

From: [Kevin Mohr](#)
To: [McCurdy, Lauren](#); [Difuntorum, Randall](#)
Cc: [Mark Tuft](#); [JoElla L. Julien](#); [Robert L. Kehr](#); [Raul L. Martinez](#); [Linda Foy](#); [Harry Sondheim](#); [Kevin Mohr G](#)
Subject: RRC - 1.4.1 [3-410] - III.B. - Agenda Materials
Date: Thursday, March 18, 2010 10:27:02 AM
Attachments: [RRC - 3-410 \[1-4-1\] - Public Comment Chart - By Commenter - DFT2 \(03-15-10\).doc](#)
[RRC - 3-410 \[1-4-1\] - Compare - Rule & Comment Explanation - DFT5 \(03-17-10\).doc](#)
[RRC - 3-410 \[1-4-1\] - Compare - Introduction - DFT3 \(03-17-10\).doc](#)
[RRC - 3-410 \[1-4-1\] - Dashboard - ADOPT - DFT3.1 \(03-17-10\).doc](#)
[RRC - 3-410 \[1-4-1\] - Rule - DFT5 \(03-18-10\) - Cf. to DFT4.doc](#)

Greetings Lauren:

I've attached the following, all in Word:

1. Dashboard, Draft 3.1 (3/17/10).
2. Introduction, Draft 3 (3/17/10).
3. Rule & Comment Comparison Chart, Draft 5 (3/17/10).
4. Rule 1.4.1, Draft 5 (3/18/10), redline, compared to Draft 4 (12/15/10) [public comment version].
5. Public Comment Chart, Draft 2 (3/15/10).

These are ready to roll. Thanks,

Kevin

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Proposed Rule 1.4.1 [3-410]

'Disclosure of Professional Liability Insurance'

(Draft #5, 3/17/10)

Summary: Proposed Rule 1.4.1 is based on rule 3-410, which was adopted by the Supreme Court to become operative on January 1, 2010. Rule 3-410 requires lawyers who do not have professional liability insurance to disclose that fact to clients. Rule 3-410 exempts government lawyers and in-house counsel with regard to the representation of their employer. Proposed Rule 1.4.1 largely tracks rule 3-410 but incorporates the Model Rule format and style conventions, and exempts from the rule court-appointed lawyers as to those matters in which they have been appointed.

Comparison with ABA Counterpart	
Rule	Comment
<input type="checkbox"/> ABA Model Rule substantially adopted <input type="checkbox"/> ABA Model Rule substantially rejected <input type="checkbox"/> Some material additions to ABA Model Rule <input type="checkbox"/> Some material deletions from ABA Model Rule <input checked="" type="checkbox"/> No ABA Model Rule counterpart	<input type="checkbox"/> ABA Model Rule substantially adopted <input type="checkbox"/> ABA Model Rule substantially rejected <input type="checkbox"/> Some material additions to ABA Model Rule <input type="checkbox"/> Some material deletions from ABA Model Rule <input checked="" type="checkbox"/> No ABA Model Rule counterpart

Primary Factors Considered

Existing California Law

Rule	RPC 3-410
Statute	Repealed Bus. & Prof. Code §§ 6147 & 6148.
Case law	

State Rule(s) Variations (In addition, see provided excerpt of selected state variations.)

Other Primary Factor(s)

Rule Revision Commission Action/Vote to Recommend Rule Adoption

(13 Members Total – votes recorded may be less than 13 due to member absences)

Approved on 10-day Ballot, Less than Six Members Opposing Adoption

Vote (see tally below)

Favor Rule as Recommended for Adoption _____

Opposed Rule as Recommended for Adoption _____

Abstain _____

Approved on Consent Calendar

Approved by Consensus

Commission Minority Position, Known Stakeholders and Level of Controversy

Minority Position Included. (See Introduction): Yes No

No Known Stakeholders

The Following Stakeholders Are Known:

Very Controversial – Explanation:

Moderately Controversial – Explanation:

Not Controversial

COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

Proposed Rule 1.4.1* Disclosure of Professional Liability Insurance*

March 2010

(Draft rule to be considered for public comment.)

INTRODUCTION:

Proposed Rule 1.4.1 is based on rule 3-410, which was adopted by the Supreme Court in July 2009 to become operative on January 1, 2010. Rule 3-410 requires lawyers who do not have professional liability insurance to disclose that fact to clients. Rule 3-410 exempts government lawyers and in-house counsel with regard to the representation of their employer.

Proposed Rule 1.4.1 largely tracks rule 3-410 but incorporates the Model Rule format and style conventions, and exempts from the Rule court-appointed lawyers as to those matters in which they have been appointed. See Explanation of Changes for paragraph (c) and Comment [5].

* Proposed Rule 1.4.1, Draft 5 (3/17/10).

