rules apply to all non-members practicing law in the State of California by virtue of a special or temporary admission. For example, those eligible to practice pro hac vice or as military counsel. (See e.g. rules 9.40, 9.41, 9.42, 9.43, 9.44, 9.45, 9.46, 9.47, and 9.48 of the California Rules of Court.)

- Cons: Retaining “member” would carry forward a term that has been in use in the California Rules for decades.
5. Change the rule number to conform to the ABA Model rules numbering and formatting (e.g., lower case letters). The rule number recommended for amended rule 3-410 is rule 1.4.2 as this would place the rule in series with other rules concerning the duty to inform a client (e.g., rule 1.4 (general rule on client communication of significant developments) and rule 1.4.1 (rule requiring communication of settlement offers to a client)).
- Pros: It will facilitate the ability of lawyers from other jurisdictions who are authorized by various Rules of Court to practice in California to find the California rule corresponding to their jurisdiction’s rule, thus permitting ease of determining whether California imposes different duties. It will also facilitate the ability of California lawyers to research case law and ethics opinions that address corresponding rules in other jurisdictions, which would be of assistance in complying with duties, particularly when California does not have such authority interpreting the California rule. As to the “Con” that there is a large body of case law that cites to the current rule numbers, the rule numbering was drastically changed in 1989 and there has been no apparent adverse effect. A similar change in rule numbering of the Rules of Court was implemented in 2007, also with no apparent adverse effect.
 - Cons: There is a large body of case law that cites to the current rule numbers and California lawyers are presumed to be familiar with that numbering system.

E. Alternatives Considered:

(See section VII.0.)

VIII. OPEN ISSUES/CONCEPTS FOR THE COMMISSION TO CONSIDER

There are no open issues for the Commission’s consideration.

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IX. COMMENTS FROM DRAFTING TEAM MEMBERS OR OTHER COMMISSION MEMBERS

Clinch

- None.

Inlender

- None.

Tuft

- None.

X. RECOMMENDATION AND PROPOSED COMMISSION RESOLUTION

Recommendation:

That the Commission recommend that the Board of Trustees of the State Bar of California adopt proposed amended rule 3-410 [1.4.2] in the form set forth in this Report and Recommendation.

Proposed Resolution:

RESOLVED: That the Commission for the Revision of the Rules of Professional Conduct recommends that the Board of Trustees adopt proposed amended rule 3-410 [1.4.2] in the form set forth in this Report and Recommendation.

XI. DISSENTING POSITION(S)

None.

XII. FINAL COMMISSION VOTE/ACTION

Date of Vote:

Action:

Vote: X (yes) – X (no) – X (abstain)

CURRENT CALIFORNIA RULE 3-410¹
"Disclosure of Professional Liability Insurance"

I. Text of Current Rule:

- (A) A member who knows or should know that he or she does not have professional liability insurance shall inform a client in writing, at the time of the client's engagement of the member, that the member does not have professional liability insurance whenever it is reasonably foreseeable that the total amount of the member's legal representation of the client in the matter will exceed four hours.
- (B) If a member does not provide the notice required under paragraph (A) at the time of a client's engagement of the member, and the member subsequently knows or should know that he or she no longer has professional liability insurance during the representation of the client, the member shall inform the client in writing within thirty days of the date that the member knows or should know that he or she no longer has professional liability insurance.
- (C) This rule does not apply to a member who is employed as a government lawyer or in-house counsel when that member is representing or providing legal advice to a client in that capacity.
- (D) This rule does not apply to legal services rendered in an emergency to avoid foreseeable prejudice to the rights or interests of the client.
- (E) This rule does not apply where the member has previously advised the client under Paragraph (A) or (B) that the member does not have professional liability insurance.

Discussion:

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

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

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

¹ **Staff Recommendation:** The first Commission's proposed Rule counterpart to current rule 3-410 was numbered 1.4.1 and followed proposed Rule 1.4 (Communication). Because this Commission has already assigned 1.4.1 to the proposed Rule requiring the communication of settlement offers, it is recommended that a recommended rule that carries forward the substance of current rule 3-410 be numbered 1.4.2.

