

Proposed Rule 1.4.1 [3-410] ‘Disclosure of Professional Liability Insurance’

(Draft #1, 10/28/09)

Summary: Proposed Rule 1.4.1 was adopted by the Supreme Court to become operative on January 1, 2010. The rule requires lawyers who do not have professional liability insurance disclose that fact to clients. The rule exempts a full time government lawyer and full time an in-house counsel with regard to the representation of their employer.

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

Rules

RPC 3-410

Statute

(Repealed B&P Code sections 6147 and 6148)

Case law

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

Other Primary Factor(s)

Commission Minority Position, Known 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

<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>(a) A lawyer 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 lawyer member, that the lawyer member does not have professional liability insurance whenever it is reasonably foreseeable that the total amount of the lawyer-member's legal representation of the client in the matter will exceed four hours.</p>	<p>"member" is changed to "lawyer" to conform to the Model Rule format and style of the proposed 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>(b) A lawyer 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 lawyer member, that the lawyer member does not have professional liability insurance whenever it is reasonably foreseeable that the total amount of the lawyer's member's legal representation of the client in the matter will exceed four hours.</p>	<p>See explanation of changes to Paragraph (a)</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 does not apply to a lawyer member who is <u>a full time employee of the client, including full time employed as a</u> government lawyers <u>and of</u> in-house counsel, when that</p>	<p>Paragraph (c) has been modified to include court-appointed lawyers in criminal and civil matter 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</p>

* Proposed Rule 1.4.1, Draft 2.1 (10/28/09) RD. 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>member is representing or providing legal advice to <u>the employer-client</u> a client in that capacity, <u>or to a court –appointed lawyer in a criminal or civil action or proceeding who is paid by or as authorized by a court.-</u></p>	<p>lawyers who regularly served 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. "Member" has also been changed to "lawyer." .See explanation of changes to Paragraph (a). Finally, the sentence has been restructured to include court appointed counsel in addition to government and in-house counsel.</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 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 does not apply where the <u>lawyer member</u> has previously advised the client under Paragraph (a) or (b) that the <u>lawyer member</u> 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"><u>Explanation of Changes to California Rule 3-410</u></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 (a A) 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 rules proposed by the Commission.</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 lawyer member may use the following language in making the disclosure required by Paragraph (a) 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 1.4.1 3-410, I am informing you in writing that I do not have professional liability insurance."</i></p>	<p>"Member" has been changed to "lawyer." Rule 3-410(A) has been changed to Paragraph (a) to conform to the Model Rule style</p> <p>Rule 3-410 has been changed to Rule 1.4.1 to conform to the rule numbering system adopted by the Commission for the proposed rules.</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 lawyer member may use the following language in making the disclosure required by Paragraph (b): Rule 3-410(B):</p> <p><i>"Pursuant to California Rule of Professional Conduct 1.4.1 3-410, 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] <u>Paragraph (c)</u> Rule—3-410(C) provides an exemption for a "government lawyer or in-house counsel when that <u>lawyer member</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 <u>R</u>rule is to provide information directly to a client if a <u>lawyer member</u> is not covered by professional liability insurance. If a <u>lawyer —member</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 <u>lawyer member</u> is or is not covered by professional liability insurance. The exemptions under this <u>R</u>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>"Rule 3-410(C)" has been changed to "Paragraph (c)" and "member" has been changed to "lawyer" to conform to the Model Rule style.</p>

625586.1

Rule 1.4.1 Disclosure of Professional Liability Insurance (Commission's Proposed Rule – Clean Version)

- (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) 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.
- (c) This rule does not apply to a lawyer who is a full time employee of the client, including full time government lawyers and in-house counsel, when representing or providing legal advice to the employer-client in that capacity, or to a court – appointed lawyer in a criminal or civil action or proceeding who is paid by or as authorized by a court.
- (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 (a) 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] Except as set forth in Comments [5] and [6], this Rule does not apply when a lawyer enters into a transaction with or acquires a pecuniary interest adverse to a client prior to the commencement of a lawyer-client relationship with the client. However, when a lawyer's interest in the transaction or in the adverse pecuniary interest results in the lawyer having a legal, business, financial or professional interest in the subject matter in which the lawyer is representing the client, the lawyer is required to comply with Rule 1.7(d)(4) [Rule 3-310(B)(4)].

[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) 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 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.

McCurdy, Lauren

From: Mark Tuft [MTuft@cwclaw.com]
Sent: Wednesday, October 28, 2009 5:39 PM
To: Difuntorum, Randall
Cc: Robert L. Kehr; Kevin Mohr; kevin_e_mohr@csi.com; Kevin Mohr G; Harry Sondheim; Harry Sondheim; pwvapk@townsend.com; McCurdy, Lauren; Lee, Mimi
Subject: RE: Comparison Chart for Rule 1.4.1

This look good, Randy. I agree we should include the Ohio opinion.

We probably will need to add a sentence or two to Comment [4] explaining why the exception in paragraph (c) applied to court-appointed counsel in criminal and civil cases. I will come up with something before the meeting, unless Bob has some typically brilliant language, and send it around.

I hope we can defer completion of the Introduction and the "Dashboard" until the Commission approves our draft.