<p align="center">No Comparable ABA Model Rule (Text provided is current California Rule 3-410)</p>	<p align="center">Commission’s Proposed Rule* (Redline/strikeout showing changes to the current California Rule 3-410)</p>	<p align="center">Explanation of Changes to California Rule 3-410</p>
<p>(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.</p>	<p>(Aa) A member-lawyer who knows or <u>reasonably</u> 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 memberlawyer, that the member-lawyer does not have professional liability insurance whenever it is reasonably foreseeable that the total amount of the memberlawyer's legal representation of the client in the matter will exceed four hours.</p>	<p>The word “member” is changed to “lawyer” throughout the Rule to conform to the format and style of the proposed Rules, which is based upon that of the Model Rules.</p> <p>The term “reasonably should know” has been substituted for “should know” because the former is a defined term in proposed Rule 1.0.1(j). No change in meaning is intended.</p> <p>Paragraph “(A)” has been changed to paragraph “(a)” to conform to the format and style of the proposed Rules.</p>
<p>(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.</p>	<p>(Bb) If a memberlawyer does not provide the notice required under paragraph (Aa) at the time of a client's engagement of the memberlawyer, and the memberlawyer subsequently knows or <u>reasonably</u> should know that he or she no longer has professional liability insurance during the representation of the client, the memberlawyer shall inform the client in writing within thirty days of the date that the memberlawyer knows or <u>reasonably</u> should know that he or she no longer has professional liability insurance.</p>	<p>See Explanation of Changes to Paragraph (a).</p>

* Proposed Rule 1.4.1, Draft 5 (3/17/10). Redline comparisons are to current rule 3-410.

<p align="center">No Comparable ABA Model Rule (Text provided is current California Rule 3-410)</p>	<p align="center">Commission's Proposed Rule* (Redline/strikeout showing changes to the current California Rule 3-410)</p>	<p align="center"><u>Explanation of Changes to California Rule 3-410</u></p>
<p>(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.</p>	<p>(C) This rule—Rule does not apply to a memberlawyer who is employed as a government lawyer or in-house counsel when that memberlawyer is representing or providing legal advice to a client in that capacity, <u>or to a court-appointed lawyer in a criminal or civil action or proceeding, but only as to those actions or proceedings in which the lawyer has been appointed.</u></p>	<p>Paragraph (c) has been modified to include court-appointed lawyers in criminal and civil matters who represent or provide advice to clients in that capacity. The change is recommended in response to concerns raised by criminal defense lawyers and civil lawyers who regularly serve on panels as court appointed counsel for indigent clients. The public policy of encouraging lawyers to serve as court appointed counsel merits including these lawyers along with government lawyers and full time in house counsel in the exception to the rule.</p> <p>“Member” has also been changed to “lawyer.” See Explanation of Changes to Paragraph (a).</p>
<p>(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.</p>	<p>(D) This rule—Rule does not apply to legal services rendered in an emergency to avoid foreseeable prejudice to the rights or interests of the client.</p>	<p>See Explanation of Changes to Paragraph (a).</p>
<p>(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.</p>	<p>(E) This rule—Rule does not apply where the memberlawyer has previously advised the client under Paragraph—paragraph (Aa) or (B) that the memberlawyer does not have professional liability insurance.</p>	<p>See Explanation of Changes to Paragraph (a).</p>

<p align="center">No Comparable ABA Model Rule (Text provided is current California Rule 3-410)</p>	<p align="center">Commission's Proposed Rule* (Redline/strikeout showing changes to the current California Rule 3-410)</p>	<p align="center">Explanation of Changes to California Rule 3-410</p>
<p>Discussion:</p> <p>[1] The disclosure obligation imposed by Paragraph (A) of this rule applies with respect to new clients and new engagements with returning clients.</p>	<p>DiscussionComment:</p> <p>[1] The disclosure obligation imposed by Paragraph (Aa) of this ruleRule applies with respect to new clients and new engagements with returning clients.</p>	<p>Comment [1] has been modified to conform to the format and style of the proposed Rules. See Explanation of Changes to Paragraph (a).</p>
<p>[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:</p> <p><i>"Pursuant to California Rule of Professional Conduct 3-410, I am informing you in writing that I do not have professional liability insurance."</i></p>	<p>[2] A memberlawyer may use the following language in making the disclosure required by Rule 3-410paragraph (Aa), and may include that language in a written fee agreement with the client or in a separate writing:</p> <p><i>"Pursuant to California Rule of Professional Conduct 3-4101.4.1, I am informing you in writing that I do not have professional liability insurance."</i></p>	<p>"Member" has been changed to "lawyer." The reference to "Rule 3-410(A)" has been changed to "paragraph (a)" to conform to the format and style of the proposed Rules.</p> <p>The reference to "3-410" in the form notice has been changed to "1.4.1" to conform to the rule numbering system the Commission recommends for the proposed Rules, which largely tracks the Model Rule numbering system.</p>
<p>[3] A member may use the following language in making the disclosure required by Rule 3-410(B):</p> <p><i>"Pursuant to California Rule of Professional Conduct 3-410, I am informing you in writing that I no longer have professional liability insurance."</i></p>	<p>[3] A memberlawyer may use the following language in making the disclosure required by Rule 3-410paragraph (Bb):</p> <p><i>"Pursuant to California Rule of Professional Conduct 3-4101.4.1, I am informing you in writing that I no longer have professional liability insurance."</i></p>	<p>See Explanation of Changes to Comment [1].</p> <p>See Explanation of Changes to Comment [2].</p>

