



**THE STATE BAR
OF CALIFORNIA**

180 HOWARD STREET, SAN FRANCISCO, CA 94105-1639

TELEPHONE: (415) 538-2116

**RE: Rule 1.4.1 [3-410]
12/11&12/09 Commission Meeting
Open Session Agenda Item IV.G.**

PLANNING, AND DEVELOPMENT

DATE: November 19, 2009
TO: Members of the Commission for the Revision of the Rules of Professional Conduct
FROM: Randall Difuntorum, Commission Staff Counsel
SUBJECT: 10-day Ballot Circulation of Proposed Rule 1.4.1

Proposed Rule 1.4.1 is being distributed for your consideration. The revisions adopted at the Commission's November 6 & 7, 2009 meeting have been implemented and approval is being sought through a 10-day ballot procedure.

Approval means that the proposed new rule would be cleared for transmission to the Board of Governors with a request that the rule be distributed for public comment as part of the Commission's Batch 6 proposed rules.

In accordance with the guidance provided by the Board, the proposed rule is presented in a comparison chart that compares the Commission's proposed rule and comment to the counterpart ABA Model Rule. The chart includes a general introduction and provides specific explanations for any departures from the ABA Model Rule. The comparison chart is provided as Enclosure 1. A clean version of proposed Rule 1.4.1, Draft 3 (11/14/09), is provided as Enclosure 2. A draft dashboard is provided as Enclosure 3. An annotated redline draft showing changes to Rule 3-410 is provided as Enclosure 4. Pursuant to the Commission's 10-day ballot procedure, if six or more members object to this proposed rule, then the proposed rule will be placed on the Commission's next agenda for further consideration. Objections should be in writing, explaining reasons for the objection, and sent to me with copies to Lauren McCurdy and Kevin Mohr. **If less than six objections are received by 5 p.m. on Monday, November 30, 2009, proposed Rule 1.4.1 will be deemed approved.**

Questions about this mail ballot may be directed to me at (415) 538-2161

Thank you.

Encs.

Enclosure 1

Proposed Rule 1.4.1

(Comparison Chart Showing Changes to RPC 3-410)

COMMISSION FOR THE REVISION OF THE RULES OF PROFESSIONAL CONDUCT

Proposed Rule 4.1* Truthfulness in Statements to Others*

November 2009

(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 4.1, Draft 2.1 (11/14/09).

<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>(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 memberlawyer 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 memberlawyer, that the memberlawyer 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>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 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 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 3 (11/11/09). 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 proceedings, 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 (Bb) 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>[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>[1] The disclosure obligation imposed by Paragraph (Aa) of this rule <u>Rule</u> 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 member <u>lawyer</u> may use the following language in making the disclosure required by Rule 3-410 <u>paragraph (Aa)</u>, 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 <u>1.4.1</u>, 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 member <u>lawyer</u> may use the following language in making the disclosure required by Rule 3-410 <u>paragraph (Bb)</u>:</p> <p><i>"Pursuant to California Rule of Professional Conduct 3-410 <u>1.4.1</u>, 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>

*Proposed Rule 3.4, Draft 1 (XX/XX/09). 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>[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 Paragraph (C) in part provides an exemption for a "government lawyer or in-house counsel when that memberlawyer 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-Rule is to provide information directly to a client if a memberlawyer is not covered by professional liability insurance. If a memberlawyer 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 memberlawyer 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>[5] Paragraph (c) also provides an exemption for <u>"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> Although the disclosure requirements of paragraphs (a) and (b) do not apply in proceedings in which a court has appointed a lawyer, this Rule is not intended to abrogate any law or court order that requires the lawyer to maintain liability insurance.</p>	<p>Comment [5] is new. It has been added to explain the application of the paragraph (c) exemption to court-appointed lawyers and to clarify that the lawyer must comply with the notification requirements of paragraph (a) and (b) in those action and proceedings in which the lawyer is not appointed.</p>

No Comparable ABA Model Rule (Text provided is current California Rule 3-410)	Commission's Proposed Rule* (Redline/strikeout showing changes to the current California Rule 3-410)	<u>Explanation of Changes to California Rule 3-410</u>
	<p>Moreover, the lawyer must comply with this Rule in all other client representations.</p>	

Enclosure 2

Proposed Rule 1.4.1
Clean Version of Draft 3 (11/14/09)

Rule 3-410. Disclosure of Professional Liability Insurance

- (a) A lawyer 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 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 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 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.
- (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.

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 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.” Although the disclosure requirements of paragraphs (a) and (b) do not apply in proceedings in which a court has appointed a lawyer, this Rule is not intended to abrogate any law or court order that requires the lawyer to maintain liability insurance. Moreover, the lawyer must comply with this Rule in all other client representations.

Enclosure 3

Proposed Rule 1.4.1
Draft “Dashboard”

Proposed Rule 1.4.1 [3-410]

“Disclosure of Professional Liability Insurance”

(Draft #3, 11/11/09)

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 adopted
<input type="checkbox"/> ABA Model Rule substantially rejected	<input type="checkbox"/> ABA Model Rule substantially rejected
<input type="checkbox"/> Some material additions to ABA Model Rule	<input type="checkbox"/> Some material additions to ABA Model Rule
<input type="checkbox"/> Some material deletions from ABA Model Rule	<input type="checkbox"/> Some material deletions from ABA Model Rule
<input checked="" type="checkbox"/> No ABA Model Rule counterpart	<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.)

Oregon Rule 8.4(b).