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=====

From: Difuntorum, Randall [mailto:Randall.Difuntorum@calbar.ca.gov]
Sent: Wednesday, October 28, 2009 12:33 PM
To: Mark Tuft
Cc: Robert L. Kehr; Kevin Mohr; kevin_e_mohr@csi.com; Kevin Mohr G; Harry Sondheim; Harry Sondheim;

The Supreme Court of Ohio

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OFFICE OF SECRETARY

OPINION 2007-6

Issued August 10, 2007

SYLLABUS: A court appointed lawyer for an indigent criminal defendant is not required to provide notice to the defendant that the lawyer does not maintain professional liability insurance. A court appointed lawyer for an indigent criminal defendant falls within the Rule 1.4(c)(3)(i) governmental entity exception to the notice requirement of Rule 1.4(c).

OPINION: This opinion addresses whether the Ohio Rules of Professional Conduct require a court appointed lawyer for an indigent criminal defendant to notify a defendant if the lawyer does not maintain professional liability insurance.

Is a court appointed lawyer for an indigent criminal defendant required pursuant to Rule 1.4(c) to provide notice to the defendant that the lawyer does not maintain professional liability insurance?

Since July 1, 2001, Ohio lawyers who do not maintain professional liability insurance are required to notify their clients and obtain acknowledgment of the lawyer's lack of professional liability insurance. The notice must be signed by the lawyer and the acknowledgment of receipt of the notice must be signed by the client. This requirement is set forth in Rule 1.4(c) of the Ohio Rules of Professional Conduct which became effective February 1, 2007 and prior to that was set forth in now former DR 1-104 of the Ohio Code of Professional Responsibility.

Rule 1.4

(c) A lawyer shall inform a client at the time of the client's engagement of the lawyer or at any time subsequent to the engagement if the lawyer does not maintain professional liability insurance in the amounts of at least one hundred thousand dollars per occurrence and three hundred thousand dollars in the aggregate or if the lawyer's professional liability insurance is terminated. The notice shall be provided to the client on a separate form set forth following this rule and shall be signed by the client.

(1) A lawyer shall maintain a copy of the notice signed by the client for five years after termination of representation of the client.

(2) A lawyer who is involved in the division of fees pursuant to Rule 1.5(e) shall inform the client as required by division (c) of this rule before the client is asked to agree to the division of fees.

(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;

(ii) A lawyer who renders legal services to an entity that employs the lawyer as in-house counsel.

NOTICE TO CLIENT

Pursuant to Rule 1.4 of the Ohio Rules of Professional Conduct, I am required to notify you that I do not maintain professional liability (malpractice) insurance of at least \$100,000 per occurrence and \$300,000 in the aggregate.

Attorney's Signature

CLIENT ACKNOWLEDGEMENT

I acknowledge receipt of the notice required by Rule 1.4 of the Ohio Rules of Professional Conduct that [insert attorney's name] does not maintain professional liability (malpractice) insurance of at least \$100,000 per occurrence and \$300,000 in the aggregate.

Client's Signature

Date

The underlying reason for requiring notice and acknowledgement of a lawyer's lack of professional liability insurance is client protection. Comment [9] to Rule 1.4 explains that "[t]he client may not be aware that maintaining professional liability insurance is not mandatory and may well assume that the practice of law requires that some minimum financial responsibility be carried in the event of

malpractice. Therefore, a lawyer who does not maintain certain minimum professional liability insurance shall promptly inform a prospective client or client.”

There are two exceptions to Rule 1.4(c). A lawyer employed by a governmental entity and who renders services pursuant to that employment is not required to provide notice of a lack of maintaining professional malpractice insurance. And, a lawyer employed as in-house counsel who renders legal services to the employing entity is not required to provide such notice. These exceptions are established in divisions (c)(3)(i) and (ii) of Rule 1.4.

Comment [8] to Rule 1.4 explains that “[a]lthough it is in the best interest of the lawyer and the client that the lawyer maintain professional liability insurance or another form of adequate financial responsibility, it is not required in any circumstance other than when the lawyer practices as part of a legal professional association, corporation, legal clinic, limited liability company, or registered partnership.

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).

In conclusion, the Board advises as follows. A court appointed lawyer for an indigent criminal defendant is not required to provide notice to the defendant that the lawyer does not maintain professional liability insurance. A court appointed lawyer for an indigent criminal defendant falls within the Rule 1.4(c)(3)(i) governmental entity exception to the notice requirement of Rule 1.4(c).

Advisory Opinions of the Board of Commissioners on Grievances and Discipline are informal, nonbinding opinions in response to prospective or hypothetical questions regarding the application of the Supreme Court Rules for the Government of the Bar of Ohio, the Supreme Court Rules for the Government of the Judiciary, the Ohio Rules of Professional Conduct, the Ohio Code of Judicial Conduct, and the Attorney’s Oath of Office.

McCurdy, Lauren

From: Difuntorum, Randall
Sent: Thursday, October 29, 2009 1:56 PM
To: McCurdy, Lauren
Subject: FW: [prec] Malpractice insurance disclosure Rule 3-410 & court--appointed lawyers . . .
Attachments: Ohio Opinion 2007-6 _2_.pdf

From: Difuntorum, Randall
Sent: Tuesday, October 27, 2009 9:09 AM
To: Mark Tuft
Cc: JoElla L. Julien; martinez@lbbslaw.com; linda.foy@jud.ca.gov; hbsondheim@verizon.net; McCurdy, Lauren; kemohr@charter.net; Kevin Mohr G; 'Robert L. Kehr'; Lee, Mimi
Subject: RE: [prec] Malpractice insurance disclosure Rule 3-410 & court--appointed lawyers . . .