<p align="center">No Comparable ABA Model Rule (Text provided is current California Rule 3-410)</p>	<p align="center">Commission’s Proposed Rule* (Redline/strikeout showing changes to the current California Rule 3-410)</p>	<p align="center"><u>Explanation of Changes to California Rule 3-410</u></p>
<p>[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.</p>	<p>[4] Rule 3-410<u>Paragraph (C)</u> in part provides an exemption for a "government lawyer or in-house counsel when that member<u>lawyer</u> 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<u>Rule</u> is to provide information directly to a client if a member<u>lawyer</u> is not covered by professional liability insurance. If a member<u>lawyer</u> 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<u>lawyer</u> is or is not covered by professional liability insurance. The exemptions under this rule for government lawyers and in-house counsel 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.</p>	<p>"Rule 3-410(C)" has been changed to "Paragraph (c)" and "member" has been changed to "lawyer" to conform to the format and style of the proposed Rules, which are based on the Model Rules.</p> <p>The phrase, "for government lawyers and in-house counsel" has been substituted for "under this Rule" because paragraph (c) now also refers to "court-appointed" lawyers and the rationale underlying the extension of the exemption to the latter is not the same as for government lawyers or in-house counsel. See Explanation of Changes for paragraph (c).</p>
	<p><u>[5] Paragraph (c) also provides an exemption for "a court-appointed lawyer in a criminal or civil action or proceeding, but only as to those actions or proceedings in which the lawyer has been appointed." A lawyer must provide notification in all other actions and proceedings as required by paragraphs (a) and (b).</u></p>	<p>Comment [5] is new. It has been added to explain the limited scope of the paragraph (c) exemption for court-appointed lawyers. The comment clarifies that such lawyers must comply with the notification requirements of paragraphs (a) and (b) in actions and proceedings where the lawyers are not serving by court appointment.</p>

Rule 1.4.1: Disclosure of Professional Liability Insurance
(Commission's Proposed Rule – Draft 5 (3/18/10) – COMPARED TO DFT4 (12/15/09))

- (a) A lawyer who knows or reasonably¹ 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 lawyer, that the lawyer does not have professional liability insurance whenever it is reasonably foreseeable that the total amount of the lawyer's legal representation of the client in the matter will exceed four hours.
- (b) If a lawyer does not provide the notice required under paragraph (a) at the time of a client's engagement of the lawyer, and the lawyer subsequently knows or reasonably² should know that he or she no longer has professional liability insurance during the representation of the client, the lawyer shall inform the client in writing within thirty days of the date that the lawyer knows or reasonably³ should know that he or she no longer has professional liability insurance.
- (c) This Rule does not apply to 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, or to a court-appointed lawyer in a criminal or civil action or proceeding, but only as to those actions or proceedings in which the lawyer has been appointed.

¹ Change made per suggestion of OCBA. The term "reasonably should know" is a defined term in proposed Rule 1.0.1(j) and is used elsewhere in the Rules.

² See footnote 1.

³ See footnote 1.

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

COMMENT

- [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 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] Paragraph (c) in part provides an exemption for a “government lawyer or in-house counsel when that lawyer 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 lawyer is not covered by professional liability insurance. If a 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 whether the lawyer is or is not covered by professional liability insurance. The exemptions for government lawyers and in-house counsels 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.
- [5] Paragraph (c) also provides an exemption for “a court-appointed lawyer in a criminal or civil action or proceeding, but only as to those actions or proceedings in which the lawyer has been appointed.” A lawyer must provide notification in all other actions and proceedings as required by paragraphs (a) and (b).

**Rule 1.4.1 Insurance Disclosure
[Sorted by Commenter]**

TOTAL = __ Agree = __
Disagree = __
Modify = __
NI = __

No.	Commenter	Position ¹	Comment on Behalf of Group?	Rule Paragraph	Comment	RRC Response
2	Anonymous	A			Although commenter did not specifically reference this rule, she expressed her support for all the rules contained in Batch 6.	No response required.
6	COPRAC	A			Supports the adoption of proposed Rule 1.4.1.	No response required.
1	McIntyre, Sandra K.	A			No comment.	No response required.
5	Orange County Bar Association	A		(a)	The only change we suggest is the insertion of the word “reasonably” into the first sentence of Section (a), so that it reads: “A lawyer who knows or <u>reasonably</u> should know that he or she does not have professional liability insurance”	The Commission agrees with the commenter and has implement the requested change. The term “reasonably should know” is a defined term in proposed Rule 1.0.1(j) and is used elsewhere in the Rules.
3	San Diego County Bar Association Legal Ethics Committee	A			We approve the new rule in its entirety.	No response required.
4	Santa Clara County Bar Association	A			No comment.	No response required.

¹ A = AGREE with proposed Rule

D = DISAGREE with proposed Rule

M = AGREE ONLY IF MODIFIED

NI = NOT INDICATED



**SAN DIEGO COUNTY
BAR ASSOCIATION**

February 12, 2010

2010 Board of Directors

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District Nine Representative**

James W. Tolley

Audrey Hollins
Office of Professional Competence,
Planning and Development
State Bar of California
180 Howard Street
San Francisco, CA 94105-1639

**Re: Comments to Proposed Amendments to the Rules of Professional Conduct of
The State Bar of California (Batch 6)**

Dear Ms. Hollins:

On behalf of the San Diego County Bar Association (SDCBA), I respectfully submit the attached comments to Batch 6 of the Proposed Amendments to the Rules of Professional Conduct. The comments were proposed by the SDCBA's Legal Ethics Committee, and have been approved by our Board of Directors.

