

# **The State Bar of California**

## **New Rule 3-410 (Disclosure of Professional Liability Insurance) of the Rules of Professional Conduct of the State Bar of California**

### ***FAQs***

**1) Q: What is the new insurance disclosure requirement?**

**A:** Under a new [Rule of Professional Conduct](#), a lawyer who does not have professional liability insurance must inform a client, in writing, at the time of the engagement, that the lawyer does not have such insurance.

The rule's key provisions are:

- (1) written notification that a lawyer does not have professional liability insurance must be made at the time a client hires the lawyer, if it is "reasonably foreseeable" that the representation will exceed four hours;
- (2) if the insurance coverage later lapses during the representation, the lawyer must inform the client in writing within 30 days of the time that the lawyer no longer has insurance;
- (3) the rule does not apply to a lawyer who is employed as a government lawyer or as an in-house counsel when that lawyer is representing a client in that capacity;
- (4) the rule does not apply to legal services given in an emergency to avoid prejudice to a client's rights or interests; and
- (5) the rule does not apply if the lawyer previously informed the same client that the lawyer does not have insurance.

Note that the rule is limited to situations in which a lawyer *does not* have professional liability insurance for an engagement that reasonably foreseeably will exceed four hours, and that the rule only requires a disclosure in writing from the lawyer to a client. In addition, disclosure is required regardless of the nature of the lawyer-client fee agreement and thus includes flat fee and contingency fee arrangements as well as hourly fee arrangements.

**2) Q: When does the new insurance disclosure requirement become operative?**

**A:** The rule was adopted by order of the California Supreme Court dated August 26, 2009 to become effective on January 1, 2010.

**3) Q: Does the new insurance disclosure requirement apply if a lawyer does not have his or her own professional liability insurance, but is nonetheless covered by the professional liability insurance policy of another person or entity?**

**A:** If a lawyer is covered by professional liability insurance – for example an insurance policy of an employer or other entity – then disclosure is not required under the rule, even though the lawyer does not have his or her own insurance or is not the individual policy holder.

**4) Q: What if a lawyer has professional liability insurance at the time of the engagement and also throughout the lawyer’s performance of the services contemplated, but thereafter the lawyer does not renew the policy or the policy otherwise lapses or terminates prior to any professional liability claim being asserted by the client against the lawyer?**

**A:** The rule imposes a disclosure obligation if the lawyer no longer has professional liability insurance “during the representation of the client.” Thus, it is necessary to analyze whether the lawyer is still representing the client, e.g., if some act remains to be done in relation to the representation. If the lawyer has completed the engagement and communicated this to the client, no disclosure would be required. However, if the engagement has not been closed, or if further action by the lawyer or by a court or agency is anticipated, then it might be asserted that the client’s representation remains pending and therefore written disclosure is required under Rule 3-410(B). Moreover, if the terms of a lawyer’s retention agreement leave the scope of representation open-ended in order to handle future matters for the client on an ad hoc or as needed basis, or for any other reason, the lawyer assumes an obligation of ongoing compliance with Rule 3-410 until the client’s representation comes to an end.

**5) Q: What happens if the operation of the terms of an insurance policy results in only nominal coverage (i.e., less than \$100) at a certain point of time during a client’s representation?**

**A:** If a lawyer has insurance at the time of the client’s engagement of the lawyer, then disclosure is not required. The rule does not specify any minimum amount of indemnity that must be available to protect a client. However, a lawyer’s general obligation to maintain good client communication militates in favor of informing a client if that client has a mistaken belief that coverage is present in some specific amount. Also, if coverage drops to zero, then the lawyer no longer has insurance for purposes of the rule, requiring the lawyer to make disclosure to the client under paragraph (B) of Rule 3-410.

**6) Q: Isn’t there an existing insurance disclosure requirement imposed by statute?**

**A:** No. From January 1993 until January 2000, statutes in the Business and Professions Code contained provisions requiring disclosure of lack of insurance in written fee agreements. These former insurance disclosure requirements were

repealed by their own terms on January 1, 2000. As discussed in question 10 below, unlike the former statutory requirement, the new rule does not require that the written disclosure be included in the lawyer's written fee agreement, but the fee agreement may contain the required disclosure.

**7) Q: Is a lawyer subject to discipline for failure to comply with the new insurance disclosure requirement?**

**A:** Yes, failure to comply with the new rule subjects a lawyer to discipline (see, generally, Business and Professions Code §6077).