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

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

[4] Rule 3-410(C) provides an exemption for a "government lawyer or in-house counsel when that member is representing or providing legal advice to a client in that capacity." The basis of both exemptions is essentially the same. The purpose of this rule is to provide information directly to a client if a member is not covered by professional liability insurance. If a member is employed directly by and provides legal services directly for a private entity or a federal, state or local governmental entity, that entity presumably knows whether the member is or is not covered by professional liability insurance. The exemptions under this rule are limited to situations involving direct employment and representation, and do not, for example, apply to outside counsel for a private or governmental entity, or to counsel retained by an insurer to represent an insured. (Added by order of the Supreme Court, operative January 1, 2010.)

II. Background/Purpose:

Rule 3-410 was first approved in January 2010. If a representation will exceed four hours of the lawyer's time, the rule requires a written disclosure to clients where the lawyer knows or should know that the lawyer does not have professional liability insurance. The rule also requires that the lawyer provide written disclosure if liability insurance coverage is lost and provides express exemptions for government and in-house lawyers, services rendered in an emergency, and where the client was previously advised.

The rule's adoption followed from consideration of an ABA Model Court Rule. In August 2004, the ABA adopted Model Court Rule on Insurance Disclosure requiring lawyers to disclose on their annual registration statements whether they maintain professional liability insurance, and authorizing that the information be available to the public.² In May 2005, the State Bar President, in consultation with the California Supreme Court, appointed a special State Bar Insurance Disclosure Task Force.

The Task Force recommended two rules to the Board: (1) a proposed new rule of professional conduct requiring an insurance disclosure to clients; and (2) a proposed new rule of court requiring an insurance disclosure to the State Bar. Based on the controversy raised by consideration of the rule, and the majority of public comments received that opposed a disclosure requirement, a Board Subcommittee was assigned to further consider the rule. The Subcommittee recommended a compromise rule, intended to address the concerns expressed in the public comments while still balancing the need for public protection. The compromise rule added the current exemptions to the rule and did not recommend a parallel rule of court. (See State Bar memorandum, "Request that the Supreme Court of California Approve New Rule of

² See Section VI, below.

Professional Conduct 3-410 and Memorandum and Supporting Documents in Explanation,” dated November 20, 2008, Supreme Court case number S168443). The Board recommended the compromise rule as proposed new rule 3-410, which was ultimately approved by the California Supreme Court. Rule 3-410 has not since been amended.

III. Input from the State Bar Office of the Chief Trial Counsel (OCTC):

A. 2016 Comment

In a _____, 2016 memorandum to the Commission, OCTC provided the following comment regarding rule 3-410:

(Note: OCTC is expected to provide new comments on this rule. These comments will be distributed to the drafting team when they are received from OCTC.)

B. 2010 Comment

In a June 15, 2010 memorandum to the first Commission, OCTC provided the following comment on proposed rule 1.4.1:

1. OCTC believes Comments 4 and 5 are more appropriate for treatises, law review articles, and ethics opinions.

C. 2001 Comment

None.

IV. Potential Deficiencies in the Current Rule:

A. The current rule includes exemptions for government and in-house lawyers, but does not provide an exemption for court-appointed lawyers as to those matters in which they have been appointed. The first Commission proposed including an exemption for court-appointed lawyers in response to concerns of lawyers who are regularly appointed as counsel for indigent clients that disclosure of the lack of insurance may impede the development of a lawyer-client relationship.³ Although a Rule memorandum regarding proposed Rule

³ On September 9, 2009, Commission member Robert L. Kehr received an email message from a criminal defense practitioner serving on the Los Angeles County Bar Association Professional Responsibility and Ethics Committee raising concerns with the application of current rule 3-410 to court-appointed lawyers in criminal matters. In part, the email message observed:

This is going to be an issue for many hundreds of criminal defense lawyers who are appointed in federal and State courts in California.

Most of them do not have liability insurance, and they do not use written retainer agreements with the clients. ¶ What will these lawyers do -- hand the client a one-line notice saying they don't have liability coverage? I don't think that will go over well with clients who already are in the position of having a

1.4.1 was filed with the Supreme Court in September 2013, the State Bar did not receive a response from the Court.