Sincerely,

Patrick L. Hosey, President
San Diego County Bar Association

Enclosures

cc: **David F. McGowan, Co-Chair, SDCBA Legal Ethics Committee**
Erin Gibson, Co-Chair, SDCBA Legal Ethics Committee

SDCBA Legal Ethics Committee
Comments to Revisions to California Rules of Professional Conduct (CRPC) Batch 6
LEC Subcommittee Deadline January 22, 2010; LEC Deadline January 26, 2010
SDCBA Deadline March 12, 2010

Coversheet

<u>Rule</u>	<u>Title [and current rule number]</u>	<u>Rec.</u>	<u>Author</u>
Rule 1.0.1	Terminology [1-100]	App	McGowan
Rule 1.4.1	Insurance Disclosure [3-410]	App.	Simmons
Rule 1.11	Special Conflicts for Gov't Employees [N/A]	Mod.App.	Hendlin
Rule 1.17	Sale of a Law Practice [2-300]	App.	Fulton
Rule 1.18	Duties to Prospective Client [N/A]	Mod. App.	Tobin
Rule 3.9	Non-adjudicative Proceedings [N/A]	App.	Leer
Rule 4.1	Truthfulness in Statements to Others [N/A]	App.	Hendlin
Rule 4.4	Respect for Rights of 3rd Persons [N/A]	No Rec.	Carr
Rule 6.1	Voluntary Pro Bono Service [N/A]	App.	Gerber
Rule 6.2	Accepting Appointments [N/A]	App.	Gibson
Rule 6.5	Limited Legal Services Programs [1-650]	App.	Simmons
Rule 8.2	Judicial and Legal Officials [1-700]	App.	McGowan

Format for Analyses:

(1) Is the **policy** behind the new rule correct? If "yes," please proceed to the next question. If "no," please elaborate, and proceed to Question #4.

Yes [] No []

(2) Is the new rule **practical** for attorneys to follow? If "yes," please proceed to the next question. If "no," please elaborate, and then proceed to the Conclusions section.

Yes [] No []

(3) Is the new rule **worded correctly and clearly**? If "yes," please proceed to the Conclusions section. If "no," please elaborate, and then proceed to the Conclusions section.

Yes [] No []

(4) Is the policy behind the existing rule correct? If "yes," please proceed to the Conclusions section. If "no," please elaborate, and then proceed to the Conclusions section.

Yes [] No []

(5) Do you have any other comments about the proposed rule? If so, please elaborate here:

Format for Recommendations:

[] We approve the new rule in its entirety.

[] We approve the new rule with modifications.*

[] We disapprove the new rule and support keeping the old rule.

[] We disapprove the new rule and recommend a rule entirely different from either the old or new rule.*

[] We abstain from voting on the new rule but submit comments for your consideration.*

Summaries Follow:

LEC Rule Volunteer Name(s): Dave McGowan

Old Rule No./Title: Part of 1-100

Proposed New Rule No./ Title: 1.0.1 "Terminology"

(1) Well, sort of. These are the definitions. It is a good idea to have definitions. Whether you agree with particular ones is a different question.

(5) There are 14 defined terms. Most are not objectionable. A good one is the definition of confidential information, which tracks the Restatement definition and does away with the pretense that anyone understands the actual language of 6068(e). The various definitions of "reasonable" are circular and vacuous but that is not the commission's fault.

More questionable is the definition of a tribunal, which is limited to adjudicative bodies and excludes legislative or administrative bodies or mediators. The difference is supposed to matter because free speech concerns are present in the latter situation but not the former. That premise is silly but its silliness may not matter much.

The bite to the definition is supposed to come in Rule 3.3, candor to the tribunal, but that rule is toothless. Sure, it says you can't lie to tribunals, but the bite to the rule came from remedial obligations to correct false testimony and statements. Under the Model Rules that obligation trumps the duty of confidentiality. Our commission reverses the trump, so if you client perjures herself before a tribunal you get to remonstrate with the client, wring your hands, and say nothing. Given that you could not straighten out a court it seems less important that you could not straighten out a mediator.

I would be inclined to favor a broader definition keyed to a more practical question: whom do we not want lawyers to lie to? But given the watering down of Rule 3.3 I do not think much turns on this and we've already had our whack at the confidentiality issue. I would just approve it and keep transaction costs down.

CONCLUSION: We approve the new rule in its entirety. (However, please see comments above.)

LEC Rule Volunteer Name(s): Ross G. Simmons

Old Rule No./Title: CRPC 3-410 Disclosure of Professional Liability Insurance

Proposed New Rule No./ Title: CRPC 1.4.1 Disclosure of Professional Liability Insurance

(5) First, please consider recently-enacted CRPC 3-410. The issue of malpractice insurance disclosure has been the subject of State Bar consideration, as well as legislative activity within the State Bar Act, for decades. In 2005, the State Bar formed the Disclosure Task Force, which after a spirited and eventful analysis by the Board of Governors between 2006 and 2007, resulted in the text of CRPC 3-410. That rule was adopted by the California Supreme Court by order dated August 26, 2009, to be effective January 1, 2010.

In sum, present Rule 3-410 requires written disclosure where a lawyer does *not* carry professional liability insurance. It exempts government lawyers and in-house counsel, and legal services rendered in an emergency.

