

**Rule 1.4.2 [3-410] Disclosure of Professional Liability Insurance**  
**(Commission's Proposed Rule Adopted on June 2 – 3, 2016 – Clean Version)**

- (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.

**PROPOSED RULE OF PROFESSIONAL CONDUCT 1.4.2**  
**(Current Rule 3-410)**  
**Disclosure of Professional Liability Insurance**

**EXECUTIVE SUMMARY**

The Commission for the Revision of the Rules of Professional Conduct (“Commission”) has evaluated current rule 3-410 (Disclosure of Professional Liability Insurance) in accordance with the Commission Charter, with a focus on the function of the rule as a disciplinary standard, and with the understanding that the rule comments should be included only when necessary to explain a rule and not for providing aspirational guidance. In addition, the Commission considered the American Bar Association (“ABA”) Model Court Rule on Insurance Disclosure. The result of the Commission’s evaluation is proposed rule 1.4.2 (Disclosure of Professional Liability Insurance). This proposed rule has been adopted by the Commission for submission to the Board of Trustees for public comment authorization. A final recommended rule will follow the public comment process.

Current rule 3-410 requires a lawyer who does not have professional liability insurance to disclose that fact to the lawyer’s clients. The current rule exempts government lawyers and in-house counsel with regard to the representation of their employer. There is no counterpart to rule 3-410 in the ABA Model Rules. In addition, the ABA Model Court Rule on Insurance Disclosure employs a different approach in not requiring a lawyer to disclose the fact that he or she lacks professional liability insurance directly to his or her client but rather requires a report to the highest court (of the respective jurisdiction) whether he or she is currently covered by professional liability insurance. The reported information is then made available to the public. The Commission is not recommending a change to the approach and policy of the ABA Model Court Rule. The Commission believes that clients ought to receive direct disclosure from a lawyer.

The Commission is not recommending any substantive changes to the current rule. However, the Commission is recommending non-substantive amendments that are intended to make the rule easier to understand. These changes include combining into one paragraph all of the current provisions that identify situations where the rule is not applicable. Another clarifying change is to substitute the phrase “reasonably should know” for “should know” as the former is a term that is defined in proposed rule 1.0.1 (Terminology). Similarly, non-substantive, mostly stylistic, amendments are recommended in the Comments.

**Rule ~~3-410~~1.4.2 Disclosure of Professional Liability Insurance  
(Redline Comparison of the Proposed Rule to Current California Rule)**

- (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 ~~(B)~~(b) that the ~~member~~lawyer does not have professional liability insurance.

**CommentDiscussion**

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

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[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.