V. California Context:

A. California Law Requiring Insurance or Security for Claims

Various statutes in California require either errors and omissions insurance or security for claims against the individual or entity. While different from a disclosure requirement, the following statutes demonstrate that where legal or law-related services are being rendered, policy appears to value insurance as an important public protection.

- Law Corporations: upon its application to register, each law corporation must provide the State Bar with proof of security for claims for errors and omissions of the corporation. See State Bar Rule 3.158, Bus. & Prof. Code § 6171(b), Corp. Code § 13406(b).
- Limited Liability Partnerships: upon its application for certification, LLPs are required to submit a statement to the State Bar that it has complied requirements to maintain security for claims for errors and omissions arising out of the practice of law. See State Bar Rules 3.172 and 3.177, Bus. & Prof. Code § 6174.5, Corp. Code § 16956.
- Foreign Legal Consultants: a registered foreign legal consultant must provide evidence of and maintain at all times security for claims for pecuniary losses, either through insurance, letter of credit, or written guarantee or agreement. See State Bar Rule 3.403.
- Certified Lawyer Referral Services: panel members are required to maintain errors and omissions insurance. See State Bar Rule 3.823(C), Bus. & Prof. Code § 6155(f)(6).
- Legal Document/Unlawful Detainer Assistants: applications for a certificate of registration must be accompanied by a bond in the amount required by statute. See Bus. & Prof. Code § 6405.

B. California Law Related to Current Rule 3-410

Since its adoption in 2010, there have been no published disciplinary cases discussing rule 3-410.

lawyer they don't know assigned to represent them! ¶ The federal CJA ("Criminal Justice Act") under which CJA Panel attorneys are appointed in federal cases does not require counsel to have insurance, and one of my colleagues thinks the same is true of State law.

Although insurance is relatively cheap for criminal defense lawyers, most do not have it because of the many hurdles to recovering from criminal defense lawyers – the popular thinking is that "happy clients" generally have nothing to sue about, and unhappy clients generally have admitted guilt or were proven guilty"

D. Repealed Statutory Requirement for Written Fee Agreements

Under former Business and Professions Code, section 6148(a)(4) disclosures to clients regarding whether the lawyer maintained professional liability insurance was required by the statutory scheme governing written fee agreements.⁴ It had provided that where a written fee agreement was required, that agreement must also provide a disclosure to the client if the lawyer did not meet the criteria regarding maintaining errors and omissions insurance coverage. By the terms of the statute, the disclosure provision sunset on January 1, 2000.

E. State Bar Sample Written Fee Agreements

To facilitate a member's compliance with rule 3-410, the State Bar's Sample Written Fee Agreements include an optional provision addressing whether the member has insurance. The Sample Written Fee Agreements are posted at the State Bar website (see links below).

<http://www.calbar.ca.gov/Attorneys/MemberServices/FeeArbitration/FormsResources.aspx>

http://www.calbar.ca.gov/Portals/0/documents/mfa/2015/2015_SampleWrittenFeeAgreementInstructions2-070115_r.pdf

VI. ***Approach In Other Jurisdictions (National Backdrop):***

A. ABA Model Court Rule on Insurance Disclosure

There is no ABA Model Rule of Professional Conduct that is analogous to rule 3-410. However, in 2004 the ABA adopted Model Court Rule on Insurance Disclosure, which governs disclosure of professional liability insurance. The model court rule requires lawyers to disclose on their annual registration statements whether they maintain professional liability insurance, with exclusions for lawyers not actively practicing law and those employed as governmental or organizational lawyers. The rule also authorizes the release of the disclosed information to the public, and discipline for failure to comply.

B. The ABA State Implementation Chart for Model Court Rule on Insurance Disclosure

An ABA Standing Committee on Client Protection Chart, entitled "State Implementation of ABA *Model Court Rule on Insurance Disclosure*," revised September 2015, is available at:

http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/chart_implementation_of_mcrd.authcheckdam.pdf

⁴ The statutes mandate that all contingency fee agreements must be in writing and that all non-contingency agreements must also be in writing if the total expense to the client, including attorney fees, will exceed one thousand dollars.