Proposed Rule 1.4.1 proposes adoption of existing Rule 3-410 with a single, substantive change. Added to the engagements excluded from written disclosure (i.e., of *the lack of* professional liability insurance coverage) is “a court-appointed lawyer in a criminal or civil action or proceeding, but only as to those actions or proceedings in which the lawyer has been appointed.” This exception is intended to encourage acceptance of such appointments, and applies in a setting where customarily the client is not in a position to be “shopping” for legal services, such that the disclosure is likely to be of little moment, an appointee being atypical of legal-service consumers.

As a practical matter, the title of the proposed rule continues a sort of misnomer, in speaking to “Disclosure of Professional Liability Insurance,” when in fact disclosure by its terms is triggered not by professional liability insurance, but rather the absence of such. However, inasmuch as this issue did not trouble the California Supreme Court in its August order, the text has been exhaustively considered and the matter does not appear to be one which would provoke material confusion, I suggest our Committee defer.

The author proposes approval of the new rule in its entirety, in that (1) this rule has only recently been adopted, hence opponents (if any) have had their opportunity to be heard on the issues, (2) adoption came after lengthy, deliberate and at times contentious consideration by the State Bar, and has since been approved by the California Supreme Court, and (3) the addition of an excepted class is modest, is of limited application, and premised on sensible, worthy considerations.

CONCLUSION: We approve the new rule in its entirety.

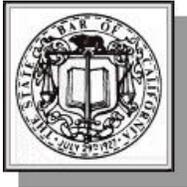
~~LEC Rule Volunteer Name(s): Richard D. Hendlin (telephone (858) 755-5442)~~

~~Old Rule No./Title: N/A~~

~~Proposed New Rule No./ Title: 1.11 “Special Conflicts of Interest for Former and Current Government Officers and Employees”~~

~~(5) Proposed Rule 1.11 addresses conflicts arising from a lawyer moving to or from government service. Although there is no current rule counterpart in California, there is ample case law that concerns this Rule’s topic. See, e.g., *City & County of San Francisco v. Cobra Solutions, Inc.* (2006) 38 Cal. 4th 839; *City of Santa Barbara v. Superior Court* (2004) 122 Cal. App. 4th 17.~~

~~The Commission deemed Proposed Rule 1.11 “Moderately Controversial” because the proposed Rule departs from the Model Rule by requiring, pursuant to California case law, that a government lawyer’s disqualification be imputed to other lawyers in the governmental organization that employs the lawyer unless the former client consents or the prohibited lawyer is~~



THE STATE BAR OF CALIFORNIA

PROPOSED RULES OF PROFESSIONAL CONDUCT

PUBLIC COMMENT FORM

INSTRUCTIONS: This form allows you to submit your comments by entering them into the text box below and/or by uploading files as attachments. We ask that you comment on **one** Rule per form submission and that you choose the proposed Rule from the drop-down box below.

All information submitted is regarded as public record.

DEADLINE TO SUBMIT COMMENT IS: MARCH 12, 2010

Your Information

Professional Affiliation

Commenting on behalf of an organization

Yes

No

* Name

* City

* State

* Email address
(You will receive a copy of your comment submission.)

The following proposed rules can be viewed by clicking on the links below:

[Rule 1.0.1 \[1-100\]](#)

[Rule 1.11 \[n/a\]](#)

[Rule 4.1 \[n/a\]](#)

[Rule 6.5 \[1-650\]](#)

[Rule 1.4.1 \[3-410\]](#)

[Rule 1.17 \[2-300\]](#)

[Rule 4.4 \[n/a\]](#)

[Rule 7.6](#)

[Rule 1.8.4 \[n/a\]](#)

[Rule 1.18 \[n/a\]](#)

[Rule 6.1 \[n/a\]](#)

[Rule 8.2 \[1-700\]](#)

[Rule 1.8.9 \[n/a\]](#)

[Rule 3.9 \[n/a\]](#)

[Rule 6.2 \[n/a\]](#)

[Discussion Draft \[all rules\]](#)

* Select the Proposed Rule that you would like to comment on from the drop down list.

From the choices below, we ask that you indicate your position on the Proposed rule. This is not required and you may type a comment below or provide an attachment regardless of whether you indicate your position from the choices.

AGREE with this proposed Rule

DISAGREE with this proposed Rule

AGREE ONLY IF MODIFIED

ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.

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* Date

02/19/2010 

Period

PC

File :

F-2010-381b Sandra McIntyre [1.4.1]

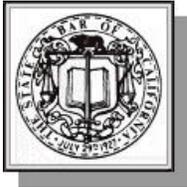
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Online

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THE STATE BAR OF CALIFORNIA

PROPOSED RULES OF PROFESSIONAL CONDUCT

PUBLIC COMMENT FORM

INSTRUCTIONS: This form allows you to submit your comments by entering them into the text box below and/or by uploading files as attachments. We ask that you comment on **one** Rule per form submission and that you choose the proposed Rule from the drop-down box below.

All information submitted is regarded as public record.

DEADLINE TO SUBMIT COMMENT IS: MARCH 12, 2010

Your Information

Professional Affiliation

Commenting on behalf of an organization

Yes

No

* Name

* City

* State

* Email address
(You will receive a copy of your comment submission.)