Mark:

I agree with your observation that the recent Supreme Court approval of Rule 3-410 militates against any major substantive amendments. Attached is an ethics opinion from Ohio, a state with a similar insurance disclosure rule, that addresses the appointed counsel issue and concludes that such representations fall under the government lawyer exception (but note that this opinion states that statutory indemnification is provided for private lawyers who accept appointments of indigent criminal defendants). In lieu of recommendations for major substantive amendments, perhaps the Commission's report can include suggested topics that COPRAC ought to consider for formal opinions. Examples of some questions that have been raised on Rule 3-410 are provided below.

–Randy D.

Q: What about a lawyer who practices as a law corporation or LLP, or a self-insured lawyer?

A: Although the former statutory insurance disclosure requirement expressly addressed the financial responsibility standards imposed on certified law corporations and an option for self-insurance of non-law corporation practitioners by filing with the State Bar an executed copy of a written agreement guaranteeing payment of all claims against an attorney (see the 1999 version of repealed Business and Professions Code §6148(a)(4)(A),(B) and (C)), the new rule requires that services be covered by a policy of insurance and does not include an exception for self-insurance or a law corporation that does not have insurance. Similarly, there is no exception for a Limited Liability Partnership (LLP) that does not have insurance.

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

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

Q: Is the new rule retroactive such that a lawyer must provide disclosure to relevant existing clients when the rule becomes operative on January 1, 2010?

A: Case law concerning the Rules of Professional Conduct indicates that lawyers are held to comply with the rules that were operative at the time that a lawyer's conduct occurred (see *Kelson v. State Bar* (1976) 17 Cal.3d 1, 4, fn. 1 [130 Cal.Rptr. 29]). In addition, this issue was specifically discussed by the Insurance Disclosure Task Force. The proposed rule originally circulated for public comment would have required notice to "existing clients" within 30 days of the effective date of the new rule, but that concept and the implementing language was deleted in response to adverse public comments.

**RRC – Rule 1.4.1 [3-410] (Insurance Disclosure)
E-mails, memos, etc. – Revised (11/3/2009)**

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**RRC – Rule 1.4.1 [3-410] (Insurance Disclosure)
E-mails, memos, etc. – Revised (11/3/2009)**

August 26, 2009 Difuntorum E-mail to RRC:

Attached please find the Supreme Court's order approving Rule 3-410 (Disclosure of Professional Liability Insurance) to become operative on January 1, 2010. A link to the docket at the California court's website is pasted below. –Randy D.

http://appellatecases.courtinfo.ca.gov/search/case/dockets.cfm?dist=0&doc_id=1900121&doc_no=S168443

California Rule 3-410 as approved by the California Supreme Court on August 26, 2009, effective January 1, 2010.

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 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 when that member is representing or providing legal advice to a client in 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.

[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):

**RRC – Rule 1.4.1 [3-410] (Insurance Disclosure)
E-mails, memos, etc. – Revised (11/3/2009)**

“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 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.

August 27, 2009 McCurdy E-mail to Tuft, cc Chair, Vapnek, Tuft & Staff:

Given the recent measures taken to expedite the completion of the rule revision project, the purpose of this letter is to lay out the assignments for which you are a lead drafter that are scheduled to be discussed during the Commission's upcoming September, October and November meetings. A “rolling assignments agenda” is enclosed that covers all of the matters that must be completed at those meetings. This agenda format is being used due to the short turnaround time between these meetings and the interest of many Commission members in working on assignments for future meetings when they have an opportunity to do so. The assignments are considered “rolling” because, for example, any rule that is not completed at the September meeting should be treated as automatically re-assigned and carried forward to the October meeting. Accordingly, the Commission is facing a significant challenge to complete fully each assigned rule in order to avoid a domino effect of rules that are not finished.

Because the Commission has been given a mandate to meet a rigorous schedule of deliverables to the Board for action, it is very important that all assignments be submitted by the assignment due dates. As emphasized by the Chair, if a lead drafter anticipates a conflict, or a conflict unexpectedly arises, that interferes with the ability to complete an assignment, the lead drafter must take the initiative to make alternate arrangements with the codrafters so that the assignment can be submitted by the due date.

Below is a list of your lead draft assignments for the next meeting, September 11, 2009, to be held at the San Diego State Bar Annual Meeting. Enclosed are materials for those assignments. Below that list is a list of assignments for the subsequent meetings in November and October. Materials for those assignments will be distributed soon. If you need any those materials immediately, then please send me an email with a copy to Randy and Kevin. Codrafter responsibilities are not listed. Please refer to the rolling agenda document which identifies the drafting team for each rule assignment. In addition staff will prepare an updated chart listing all rule assignments by Commission member.

Your continued hard work and dedication to this important project is appreciated, and don't forget that staff and the Commission Consultant are here to help so please feel free to contact us for assistance.

