

COMMISSION PROVISIONAL REPORT AND RECOMMENDATION: RULE 1.4.2 [3-410]

Commission Drafting Team Information

Lead Drafter: Nanci Clinch

Co-Drafters: Tobi Inlender, Mark Tuft

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 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. FINAL VOTES BY THE COMMISSION AND THE BOARD

Commission:

Date of Vote: October 21 & 22, 2016

Action: Recommend Board Adoption of Proposed Rule 1.4.2

Vote: 15 (yes) – 0 (no) – 0 (abstain)

Board:

Date of Vote: November 17, 2016

Action: Board Adoption of Proposed Rule 1.4.2

Vote: 14 (yes) – 0 (no) – 0 (abstain)

III. COMMISSION’S PROPOSED RULE 1.4.2 (CLEAN)

Rule 1.4.2 [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 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;
- (3) a lawyer who is rendering legal services in an emergency to avoid foreseeable prejudice to the rights or interests of the client;
- (4) 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 1.4.2, 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 1.4.2, I am informing you in writing that I no longer have professional liability insurance."

[4] The exception in paragraph (c)(2) 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. 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.

IV. COMMISSION'S PROPOSED RULE 1.4.2 (REDLINE TO CURRENT CALIFORNIA RULE 3-410)

Rule ~~3-410~~1.4.2 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.~~
- (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:
- (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.~~
- (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);
- (G2) ~~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~~;~~
- (D3) ~~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~~;~~
- (E4) ~~This rule does not apply where the member~~a lawyer who has previously advised the client in writing* under ~~Paragraph (A)~~paragraph (a) or ~~(Bb)~~ 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:

"Pursuant to California Rule of Professional Conduct ~~3-410~~1.4.2, 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~~1.4.2, 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~~The exception in paragraph (c)(2) for government lawyers and in-house counsels is limited to situations involving direct employment and representation, and ~~de~~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. 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.

V. RULE HISTORY

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. 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 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.

VI. OCTC / STATE BAR COURT COMMENTS

- **Gregory Dresser, Office of Chief Trial Counsel, 9/27/2016**
(In response to 90-day public comment circulation):
 1. OCTC supports this rule.
 2. OCTC supports Comments 1 and 4.
 3. OCTC is concerned that Comments 2 and 3 do not explain or interpret the rule, but simply.
- **State Bar Court:** No comments were received from State Bar Court.

VII. PUBLIC COMMENTS & PUBLIC HEARING TESTIMONY

One comment from OCTC was received and agreed with the proposed rule. A public comment synopsis table is provided at the end of this report.

VIII. RELATED CALIFORNIA LAW AND ABA MODEL RULE ADOPTIONS

A. ABA Model Rule Adoptions

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/chart_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.

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

A. Concepts Accepted (Pros and Cons):

1. 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.

B. Concepts Rejected (Pros and Cons):

1. 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.

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.

2. Adding a new exception for court-appointed lawyers as to those matters in which they have been appointed was considered. 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 regularly appointed as counsel for indigent clients that disclosure of the lack of insurance may impede the development of a lawyer-client relationship.⁷ This Commission determined there was no reason to provide the exception for criminal defense attorneys because attorneys on court appointed lists are currently required to have liability insurance. This was not true in 2009 when the comment referenced in footnote 9 was received by the first Commission. No comments were received by the second Commission requesting that criminal defense attorneys be exempted from this Rule. After consideration, this exception was not included in the proposed Rule.
 - Pros: 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.
 - Cons: 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-

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”

appointed counsel, warrants including these lawyers, along with government lawyers and full-time in-house counsel, as the exception to the rule.

This section identifies concepts the Commission considered before the rule was circulated for public comment. Other concepts considered by the Commission, together with the Commission's reasons for not recommending their inclusion in the rule, can be found in the Public Comment Synopsis Tables.

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 0.1, 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 [4] 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.

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.

- 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 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 IX.B.)

X. RECOMMENDATION AND PROPOSED BOARD RESOLUTION

Recommendation:

That the Commission recommends adoption of proposed Rule 1.4.2 [3-410] in the form attached to this Report and Recommendation.

Proposed Resolution:

RESOLVED: That the Board of Trustees adopt proposed Rule 1.4.2 [3-410] in the form set forth in this Report and Recommendation.