The following proposed rules can be viewed by clicking on the links below:

[Rule 1.0.1 \[1-100\]](#)

[Rule 1.11 \[n/a\]](#)

[Rule 4.1 \[n/a\]](#)

[Rule 6.5 \[1-650\]](#)

[Rule 1.4.1 \[3-410\]](#)

[Rule 1.17 \[2-300\]](#)

[Rule 4.4 \[n/a\]](#)

[Rule 7.6](#)

[Rule 1.8.4 \[n/a\]](#)

[Rule 1.18 \[n/a\]](#)

[Rule 6.1 \[n/a\]](#)

[Rule 8.2 \[1-700\]](#)

[Rule 1.8.9 \[n/a\]](#)

[Rule 3.9 \[n/a\]](#)

[Rule 6.2 \[n/a\]](#)

[Discussion Draft \[all rules\]](#)

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AGREE with this proposed Rule

DISAGREE with this proposed Rule

AGREE ONLY IF MODIFIED

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03/01/2010 

Period

PC

File :

F-2010-382b SCCBA [1.4.1]

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OC DEPUTY PUBLIC DEFENDERS
OC TRIAL LAWYERS ASSOC.
OC WOMEN LAWYERS ASSOC.

March 9, 2010

Audrey Hollins
Office of Professional Competence, Planning and Development
The State Bar of California
180 Howard Street
San Francisco, CA 94105

Re: Twelve Proposed New or Amended Rules of Professional Conduct

Dear Ms. Hollins:

The Orange County Bar Association hereby submits written comments on the following:

Rule 1.0.1	Terminology [1-100]
Rule 1.4.1	Insurance Disclosure [3-410]
Rule 1.11	Special Conflicts for Government Employees [N/A]
Rule 1.17	Sale of a Law Practice [2-300]
Rule 1.18	Duties to Prospective Client [N/A]
Rule 3.9	Non-adjudicative Proceedings [N/A]
Rule 4.1	Truthfulness in Statements to Others [N/A]
Rule 4.4	Respect for Rights of 3rd Persons [N/A]
Rule 6.1	Voluntary Pro Bono Service [N/A]
Rule 6.2	Accepting Appointments [N/A]
Rule 6.5	Limited Legal Services Programs [1-650]
Rule 8.2	Judicial and Legal Officials [1-700]

These comments have been drafted by the OCBA Professionalism and Ethics Committee and approved by the OCBA Board of Directors. Please let me know if you have any questions or require additional information.

Sincerely,

ORANGE COUNTY BAR ASSOCIATION

Trudy Levindofske
Executive Director

MEMORANDUM

Date: February 24, 2010

To: Commission for the Revision of the Rules of Professional Conduct of the State Bar of California

From: Orange County Bar Association ("OCBA")

Re: **Proposed Rule 1.4.1 – Disclosure of Professional Liability Insurance**

Founded over 100 years ago, the Orange County Bar Association has over 7,000 members, making it one of the largest voluntary bar associations in California. The OCBA Board of Directors, made up of practitioners from large and small firms, with varied civil and criminal practices, and of differing ethnic backgrounds and political leanings, has approved this comment prepared by the Professionalism and Ethics Committee.

The OCBA respectfully submits the following comments concerning the subject proposed Rule:

Proposed Rule 1.4.1 is substantively identical to current Rule 3-410, which only went into effect January 1, 2010, and also to Model Rule 1.4.1. Like Rule 3-410 and Model Rule 1.4.1, it requires lawyers to disclose to new clients if they do not have professional liability insurance and, similarly, to disclose to existing clients within 30 days if their insurance lapses. The only changes the Commission proposes to Model Rule 1.4.1 are minor, non-substantive changes to conform the Rule's language to similar language in other California rules (e.g., changing "member" to "lawyer") and one substantive change to provide a limited exemption for court-appointed lawyers similar to the exemption provided to government lawyers and in-house counsel.

The OCBA generally supports the adoption of proposed Rule 1.4.1 and agrees with the recommendations of the Commission. The only change the OCBA suggests is the insertion of the word "reasonably" into the first sentence of Section (a), so that it reads: A lawyer who knows or reasonably should know that he or she does not have professional liability insurance...."



**THE STATE BAR
OF CALIFORNIA**

180 HOWARD STREET, SAN FRANCISCO, CA 94105-1639

**COMMITTEE ON PROFESSIONAL
RESPONSIBILITY AND CONDUCT**

TELEPHONE: (415) 538-2161

March 12, 2010

Harry B. Sondheim, Chair
Commission for the Revision of the
Rules of Professional Conduct
State Bar of California
180 Howard Street
San Francisco, CA 94105

RE: Proposed Rule 1.4.1

Dear Mr. Sondheim:

The State Bar of California's Committee on Professional Responsibility and Conduct (COPRAC) appreciates the opportunity to comment on the proposed amendments to the Rules of Professional Conduct of the State Bar of California, pursuant to the request of the Board Committee on Regulation, Admissions & Discipline Oversight (RAD) for public comment.

COPRAC has reviewed the provisions of proposed Rule 1.4.1 and supports the adoption of proposed Rule 1.4.1.

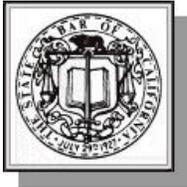
Thank you for your consideration of our comments.

Very truly yours,

A handwritten signature in black ink that reads "Carole J. Buckner".

Carole J. Buckner, Chair
Committee on Professional
Responsibility and Conduct

cc: Members, COPRAC



THE STATE BAR OF CALIFORNIA

PROPOSED RULES OF PROFESSIONAL CONDUCT

PUBLIC COMMENT FORM

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All information submitted is regarded as public record.