**RRC – Rule 1.4.1 [3-410] (Insurance Disclosure)
E-mails, memos, etc. – Revised (11/3/2009)**

ASSIGNMENTS FOR SEPTEMBER MEETING

September 11, 2009 Meeting

Assignments Due: Wed., 9/2/09

1. **III.A. Rule 1.0 Purpose and Scope of the Rules [1-100]** (Post Public Comment Rule Draft #7 dated 6/18/07)

Codrafters: Julien, Lamport, Melchior, Ruvolo

Assignment: (1) a chart comparing proposed Rule 1.0 to relevant parts of the MR Preamble and Scope; (2) a “dashboard” cover sheet; and (3) a chart summarizing the public comment received and the Commission’s response.

2. **III.M. Rule 5.1 Responsibilities of Partners, Managers, and Supervisory Lawyers [N/A]** (June 2009 Comparison Chart - Post Public Comment Rule Draft #9 dated 6/1/09)

Codrafters: Martinez, Peck

Assignment: (1) a chart comparing proposed Rule 5.1 to MR 5.1; (2) a “dashboard” cover sheet; and (3) a chart summarizing the public comment received and the Commission’s response.

3. **III.N. Rule 5.2 Responsibilities of a Subordinate Lawyer [N/A]** (Post Public Comment Rule Draft #5.2 dated 6/16/07)

Codrafters: Martinez, Peck

Assignment: (1) a chart comparing proposed Rule 5.2 to MR 5.2; (2) a “dashboard” cover sheet; and (3) a chart summarizing the public comment received and the Commission’s response.

4. **III.O. Rule 5.3 Responsibilities Regarding Nonlawyer Assistants [N/A]** (Post Public Comment Rule Draft #9.1 dated 6/16/07)

Codrafters: Martinez, Peck

Assignment: (1) a chart comparing proposed Rule 5.3 to MR 5.3; (2) a “dashboard” cover sheet; and (3) a chart summarizing the public comment received and the Commission’s response.

ASSIGNMENTS FOR OCTOBER MEETING

October 16 & 17, 2009 Meeting

Assignments Due: Wed., 9/30/09

No lead drafter assignments.

(NOTE: This is in addition to any assigned rule not completed at the September meeting.)

ASSIGNMENTS FOR NOVEMBER MEETING

November 6 & 7, 2009 Meeting

Assignments Due: Wed., 11/28/09

1. **III.QQ. Rule 4.2 Communication with a Represented Person [2-100]** (Post Public Comment Draft #17.4 dated 1/5/09)

Codrafters: MARTINEZ (Co-lead), Voogd

**RRC – Rule 1.4.1 [3-410] (Insurance Disclosure)
E-mails, memos, etc. – Revised (11/3/2009)**

Assignment: (1) a chart comparing proposed Rule 4.2 to MR 4.2; (2) a “dashboard” cover sheet; and (3) a chart summarizing the public comment received and the Commission’s response.

2. **III.RR. Rule 4.3 Dealing with Unrepresented Person [n/a]** (Post Public Comment Draft #5.1 dated 10/15/08; awaiting further discussion at the same time as MR 4.4 and the Commission’s proposed Rule 4.2(e))

Codrafters: MARTINEZ (co-lead), Voogd

Assignment: (1) a chart comparing proposed Rule 4.3 to MR 4.3; (2) a “dashboard” cover sheet; and (3) a chart summarizing the public comment received and the Commission’s response.

3. **III.SS. Rule 5.4 Professional Independence [1-310][1-320][1-600]** (Post Public Comment Draft #13.2 dated 1/8/09 to be revised following the January 2009 meeting)

Codrafters: Martinez, Peck

Assignment: (1) a chart comparing proposed Rule 5.4 to MR 5.4; (2) a “dashboard” cover sheet; and (3) a chart summarizing the public comment received and the Commission’s response.

4. **IV.C. Rule 4.1 Truthfulness in Statements to Others [N/A]** (new matter assigning the preparation of a first draft rule in a MR comparison chart format)

Codrafters: MARTINEZ, Voogd

Assignment: (1) a chart comparing proposed Rule 4.1 to MR 4.1; and (2) a “dashboard” cover sheet. (If a California version of the MR is not recommended, then the chart should show the MR as stricken.)

5. **IV.D. Rule 4.4 Respect for Rights of 3rd Persons [N/A]** (new matter assigning the preparation of a first draft rule in a MR comparison chart format)

Codrafters: MARTINEZ (co-lead), Voogd

Assignment: (1) a chart comparing proposed Rule 4.4 to MR 4.4; and (2) a “dashboard” cover sheet. (If a California version of the MR is not recommended, then the chart should show the MR as stricken.)

6. **IV.R. Rule 3-410 Insurance Disclosure** [adopted by the Sup. Ct. operative 1/1/10)

Codrafters: Foy, Julien, Kehr, Martinez

Assignment: (1) a comparison chart with any recommended changes to the anticipated new RPC 1-650; and (2) a “dashboard” cover sheet.

(NOTE: This is in addition to any assigned rule not completed at the September meeting.)

**RRC – Rule 1.4.1 [3-410] (Insurance Disclosure)
E-mails, memos, etc. – Revised (11/3/2009)**

October 26, 2009 McCurdy E-mail to Drafters (Tuft, Julien, Kehr, Martinez, Foy), cc Chair, Voogd, Vapnek & Staff:

The first draft of the rule & comment comparison table for this rule is attached. We're numbering it proposed Rule 1.4.1.