**8) Q: Is California the only state with an insurance disclosure rule for lawyers?**

**A:** No. As of November 2008, when the new rule was submitted by the State Bar to the California Supreme Court for approval, the State Bar reported that twenty-four states had adopted an insurance disclosure rule.

**9) Q: What about lawyers who practice as a law corporation or LLP, or a self-insured lawyer?**

**A:** The former statutory insurance disclosure requirement expressly addressed the financial responsibility standards imposed on certified law corporations and an option for self-insurance of non-law corporation practitioners by filing with the State Bar an executed copy of a written agreement guaranteeing payment of all claims against an attorney (see the 1999 version of repealed Business and Professions Code §6148(a)(4)(A),(B) and (C)). In contrast, the new rule requires that services be covered by a policy of insurance and does not include an exception for self-insurance or a law corporation that does not have insurance. Similarly, the new rule does not include an exception for a Limited Liability Partnership (LLP) that does not have insurance.

**10) Q: Do lawyers have to submit a copy of their insurance policy or any other proof of compliance to the State Bar?**

**A:** No. The new rule is different from the former statutory insurance disclosure requirement that included a self-insurance option with a State Bar filing requirement for the lawyer's executed written guarantee of payment of all client claims. The new rule does not provide for a self-insurance compliance option and there is no filing requirement.

**11) Q: Does the Bar offer a form or template for complying with the new rule?**

**A:** Comment [2] and Comment [3] to the rule provide compliance language for the disclosure requirement. Although written disclosure may be included in a written fee agreement, it is not required. To provide a sample disclosure in a written fee agreement, the State Bar is considering a possible addition to the Bar's current [sample written fee agreements](#).

**12) Q: Does the new rule apply to services rendered on a pro bono basis?**

**A:** Yes, the rule applies as there is no exception in the rule for services rendered on a pro bono basis. However, note that if the pro bono services are covered by insurance because, for example, the lawyer is providing services under the auspices of a non-profit legal services program with insurance that covers the services being provided by participating lawyers, then no disclosure would be required under the rule even though the lawyer is not the insurance policy holder. (See also, question 3 above.)

**13) Q: Does the exemption covering all government and in-house work apply to any and all legal services performed by such lawyers, including work performed for non-employer clients whether for additional compensation or pro bono ?**

**A:** No, see Comment [4] to the rule. The rationale for the exception extends only to services rendered in the course and scope of a lawyer's government or in-house employment. Therefore, government or in-house lawyers must comply with the new insurance disclosure requirement when performing legal services for a client outside the scope of the government or in-house employment.

**14) Q: Is the new rule retroactive such that a lawyer is required under the rule to provide disclosure to relevant existing clients when the rule became effective on January 1, 2010?**

**A:** No. The issue of application of the rule to existing clients was specifically discussed by the Insurance Disclosure Task Force. The proposed rule originally circulated for public comment would have required notice to "existing clients" within 30 days of the effective date of the new rule, but that concept and the implementing language was deleted in response to public comments. Accordingly, Comment [1] to the rule clarifies that the disclosure requirement applies with respect to "new clients and new engagements with returning clients."

15) **Q: Rule 3-410 contains an exception (E) “where the member has previously advised the client under Paragraph (A) or (B) that the member does not have professional liability insurance.” Does this mean that so long as a given client has been advised appropriately at any earlier time, including at a time prior to the effective date of Rule 3-410, no further disclosure is needed to comply with the rule?**

**A:** No. By its terms, this exception requires that the prior disclosure must have been made “under Paragraph (A) or (B)” of Rule 3-410. Because Rule 3-410 was not effective until January 1, 2010, disclosures made to clients before that date would not be in compliance with the rule itself. As discussed in question 14 above, effective January 1, 2010, the disclosure requirement in Rule 3-410 applies with respect to “new clients and new engagements with returning clients.” Although disclosures made to clients prior to the effective date of Rule 3-410 might be consistent with the public policy underlying the rule, it is not clear that such disclosures would constitute substantial compliance with the rule. In contrast, if a required disclosure is made with respect to a new client or a new engagement with a returning client after January 1, 2010, then consistent with Paragraph (E) no additional or subsequent disclosure would be required to that same client during the course of that same engagement.