THE STATE BAR OF CALIFORNIA

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DATE: December 3, 2007

TO: Members of the Regulation, Admissions and Discipline Oversight Committee

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

SUBJECT: Insurance Disclosure Proposal

EXECUTIVE SUMMARY

On November 9, 2007, the Board of Governors referred a proposal to amend proposed Rule of Professional Conduct 3-410 to the Regulation, Admissions and Discipline Oversight Committee (RAD) and staff for further consideration in light of issues raised during the Board meeting. A subcommittee of RAD proposes that Rule 3-410 be amended in the form of Attachment A hereto. For the reasons discussed in this Agenda Item, staff has concerns about amending proposed Rule 3-410 as the RAD subcommittee proposes. If RAD agrees with the RAD subcommittee recommendation, Rule 3-410, as proposed to be amended, would need to be circulated for public comment for a period of time to be determined by RAD.

For further information on this item, contact Saul Bercovitch at (415) 538-2306 or by email at Saul.Bercovitch@calbar.ca.gov, or Jill Sperber at (415) 538-2023 or by email at Jill.Sperber@calbar.ca.gov.

I. BACKGROUND

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.

On November 9, 2007, the Board of Governors continued its consideration of the insurance disclosure proposal. During that meeting, a motion was made to adopt proposed Rule 3-410 of the California Rules of Professional Conduct, in the form that the Task Force recommended. A motion was subsequently made to amend that motion. The proposed amendment to the motion would have required disclosure to clients of the absence of insurance only when a written fee agreement is required under Business and Professions Code Section 6147 or 6148. The Board voted 10 to 9 in favor of the motion to allow for amendment of the original motion. However, the Board did not vote on the motion as amended. Instead, the Board referred the proposal to the Regulation, Admissions and Discipline Oversight Committee (RAD) and staff for further consideration – in light of issues raised during the November 9 Board meeting – deferring Board action on this and other elements of the Task Force's recommendations.

After the November 9 Board meeting, the Chair of RAD appointed a subcommittee to discuss possible amendments to proposed Rule 3-410. That subcommittee now proposes that Rule 3-410 be amended in the form attached hereto as Attachment A. The proposed amendments would 1) require notice to the client of the absence of 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;" 2) add a provision stating that the "rule does not apply to legal services rendered in an emergency to avoid foreseeable prejudice to the rights or interests of the client;" and 3) add a provision stating that the rule does not apply where the member has previously advised the client that the member does not have professional liability insurance.

Staff from the Office of the Executive Director, Office of Mandatory Fee Arbitration, and Office of Professional Competence have reviewed and analyzed the RAD subcommittee proposal, as directed by the Board. For the reasons discussed below, staff has concerns about amending proposed Rule 3-410 as the RAD subcommittee proposes.

As noted during the November 9, 2007 Board meeting, Business and Professions Code Sections 6147 and 6148, which govern the requirements for written fee agreements, contain certain statutory exemptions and did contain an insurance disclosure requirement at one point.[1] But the mere fact that Sections 6147 and 6148 resulted in exemptions from an insurance disclosure obligation does not mean that similar exemptions are appropriate in a Rule of Professional Conduct. Sections 6147 and 6148 were not drafted as disciplinary rules, and contain a built-in statutory remedy. Failure to comply with Section 6147 or 6148 renders the fee agreement voidable at the option of the client, and the attorney, if the agreement is voided, is entitled to collect a reasonable fee. Failure to comply with Section 6147 or 6148 is not, in and of itself, an inherently disciplinable offense. See *In re Harney*, 3 Cal. State Bar Ct. Rptr. 266 (1995).

[1] Sections 6147 and 6148 were originally enacted without an insurance disclosure requirement. In 1992, an insurance disclosure requirement was added to those statutes, which already included certain exemptions from the requirement that there be a written fee agreement.

Proposed Rule 3-410, if adopted, would create an *explicit* ethical duty – not part of the previous statutory scheme – to inform a client about the absence of insurance. Creation of a new Rule of Professional Conduct with an explicit duty requires the highest justification for any exemptions from that duty, consistent with public protection. From a public protection perspective, there is no compelling justification for the proposed exemption from the insurance disclosure obligation based on the amount of time spent on the representation of a client. Clients who obtain "quick" legal advice should be entitled to the same level of consumer protection as any other client.[2]

The proposed exemption cannot be viewed in isolation, but must viewed in the context of all the other Rules of Professional Conduct. Proposed Rule 3-410 contains a duty to inform a client. The California Rules of Professional Conduct do not contain exemptions from other duties to inform a client, based on the length of representation of the client.[3] Creation of an exemption from such a duty would be unprecedented. It may also result in arguments that other duties imposed by the Rules of Professional Conduct should not apply in the case of "quick" legal representation.