The assignments for the November meeting are due this Wednesday, October 28th.

See **RRC - 3-410 [1-4-1] - Compare - Rule & Comment Explanation - DFT1 (10-26-09).doc**

October 26, 2009 Tuft E-mail to Drafters, cc Chair, Voogd, Vapnek & Staff:

Since the Supreme Court recently adopted this rule and since the BOG spent considerable time coming to a consensus on the wording of the rule after receiving significant public comments both for and against the rule, I do not recommend the RRC change the rule except to conform the wording to the Model Rule style and format we have been using for our rules. I have drafted a proposed explanation of the minor changes I believe are appropriate for this rule for your review and comment. If acceptable, I would ask that Kevin or some one in Randy's office to prepare the middle column showing proposed rule 1.4.1 with the changes. Let me know what additional changes you believe are needed and whether you agree or disagree with my assessment that we not substantially modify this controversial rule or recommend against its adoption at this late date.

October 27, 2009 Kehr E-mail to Drafters, cc Chair, Voogd, Vapnek & Staff:

Some potential problems have come up. I'll forward some e-mails in a moment that explain this. I haven't considered whether there is a simple drafting solution – and I'm not inclined to support anything else for the reasons you gave in your message – but I do think we should at least include in our report to the Board that these new, previously unconsidered issues do exist.

E-MAIL STRING AMONG JENNESS, KEHR & TOWERY RE COURT-APPOINTED LAWYERS:

September 2, 2009 Evan Jenness E-mail to LACBA PREC listserv:

From: Evan Jenness [mailto:Evan@jennesslaw.com]
Sent: Wednesday, September 02, 2009 10:14 AM
To: prec@forums.lacba.org
Subject: [prec] Malpractice insurance disclosure Rule 3-410 & court--appointed lawyers .
..

Does anyone know whether private counsel who are appointed by the court (referred to as "CJA panel attorneys" in federal criminal cases) are covered by the new rule? CJA lawyers do not enter into retainer agreements with clients and are paid by the Administrative Office of the US Courts. However, most have 'private' practices as well, in which they are paid by clients pursuant to written retainers.

**RRC – Rule 1.4.1 [3-410] (Insurance Disclosure)
E-mails, memos, etc. – Revised (11/3/2009)**

Here is the question I received from a CJA lawyer:

“what are your thoughts about the application of the Malpractice Insurance Disclosure Rule [Rule 3-410] to panel attorney’s? I have not seen an exemption that clearly applies unless CJA counsel are “government lawyers.” To be exempt a member must be employed directly by and provide services directly for the governmental entity. While you might argue that a CJA attorney is employed directly by the Federal Government, his services might arguably not be directly for the governmental entity.

September 2, 2009 Kehr E-mail to Towery:

Jim: This question just came in from Evan Jenness, a member of the L.A. ethics committee. She is a former federal defender and now a private practice criminal defense lawyer. Do you have any thoughts about this?

September 2, 2009 Towery E-mail to Kehr:

It's a good question, and a permutation that the task force never considered. An educated guess on my part is that a court-appointed lawyer should make the disclosure to the direct client, because the only exceptions in the rule are for government lawyers and in-house counsel. Thus the rule was intended to apply to private attorney-client relationships, regardless of third party (government or otherwise) payment. What are your thoughts?

September 2, 2009 Kehr E-mail to Towery:

I had a number of concerns about the insurance disclosure, but this is one that went right by me.

I see nothing in the Rule that would avoid its application to a court-appointed lawyer, but I have other concerns. The problem can't come up if the rules of the appointing court require the lawyer to have professional liability insurance. Assuming they don't, it still might be prudent for the lawyer to make the rule 3-410 disclosure to the court so that there will be no suggestion that the lawyer has been deceitful.

Also, I wonder if there aren't other unusual situations. For example, what about a lawyer handling a subrogation claim who has been hired and is to be paid by X, but in order to pursue the claim becomes lawyer of record for Y?

I fear there will be other unexpected issues over time.

September 2, 2009 Kehr E-mail to Jenness:

Evan: I've pasted below my initials Jim Towery's answer and my reply to him.

September 2, 2009 Jenness E-mail to Kehr:

This is going to be an issue for many hundreds of criminal defense lawyers who are appointed in federal and State courts in California.

**RRC – Rule 1.4.1 [3-410] (Insurance Disclosure)
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Most of them do not have liability insurance, and they do not use written retainer agreements with the clients.

What will these lawyers do -- hand the client a one-line notice saying they don't have liability coverage? I don't think that will go over well with clients who already are in the position of having a lawyer they don't know assigned to represent them!

The federal CJA ("Criminal Justice Act") under which CJA Panel attorneys are appointed in federal cases does not require counsel to have insurance, and one of my colleagues thinks the same is true of State law.

Although insurance is relatively cheap for criminal defense lawyers, most do not have it because of the many hurdles to recovering from criminal defense lawyers – the popular thinking is that 'happy clients generally have nothing to sue about, and unhappy clients generally have admitted guilt or were proven guilty BYARD.'

Thanks very much for helping. I put a call in to the State Bar Ethics Hotline, but have not yet received a return call btw.

I think there may be other types of matters where private lawyers are appointed by courts and where the lawyers have no retainer agreement with the client (e.g. dependency and juvenile proceedings, conservatorship proceedings-?).