DEADLINE TO SUBMIT COMMENT IS: MARCH 12, 2010

Your Information

Professional Affiliation

Commenting on behalf of an organization

Yes

No

* Name

* City

* State

* Email address
(You will receive a copy of your comment submission.)

The following proposed rules can be viewed by clicking on the links below:

[Rule 1.0.1 \[1-100\]](#)

[Rule 1.11 \[n/a\]](#)

[Rule 4.1 \[n/a\]](#)

[Rule 6.5 \[1-650\]](#)

[Rule 1.4.1 \[3-410\]](#)

[Rule 1.17 \[2-300\]](#)

[Rule 4.4 \[n/a\]](#)

[Rule 7.6](#)

[Rule 1.8.4 \[n/a\]](#)

[Rule 1.18 \[n/a\]](#)

[Rule 6.1 \[n/a\]](#)

[Rule 8.2 \[1-700\]](#)

[Rule 1.8.9 \[n/a\]](#)

[Rule 3.9 \[n/a\]](#)

[Rule 6.2 \[n/a\]](#)

[Discussion Draft \[all rules\]](#)

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AGREE with this proposed Rule

DISAGREE with this proposed Rule

AGREE ONLY IF MODIFIED

ENTER COMMENTS HERE. To upload files proceed to the ATTACHMENTS section below.

I agree with all of them, since I have dealt with lawyers who many of them have violated more than one if not all of these rules.

I agree with all of them, since I have dealt with lawyers who many of them have violated more than one if not all of these rules.

OFFICE USE ONLY.

* Date

01/26/2010 

Period

PC

File :

F-2010-378 Esther [multiple].pdf

Commented On:

Specify:

Submitted via:

Online

* Required

**RRC – Rule 1.4.1 [3-410] (Insurance Disclosure)
E-mails, memos, etc. – Revised (3/24/2010)**

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November 5, 2009 KEM E-mail to Kehr:	34
November 5, 2009 Difuntorum E-mail to Kehr & KEM, cc Chair & Staff:	34
November 5, 2009 Kehr E-mail to Difuntorum, cc Chair & Staff:	35
November 5, 2009 Sondheim E-mail to KEM, cc Kehr & Staff:	35
November 5, 2009 KEM E-mail to Sondheim, cc Kehr & Staff:	35
November 5, 2009 Kehr E-mail to Difuntorum, cc Chair & Staff:	35
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November 16, 2009 KEM E-mail to Staff, cc Chair:	37
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December 16, 2009 Difuntorum E-mail to KEM, cc McCurdy, Lee, Yen, Andrew Tuft:	41
March 10, 2010 McCurdy E-mail to Drafters (Tuft, Foy, Julien, Kehr, Martinez), cc Chair, Vice-Chairs & Staff:	42
March 11, 2010 KEM E-mail to Drafters, cc Chair, Vice-Chairs & Staff:	43
March 15, 2010 McCurdy E-mail to Drafters, cc Chair, Vice-Chairs & Staff:	43
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**RRC – Rule 1.4.1 [3-410] (Insurance Disclosure)
E-mails, memos, etc. – Revised (3/24/2010)**

March 10, 2010 McCurdy E-mail to Drafters (Tuft, Foy, Julien, Kehr, Martinez), cc Chair, Vice-Chairs & Staff:

Rule 1.4.1 Drafting Team (TUFT, Foy, Julien, Kehr, Martinez):

This message provides the assignment background materials for Rule 1.4.1 on the March agenda. **The assignment deadline is Thursday, March 18, 2010.**

This message includes the following draft documents:

1. public comment compilation (full text of comment letters received to date – public comment period ends March 12th)
2. public commenter chart (a staff prepared chart with the synopsis of comments in draft form and open third column for the codrafters recommended response to the comments)
3. dashboard (public comment version)
4. introduction (public comment version – this should be updated if there are any recommended amendments to the rule)
5. Model Rule comparison chart (public comment version)
6. clean rule text (public comment version – use this clean version to make any changes to the rule, do not edit the rule in the Model Rule comparison chart)
7. state variations excerpt (this does not require any work)

The codrafters are assigned to review any written comments received and to prepare a revised draft rule and comment, if any changes are recommended. The “RRC Response” column on the public commenter chart should be filled in with the drafting team’s recommended action in response to the public comment. In addition, we need the drafting team to prepare a completed dashboard, and to update, as needed, the Introduction, and the Explanations in the third column of the Model Rule comparison chart based on the revised rule. Please do not edit the redline-middle column of the Model Rule comparison chart. Staff is available to generate a new redline of the post public comment rule to the Model Rule and will assist in completing the middle column of the Model Rule comparison chart.

We are looking for submissions that are as close to final form as possible. As noted above, please feel free to send us your revised clean version of the proposed rule and we will generate a redline comparison to the Model Rule for the comparison chart. Of course, you will still need to complete the Explanation column of the Model Rule Comparison Chart. Lastly, if among the drafters there is a minority view, please consider including the minority view in your draft Introduction.