According to the chart, twenty-four jurisdictions require some type of insurance disclosure. Seventeen jurisdictions require an insurance disclosure on annual registration statements,⁵ thirteen of which make that information available to the public.⁶ Seven jurisdictions, including California, require that the insurance disclosure be given directly to the client.⁷ Six jurisdictions are considering adoption of the Model Court Rule.⁸ Oregon is currently the only jurisdiction that requires lawyers to maintain professional liability insurance.

VII. Public Comment Received by the First Commission:

The clean text of proposed rule 1.4.1 drafted by the first Commission and adopted by the Board to replace rule 3-410 is enclosed with this assignment, together with the synopsis of public comments received on that proposed rule and the full text of those comments. Although the proposed rule differs slightly from current rule 3-410, the drafting team might consider to what extent, if any, the public comments received on the proposed rule provide helpful information in analyzing the current rule.

To facilitate the review and to appreciate the relevance of these public comments, a redline comparison of the first Commission's proposed rule showing changes to rule 3-410 is also enclosed with the public comments received. However, given the Board's charge to engage in a comprehensive review of the current rules and to retain the historical nature of the California Rules as "a clear and enforceable articulation of disciplinary standards," a drafting team that considers amendments developed by the first Commission should not presume that the approach taken by the first Commission was appropriate to achieve those objectives.

VIII. Potential Issues Identified by Professional Competence Staff Following Review of the Proposed Rule Developed by the First Commission and Adopted by the Board:

Bearing in mind the Commission's Charter to engage in a comprehensive review of the current rules and to retain the historical nature of the California Rules as "a clear and enforceable articulation of disciplinary standards," Professional Competence staff identified the following rule amendment issues (in no particular order) that the drafting team might consider. The drafting team need not address any of the issues. For example, if after critically evaluating an issue addressed by a revision made by the first Commission, the drafting team determines that the revision does not address an actual (as opposed to theoretical) public protection deficiency in the current rule, then the

⁵ The seventeen jurisdictions are: Arizona, Colorado, Delaware, Hawaii, Idaho, Illinois, Kansas, Massachusetts, Michigan, Minnesota, Nebraska, Nevada, North Dakota, Rhode Island, Virginia, Washington, West Virginia.

⁶ The thirteen jurisdictions are: Arizona, Colorado, Idaho, Illinois, Kansas, Massachusetts, Minnesota, Nebraska, Nevada, North Dakota, Virginia, Washington, West Virginia.

⁷ The seven jurisdictions are: Alaska, California, New Hampshire, New Mexico, Ohio, Pennsylvania, South Dakota.

⁸ The six jurisdictions are: Maine, New Jersey, New York, South Carolina, Utah, Vermont.

drafting team should hesitate to recommend a change to the current rule despite the prior decision by the first Commission and the Board to address the issue. (Note: For the sake of completeness and ease of reference, some of the issues listed below may have already been mentioned in connection with other information provided above, such as in connection with the approaches taken in other jurisdictions or prior public comment. Multiple mentions of an issue do not necessarily warrant the drafting team taking action on an issue.)

A. Whether the rule should add an exemption for court-appointed lawyers as to those matters in which they have been appointed.

IX. Research Resources:

- State Bar Rule 3.158 (re law corps security for claims)
- Bus. & Prof. Code § 6171(b) (re law corps security for claims)
- Corp. Code § 13406(b). (re law corps security for claims)
- State Bar Rules 3.172, 3.177 (re limited liability partnership security for claims)
- Bus. & Prof. Code § 6174.5 (re limited liability partnership security for claims)
- Corp. Code § 16956 (re limited liability partnership security for claims)
- State Bar Rule 3.403 (re Foreign Legal Consultant security for claims)
- State Bar Rule 3.823(C) (re Lawyer Referral Service panel attorney insurance)
- Bus. & Prof. Code § 6155(f)(6) (re Lawyer Referral Service panel attorney insurance)
- Bus. & Prof. Code § 6405 (re Legal Document Assistant/Unlawful Detainer Assistant requirement to post bond)