Drawing a line at a four-hour representation is also arbitrary. There is no logical connection between the length of the representation and the potential significance of the insurance disclosure obligation. For example, an attorney could agree to file a personal injury complaint (involving less than four hours of work) to preserve the statute of limitations in a case, with the understanding that other counsel will then take over the litigation. The potential adverse economic impact to the client arising from a failure to file the complaint on time – or failure to file one at all – could be completely unrelated to the length of the engagement. In other circumstances, an attorney who provides expedited legal advice may expose a client to greater risk than an attorney who spends more than four hours researching the issues, thereby *increasing* the need for client protection in a case where *fewer* hours are spent.

Finally, the notion of triggering insurance disclosure based upon the "reasonably foreseeable" length of the representation would inject ambiguity into this Rule of Professional Conduct, making enforcement more challenging.

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[2] In a different but related context, the California Supreme Court found that an "attorney's standard of professional conduct to a pro bono client should be no different from his or her responsibility to any other client." *Segal v. State Bar of California* (1988) 44 Cal.3d 1077, 1084

[3] Under ABA Model Rule 6.5, there are some exemptions placed on the conflict of interest rules for a "lawyer who, under the auspices of a program sponsored by a nonprofit organization or court, provides short-term limited legal services to a client without expectation by either the lawyer or the client that the lawyer will provide continuing representation in the matter." This is a narrow exemption, based on the fact that "such programs are normally operated under circumstances in which it is not feasible for a lawyer to systematically screen for conflicts of interest as is generally required before undertaking a representation." ABA Model Rule 6.5, Comment [1]. California does not currently follow the ABA Model Rules, and ABA Model Rule 6.5 does not have any counterpart in California.

In light of these concerns, staff believes the preferred approach is for the Board to continue its consideration of proposed Rule 3-410, without amendment as the RAD subcommittee proposes.

II. PROPOSAL/RECOMMENDATION

If RAD agrees with the subcommittee's recommended amendment of proposed Rule 3-410, RAD would need to authorize the release for public comment of Rule 3-410, as proposed to be amended, for a period of time to be determined by RAD.[4] If RAD believes that the Board should continue considering Rule 3-410 without amendment, the results of the RAD meeting could be reported to the Board at the next Board meeting, and the Board could then resume its consideration of proposed Rule 3-410.

III. FISCAL/PERSONNEL IMPACT

The fiscal and personnel impact are unknown at this time. The mere adoption of the proposed Rule of Professional Conduct – with or without the amendments that the RAD subcommittee proposes – does not involve an unbudgeted fiscal or personnel impact.

IV. IMPACT ON THE BOARD BOOK/ADMINISTRATIVE MANUAL

None.

V. PROPOSED RESOLUTION

If RAD agrees with the RAD subcommittee's recommended amendment of proposed Rule 3-410, the following resolutions would be appropriate:

RESOLVED that the Regulation, Admissions and Discipline Oversight Committee hereby authorizes staff to make available for public comment for a period of __ days[5] proposed new Rule 3-410 of the California Rules of Professional Conduct, in the form attached hereto as Attachment A; and it is

FURTHER RESOLVED that this authorization for release for public comment is not, and shall not be construed as, a statement or recommendation of approval of the proposed item.

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[4] Effective July 20, 2007, State Bar Rule 1.10 provides that "[p]roposals are circulated for ninety days, but the board may shorten the comment period to a reasonable period that may not be fewer than thirty days." The public comment rule no longer contains a list of factors to be considered in deciding whether to shorten the public comment period.

[5] The number of days would need to be inserted into this Resolution, following RAD's determination of the length of the public comment period.

If RAD believes the Board should continue considering Rule 3-410 without amendment, the following resolution would be appropriate:

> **RESOLVED** that the Regulation, Admissions and Discipline Oversight Committee (RAD), upon consideration of the issues referred to RAD and staff at the November 9, 2007 meeting of the Board of Governors, recommends that the Board of Governors consider proposed new Rule 3-410 of the California Rules of Professional Conduct, in the form that the Insurance Disclosure Task Force recommended, attached hereto as Attachment B.

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

December 13, 2007

RAD Subcommittee's Proposed Amendments

Redlined to show changes from
Insurance Disclosure Task Force's Proposed Rule 3-410

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 in writing, 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.~~ 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 and does not represent or provide legal advice to clients outside 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.

Attachment A

[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.

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

December 13, 2007

Insurance Disclosure Task Force's Proposed Rule 3-410

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."

Attachment B

[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.