September 2, 2009 Kehr E-mail to Jenness:

I don't know how juvenile, dependency, or conservatorship appointments work, but I o/w agree with your comments. I would add that court's have a general power to appoint a lawyer to assist it by representing someone appearing before the court. I also wonder if there are professional liability policy exclusions that might come into play.

As I said to Jim Towery, other unexpected issues will come up over time.

October 27, 2009 Difuntorum E-mail to Tuft, cc Drafters, Chair & Staff:

I agree with your observation that the recent Supreme Court approval of Rule 3-410 militates against any major substantive amendments. Attached is an ethics opinion from Ohio, a state with a similar insurance disclosure rule, that addresses the appointed counsel issue and concludes that such representations fall under the government lawyer exception (but note that this opinion states that statutory indemnification is provided for private lawyers who accept appointments of indigent criminal defendants). In lieu of recommendations for major substantive amendments, perhaps the Commission's report can include suggested topics that COPRAC ought to consider for formal opinions. Examples of some questions that have been raised on Rule 3-410 are provided below.

–Randy D.

Q: What about a lawyer who practices as a law corporation or LLP, or a self-insured lawyer?

A: Although the former statutory insurance disclosure requirement expressly addressed the financial responsibility standards imposed on certified law corporations and an option for self-insurance of non-law corporation practitioners by filing with the State Bar an executed copy of a

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written agreement guaranteeing payment of all claims against an attorney (see the 1999 version of repealed Business and Professions Code §6148(a)(4)(A),(B) and (C)), the new rule requires that services be covered by a policy of insurance and does not include an exception for self-insurance or a law corporation that does not have insurance. Similarly, there is no exception for a Limited Liability Partnership (LLP) that does not have insurance.

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

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

Q: Is the new rule retroactive such that a lawyer must provide disclosure to relevant existing clients when the rule becomes operative on January 1, 2010?

A: Case law concerning the Rules of Professional Conduct indicates that lawyers are held to comply with the rules that were operative at the time that a lawyer's conduct occurred (see *Kelson v. State Bar* (1976) 17 Cal.3d 1, 4, fn. 1 [130 Cal.Rptr. 29]). In addition, this issue was specifically discussed by the Insurance Disclosure Task Force. The proposed rule originally circulated for public comment would have required notice to "existing clients" within 30 days of the effective date of the new rule, but that concept and the implementing language was deleted in response to adverse public comments.

Q: Doesn't the mandatory disclosure imposed by the rule infringe upon a lawyer's First Amendment rights to be free from state compelled speech?

A: Although nothing in the rule or its comment addresses this point, in the submission to the California Supreme Court, the State Bar analyzed the issue of constitutional infirmity based on a lawyer's commercial speech rights. The State Bar concluded that the disclosure requirement in Rule 3-410 meets the four-prong criteria for intermediate scrutiny of governmental regulation of commercial speech as set forth in *Central Hudson Gas & Electric v. Public Services Commission* (1980) 447 U.S. 557 [100 S.Ct. 2343].

October 27, 2009 Tuft E-mail to Kehr, cc Drafters, Chair & Staff:

Bob, your emails persuade me that the exception in paragraph (c) should be expanded to include court appointed lawyers in criminal and civil matters. Here is a proposed revision of paragraph (c) for your review.

This rule does not apply to a lawyer who is employed as a government lawyer or an in-house counsel when that member is representing or providing legal advice to a client in that capacity or to a court appointed to by a court to represent a client in a criminal or civil action or proceeding.

The explanation for the change is the emails you received plus the fact the governor recently signed legislation permitted court appointed counsel in civil cases.

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October 27, 2009 Difuntorum E-mail to Tuft, cc Drafters, Chair, Voogd, Vapnek & Staff:

Please resend with your draft and proposed explanation of minor changes. Staff will add the middle column redline.

October 27, 2009 Kehr E-mail to Tuft, cc Drafters, Chair & Staff:

Mark: Your proposal raises a policy issue about recommending any change to what already has been done by others, but I certainly support putting that question to the Commission. I have some minor drafting suggestions, such as removing “member”. Here is my edit ---

This rule does not apply to a lawyer who is a full-time employee of the client, including full-time government lawyers, when representing or providing legal advice to the employer, or to a court- appointed lawyer in a criminal or civil action or proceeding who is paid by or through the court.

By the way, I wonder if we should bring Jim Towery into this to see if he has any recommendations. We might want to do that before the November meeting.

October 27, 2009 Tuft E-mail to Kehr, cc Drafters, Chair & Staff:

I agree with Bob's revision to proposed paragraph (c) of rule 1.4.1. I have added "and in-house counsel" after government lawyers to be more in line with the existing exception. I will not be available tomorrow morning and wonder if Randy's people can make this change to the comparison chart I sent on Sunday. If not, I can send a revised comparison chart tomorrow afternoon.

Paragraph (c) would read:

This rule does not apply to a lawyer who is a full-time employee of the client, including full-time government lawyers and in-house counsel, when representing or providing legal advice to the employer, or to a court- appointed lawyer in a criminal or civil action or proceeding who is paid by or through the court.

October 27, 2009 Kehr E-mail to Tuft, cc Drafters, Chair & Staff:

Looks good.