- Other Primary Factor(s)

Stakeholders and Level of Controversy

Minority position included on Model Rule comparison chart: Yes No

No Known Stakeholders

The Following Stakeholders Are Known:

Very Controversial – Explanation:

Moderately Controversial – Explanation:

Not Controversial

Enclosure 4

Proposed Rule 1.4.1

(Annotated Redline Showing Changes to RPC 3-410)

Rule 3-410. Disclosure of Professional Liability Insurance

- (Aa) A ~~member~~lawyer 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~~lawyer, that the ~~member~~lawyer does not have professional liability insurance whenever it is reasonably foreseeable that the total amount of the ~~member~~lawyer's legal representation of the client in the matter will exceed four hours.
- (Bb) If a ~~member~~lawyer does not provide the notice required under paragraph (Aa) at the time of a client's engagement of the ~~member~~lawyer, and the ~~member~~lawyer subsequently knows or should know that he or she no longer has professional liability insurance during the representation of the client, the ~~member~~lawyer shall inform the client in writing within thirty days of the date that the ~~member~~lawyer knows or should know that he or she no longer has professional liability insurance.
- (Cc) This ~~rule~~Rule does not apply to a ~~member~~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, 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
- (Dd) 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.
- (Ee) This ~~rule~~Rule does not apply where the ~~member~~lawyer has previously advised the client under ~~Paragraph~~paragraph (Aa) or (Bb) that the ~~member~~lawyer does not have professional liability insurance.

Discussion:

[1] The disclosure obligation imposed by Paragraph (Aa) of this ~~rule~~Rule 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~~1.4.1, I am informing you in writing that I do not have professional liability insurance.”

¹ RRC Action: At the 11/6-7/09 meeting, addition of the foregoing clause to exempt court-appointed lawyers from the application of the Rule was deemed approved. See 11/6-7/09 KEM Meeting Notes, III.R., at ¶. 1A.

RRC – Rule 1.4.1 [3-410]
Rule – Draft 3 (11/11/09) – COMPARED TO CRPC 3-410 (7/2009)
Post – November 6-7, 2009 Meeting

[3] A [memberlawyer](#) 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~~1.4.1, I am informing you in writing that I no longer have professional liability insurance.”

[4] [Rule 3-410 Paragraph \(Cc\) in part](#) provides an exemption for a “government lawyer or in-house counsel when that [memberlawyer](#) 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~~ [Rule](#) is to provide information directly to a client if a [memberlawyer](#) is not covered by professional liability insurance. If a [memberlawyer](#) 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 [memberlawyer](#) is or is not covered by professional liability insurance. The exemptions [under this rule 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. ~~(Added by order of the Supreme Court, operative January 1, 2010.)~~

[\[5\]² 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.” Although the disclosure requirements of paragraphs \(a\) and \(b\) do not apply in proceedings in which a court has appointed a lawyer, this Rule is not intended to abrogate any law or court order that requires the lawyer to maintain liability insurance.³ Moreover, the lawyer must comply with this Rule in all other client representations.](#)

² [RRC Action](#): At the 11/6-7/09 meeting, conforming Comment [4] to the revisions to paragraph (c), see footnote 1, was deemed approved. See 11/6-7/09 KEM Meeting Notes, III.R., at ¶. 1B.b.

[Consultant’s Note/Question](#): Rather than attempt to revise Comment [4], I recommend a new Comment [5]. The problem is that the rationale for exempting in-house and government lawyer employees from the Rule does not apply to the exemption for court-appointed lawyers. Rather than confuse the issue, I thought a separate comment was the better approach.

[What is the rationale for exempting court-appointed lawyers? Is it because they do not enter into engagement agreements directly with their clients? See 11/2/09 Jenness E-mail to Kehr, at pp. 20-21 of E-mail compilation. Is the rationale access to justice? I note that whatever the rationale might be, exempting court-appointed lawyers does not comport with the Rule’s stated purpose in Comment \[4\], “to provide information directly to a client if a lawyer is not covered by professional liability insurance.”](#)

[Accordingly, I have not tried to identify a rationale, instead choosing to simply clarify the the second clause of paragraph \(c\).](#)

³ [Consultant’s Note](#): I’ve added this sentence in case the any court appointments require a lawyer to maintain insurance. I’m not aware of any. Perhaps it is best to leave it out.

[In Ohio, a state statute indemnifies court-appointed lawyers for malpractice. An Ohio ethics opinion has concluded that court-appointed lawyers fit within the exemption for government employee lawyers:](#)

It is the Board's view that a lawyer appointed by a court to represent an indigent criminal defendant falls within the governmental entity exception in Rule 1.4(c)(3)(i) and therefore is not required to provide notice of lack of professional liability insurance. No purpose would be served by requiring such disclosure. A court appointed criminal defense lawyer is providing legal representation for which indemnification for malpractice is provided by law. Ohio law provides that if a malpractice action is filed against a lawyer, who accepts court appointments to represent indigent criminal defendants, the lawyer shall be indemnified for any judgment awarded in the malpractice action or the amount negotiated in settlement of the malpractice claim, and for court costs or legal fees incurred in defense of the malpractice claim. Ohio Rev.Code Ann. §120.41 (West 2002). See Ohio Ethics Op. 2007-1, available at: www.sconet.state.oh.us/Boards/BOC/Advisory.../Op_07-006.doc

If that is also true in California (I don't know) and in the federal system, then we can add that as a rationale for the exemption. Otherwise, we should say nothing in the Comment.

Note: Ohio Rule 1.4(c)(3)(i), cited in the Ohio ethics opinion, provides:

(3) _____ The notice required by division (c) of this rule shall not apply to either of the following:

(i) _____ A lawyer who is employed by a governmental entity and renders services pursuant to that employment;

It appears that (c)(3)(i) would only apply to court-appointed lawyers who are paid by the government; during the November meeting, however, the RRC removed reference to payment in the court-appointed lawyer provision.