Attached:

- RRC - 3-410 [1-4-1] - Dashboard - ADOPT - DFT3 (03-10-10).doc
- RRC - 3-410 [1-4-1] - Compare - Introduction - DFT2 (12-15-09) RD-LM2.doc
- RRC - 3-410 [1-4-1] - Compare - Rule & Comment Explanation - DFT4 (12-15-09) RD-LM.doc
- RRC - 3-410 [1-4-1] - Rule - DFT4 (12-15-09)RD - CLEAN-LAND2.doc
- RRC - 3-410 [1-4-1] - Public Comment Complete - REV (03-10-10).pdf
- RRC - 3-410 [1-4-1] - Public Comment Chart - By Commenter - DFT1 (03-10-10)AT.doc
- RRC - 3-410 [1-4-1] - State Variations (2009).pdf

**RRC – Rule 1.4.1 [3-410] (Insurance Disclosure)
E-mails, memos, etc. – Revised (3/24/2010)**

March 11, 2010 KEM E-mail to Drafters, cc Chair, Vice-Chairs & Staff:

To assist you in preparing the materials for the 3/26-27/10 meeting, I've attached the following for this Rule:

1. My cumulative meeting notes, revised 11/27/09.
2. Full E-mail compilation, revised 1/5/10.

Please note that nearly all of the work the Commission has done on this rule was accomplished either through a telephone conference involving the members of the rule 3-410 task force or through an exchange of e-mails. There was no substantive discussion in the full Commission until the November 2009 meeting.

Please let me know if you have any questions.

March 15, 2010 McCurdy E-mail to Drafters, cc Chair, Vice-Chairs & Staff:

This message provides an updated public comment compilation adding comments received since the materials I transmitted with the message below. In addition, I've attached an updated commenter chart.

Since the last transmission, comments from the following commenters were received:

COPRAC

Any additional comments received will be sent to you as soon as they are received.

Attached:

RRC - 3-410 [1-4-1] - Public Comment Complete - REV (03-15-10).pdf

RRC - 3-410 [1-4-1] - Public Comment Chart - By Commenter - DFT1.1 (03-15-10)AT.doc

March 15, 2010 KEM E-mail to Drafters, cc Chair, Vice-Chairs & Staff:

I've attached the following:

1. Public Comment Chart, Draft 2 (3/15/10).
2. Propose Rule 1.4.1, Draft 5, redline, compared to Draft 4 (12/15/09), the public comment version of the Rule.

Notes:

1. The Public Comment Chart includes COPRAC's comment from Friday. Please also note that I've changed "Esther" to "Anonymous."
2. The rule implements the change requested by OCBA, i.e., changing "knows or should know" to "knows or reasonably should know," which is a defined term in 1.0.1(j). I've made the change to both (a) and (b).

**RRC – Rule 1.4.1 [3-410] (Insurance Disclosure)
E-mails, memos, etc. – Revised (3/24/2010)**

Please let me know of any objections by Wednesday, 3/17, at 5:00 p.m.

If the foregoing is OK by you, I'll update the rule & comment comparison chart to incorporate the foregoing change to the rule. I don't think the Introduction will require any change but I'll review it to make sure.

March 17, 2010 Tuft E-mail to Drafters, cc Chair & Staff:

I agree with the change to "knows or reasonably should know" and approve the public comment chart.

March 17, 2010 Kehr E-mail to Drafters, cc Chair & Staff:

I cannot look at this carefully before you 5:00 deadline, but I do agree with the change to "reasonably should know".

March 18, 2010 Foy E-mail to Drafters, cc Chair & Staff:

I agree with change to "reasonably show know" but have not been able to do complete review of the chart.

March 18, 2010 KEM E-mail to Foy, cc Drafters, Chair & Staff:

Aside from the "reasonably should know" request, all the public comment approved the rule w/o change.

March 18, 2010 KEM E-mail to McCurdy & Difuntorum, cc Drafters, Chair & Staff:

I've attached the following, all in Word:

1. Dashboard, Draft 3.1 (3/17/10).
2. Introduction, Draft 3 (3/17/10).
3. Rule & Comment Comparison Chart, Draft 5 (3/17/10).
4. Rule 1.4.1, Draft 5 (3/18/10), redline, compared to Draft 4 (12/15/10) [public comment version].
5. Public Comment Chart, Draft 2 (3/15/10).

These are ready to roll.

**RRC – Rule 1.4.1 [3-410] (Insurance Disclosure)
E-mails, memos, etc. – Revised (3/24/2010)**

March 19, 2010 Kehr E-mail to RRC:

Here are my comments on these materials:

1. A nit - In the first line of the Introduction, I would change “to become operative” to: “and became operative”.
2. On rereading our addition to paragraph (c), I see awkward phrasing that I think can be remedied easily. The problem is that, by making “or to a court-appointed lawyer” a parenthetical, what follows (“but only as to”) would seem to modify both the parenthetical and what precedes it. My suggestion is to collapse the addition to say: “... , or to a court-appointed lawyer in a criminal or civil action or proceeding with respect to the matter in which the lawyer has been appointed.” If this change is made it should be copied into Comment [5].
3. Another nit - to adhere to our format, I would remove “of this Rule” from Comment [1].

March 22, 2010 Sapiro E-mail to RRC List:

I know I am probably a minority of one on this rule, but I vote “no.” I think this rule was a waste of time and effort in its first lifetime and its current iteration and should not be resurrected a third time.

March 22, 2010 Sondheim E-mail to RRC:

I am hopeful that we can conclude consideration of this rule quickly. So far, only Bob has commented on this rule. Unless someone else raises an issue, I propose Bob's suggestions be deemed approved absent an objection by Wednesday, March 24, and we will just vote on the rule.