October 28, 2009 Difuntorum E-mail to Tuft & Kehr, cc Drafters, Chair, Voogd, Vapnek & Staff:

If either of you can send me the draft 3-410 chart, I can make the edits and include it in the agenda materials.

October 27, 2009 Kehr E-mail to Difuntorum, cc Drafters, Chair & Staff:

I don't think I've seen anything other than the chart that Lauren sent out late Monday.

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E-mails, memos, etc. – Revised (11/3/2009)**

October 28, 2009 (@ 10:56 a.m.) Tuft E-mail to Drafters, cc Chair, Voogd, Vapnek & Staff:

Please disregard the last version of the comparison chart for this rule. I am attaching a more complete version for your consideration and comment.

Attached:

RRC - 3-410 [1-4-1] - Compare - Rule & Comment Explanation - DFT2 (10-28-09)MLT.doc

October 28, 2009 Kehr E-mail to Drafters, cc Chair, Voogd, Vapnek & Staff:

I don't have time now to consider any comments on this, so it should be used for the agenda package as far as I'm concerned.

October 28, 2009 Tuft E-mail to Kehr, cc Drafters, Chair, Voogd, Vapnek & Staff:

I modified paragraph (c) slightly from your last email, so be sure to take a look at it. Also, please add to the explanation for the change from what I have suggested.

Randy, it would be good to include your email to me with the issues you spotted in the materials for this agenda item so the Commission is fully inform of the concerns that have been raised to the current rule.

October 28, 2009 Difuntorum E-mail to Drafters, cc Chair, Vapnek & Staff:

Attached is a revised version of your chart that fixes some quotation mark typos on the last page. Also attached is a clean version of your proposed amended rule and a draft Dashboard.

We'll add the issues email. I think it might also be helpful to include the Ohio opinion as evidence of another state's experience with the appointed counsel concern.

Attachments:

RRC - 3-410 [1.4.1] - Rule - DFT1 (10-28-09) - CLEAN - RLK.doc

RRC - 3-410 [1-4-1] - Dashboard - ADOPT - DFT1 (10-28-09)ML.doc

RRC - 3-410 [1-4-1] - Compare - Rule & Comment Explanation - DFT2.1 (10-28-09)RD.doc

October 28, 2009 Tuft E-mail to Drafters, cc Chair, Vapnek & Staff:

I am afraid I cannot turn to this until the end of the day. So, I defer to you to decide if it is ready to be send out.

October 28, 2009 Kehr E-mail to Drafters, cc Chair, Vapnek & Staff:

I won't be able to look until after the agenda package is finalized. I'll comment when I can.

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October 28, 2009 Tuft E-mail to Difuntorum, cc Drafters, Chair, Vapnek & Staff:

This look good, Randy. I agree we should include the Ohio opinion.

We probably will need to add a sentence or two to Comment [4] explaining why the exception in paragraph (c) applied to court-appointed counsel in criminal and civil cases. I will come up with something before the meeting, unless Bob has some typically brilliant language, and send it around.

I hope we can defer completion of the Introduction and the "Dashboard" until the Commission approves our draft.

October 31, 2009 Sondheim E-mail to RRC:

There is also a problem with III R, p. 353 of the agenda materials. The bottom of the chart is missing, although the second column appears, in part, in the clean version.

October 31, 2009 Julien E-mail to Kehr, cc Drafters, cc Chair & Staff:

I await your research on the particulars regarding different legal specialists. I think I lean toward lawyers having malpractice insurance no matter who their client is with the exceptions already noted in our proposed rule.

One of my questions is whether all indigent client's lawyers are appointed by the courts.

It looks like you and I are working on commission work at the same time because as fast as I send you an email on one thing, I get one from you on something different. I am trying my best to keep up and have devoted this day (albeit late in some cases) to do just that.

October 31, 2009 Kehr E-mail to Julien, cc Drafters, cc Chair & Staff:

You can decide for yourself whether I am giving out tricks or treats.

The Rule recently adopted by the Supreme Court, based on the work of a committee headed by former State Bar President Jim Towery, only requires lawyers to disclose when they don't carry malpractice insurance. I don't think anyone has suggested that we should recommend what would amount to a complete rewrite of the new Rule by requiring all lawyers to carry malpractice insurance. I understand that b/c of the many problems with that, the Board of Governors about ten years ago looked into the creation of some sort of forced insurance pool to cover lawyers who couldn't obtain or afford insurance.

The current discussion began with comments from Evan Jenness, who is the Vice Chair of the L.A. ethics committee, a former federal public defender, and currently a private practice criminal defense lawyer. I think the essential point of the recent discussion, and of Mark's current draft, is that there are some situations in which it seems that a lawyer should not be disciplined for failing to make this disclosure to the client. Evan's messages explain the problem in the appointed criminal defense situation.

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As for all indigent clients' lawyers being appointed by the courts, no, some are hired by relatives, friends, or others. I haven't yet looked at Mark's latest draft, but I don't think he proposed an exemption in that situation.

October 31, 2009 Julien E-mail to Kehr, cc Drafters, cc Chair & Staff:

If clients have some kind of redress, i.e., with lawyers who don't have the malpractice insurance, then I could agree with the rule. I think I understand the criminal defense situation because of the nature of this kind of practice. The only outstanding question for me then is if indigent clients are sometimes represented by other than courts appointees, then I think we ought to consider whether those attorneys should also have the insurance unless the pool covers them. If that kind of coverage exists, I can support the rule in its totality.

November 1, 2009 Sapiro E-mail to RRC List:

1. There is a problem with the spreadsheet for this rule. Paragraph (c) is not complete at page 353; paragraphs (d) and (e) are missing from that page and are not included at page 354.
2. Assuming that the proposed rule is as stated at page 356 of the agenda materials, I offer the following observations with some reluctance. I confess that I am opposed to this rule, so I am reluctant to offer any suggestion for improvement.
3. As to paragraph (c), I request clarification about the last exception. If a defendant in a criminal case is represented by the public defender, is that within the scope of this exception? I think it important that we make sure that public defenders are exempted from the rule because, unlike the beginning of paragraph (c), a public defender is not a full time employee of the client. The public defender is usually a full time employee of the government who is paid to representation a third party. A public defender should not be subject to the rule, but is he or she a "court-appointed lawyer" in the case? And if the county has a "private defender," contracts out its juvenile court representation, or similar system, are its lawyers subject to this rule? If not, why not? I request an explanation from someone who has more experience in this area than I do.
4. In proposed paragraph (e), there are two references to paragraph (a). Probably, one of them should be to paragraph (b).

November 1, 2009 Kehr E-mail to RRC List:

Here is what I think was to be included as paragraph (c) in the agenda materials (note that "full time" should be "full-time" because it is used as a compound adjective) ---

(c) This rule does not apply to a lawyer member who is a full time employee of the client, including full time employed as a government lawyers and or in-house counsel, when the member is representing or providing legal advice to the employer-client a client in that capacity, or to a court-appointed lawyer in a criminal or civil action or proceeding who is paid by or as authorized by a court.

The agenda draft also cuts off the paragraph (c) explanation. Here it is:

**RRC – Rule 1.4.1 [3-410] (Insurance Disclosure)
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Paragraph (c) has been modified to include court-appointed lawyers in criminal and civil matter 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 served 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. "Member" has also be changed to "lawyer." See explanation of changes to Paragraph (a). Finally, the sentence has been restructured to include court appointed counsel in addition to government and in-house counsel.

Mark asked for my suggestions on the drafting of Comment [4]. Here they are:

1. In its second line, I would insert "full-time" in order to track the suggested change to paragraph (c);
2. I would do the same at the tenth line after the first word in the line ("provides") and the fourteenth line after "direct";
3. Depending on what we do with paragraph (c), the quote in the first sentence might not be accurate; and
4. Because of the proposed addition of an exemption for court-appointed and paid lawyers, I would change the beginning of the last sentence of the current Comment paragraph to say: "These exemptions are limited"

Turning now to the explanation for the paragraph (c) changes:

5. I would insert a new first sentence along these lines: "The exemption for employee lawyers has been limited to full-time employees. It should be generally understood that full-time employee lawyers customarily do not carry malpractice insurance, but the existence of coverage might be ambiguous when the lawyer is a part-time employee."
6. In what currently is the second sentence of the explanation, I would remove the reference to civil lawyers because I don't think it is correct. I then would end the sentence: "... criminal defense lawyers because their appointment by and payment by or through a court makes it appropriate for the appointing court to determine the importance of malpractice insurance."
7. I would remove what currently are the third and final sentences of the explanation.

Finally, Jerry has raised the question of how this rule applies to public defenders. I'm not aware that anyone thought of this before, and I want to think about this before suggesting any possible change to paragraph (c).

November 1, 2009 KEM E-mail to RRC (reply to 10/31/09 Sondheim E-mail):

I've attached the complete comparison chart for Rule 1.4.1. As Harry noted in his e-mail, below, the row for paragraph (c) was cut off. It turns out that all of page 2 of the chart was

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inadvertently omitted from the agenda package. I've highlighted the missing page in the attached, scaled PDF. Please print just that page and insert it in your agenda materials after page 353.

Thanks,

Kevin

P.S. The draft is correctly numbered 2.1 (10/28/09)RD. The chart in the agenda materials is the same draft 2.1; the document that was copied, however, was never renumbered.

November 2, 2009 Foy E-mail to Julien, cc Drafters, Chair & Staff:

There are many constitutional provisions, statutes and Rules of Court providing for court-appointed counsel for indigent parties, including criminal matters and certain disputes involving child custody and dependency matters (e.g., California Rule of Court 5.534(h)(1) requires appointment of counsel for child unless the court makes finding that child would not benefit from such appointment and requires appointment of counsel for any indigent parent if out-of-home care is ordered or recommended unless parent knowingly waives).

In addition, the California legislature recently passed and Gov. Schwarzenegger has signed a bill ensuring counsel for indigent respondents in certain critical civil matters, including evictions, child custody, etc. which will substantially increase the volume of appointed counsel (although plan is to have counsel provided by public interest law firms, not the general attorney population).

November 2, 2009 Foy E-mail to Julien, cc Drafters, Chair & Staff:

I would like to point out that government agencies do employ lawyers that are part-time, seasonal, or limited-term and are not considered permanent for purposes of personnel matters. But that does not change the nature of the the representation and the relationship between the agency employer and these types of lawyer. Is there a reason why the exception applies only to full-time employee but not part-time, seasonal or limited-term?