

Professional Liability Insurance Disclosure



Hearing Report Austin, November 9

By Kevin Priestner

The State Bar of Texas Board of Directors held its seventh and final public hearing on whether lawyers should be required to disclose to clients if they carry professional liability insurance. Seven attendees chose to testify publicly — two in favor of requiring disclosure, five opposed to the idea. The Board will vote in January to make a recommendation to the Supreme Court of Texas. The Court sent a letter to the Board asking for its recommendation.

Several State Bar directors participated in the hearing, including Steve Benesh and Randy Howry of Austin; Guy Choate of San Angelo; David Copeland of Midland; and Barbara Young of Temple. State Bar President-elect Terry Tottenham of Austin introduced the meeting. Jonathan Smaby, executive director of the Texas Center for Legal Ethics, moderated. Audio recordings of the seven hearings, as well as background materials, are available at www.texasbar.com/plidisclosure.

Among the points raised during public testimony:

- A lawyer who has been practicing for 25 years (at small, medium, and large law firms) and has always carried insurance said he opposed the measure. "The emperor has no clothes," he said. The proposal would have the effect of forcing lawyers to buy insurance if they don't have it now. To have to tell clients that you don't have insurance will lead to clients going elsewhere. I read all the materials on the State Bar website. I read the public survey. Unless I missed it, the survey did not ask whether the presence or absence of insurance would affect the hiring decision. This proposal is being presented as an issue of consumer protection. Follow the money. I saw a billboard on I-10 that said "I sue lawyers." That's the new industry. There's only one ingredient needed for an "I sue lawyers" boom — widespread insurance. This proposal would benefit only lawyers. It will drive up costs. I think it's a bad proposal. I urge the Board to vote against it.
- A lawyer who handles legal malpractice claims said the Board of Directors and Supreme Court of Texas should follow the lead of more than 25 states and adopt a disclosure rule. I favor the simplest form of disclosure: post it to the State Bar website. Two-thirds of lawyers already have insurance and will be unaffected. In Virginia, in the first week after insurance disclosure was added to their website, they had 25,000 hits. It will not cost anything. I served on the task force that

studied insurance disclosure and had the task of talking to other states. I asked, "What happens? Do people buy insurance?" The answer, overwhelmingly, was, "No." After adoption, there may be a slight spike, but it quickly goes down. The ABA studied the issue and reported "no significant problems." Twenty-five states have this, with 100 years of collective experience. We lawyers are good at finding specters. In 1999, it was the Discovery Rules. They worked out fine. Every time we adopt rules there's a hue and cry. Once we adopt, it's easy. There's no cost involved in insurance disclosure. Seventy percent of consumers say we should do it. If we don't adopt disclosure, the Legislature will act. There was a bill introduced last session. It didn't go anywhere because there was an assumption that the Court was preparing to act.

- An administrative lawyer who has been practicing for 29 years opposed the measure. My understanding is that the goal is consumer protection. For 100 years, this has not been a problem. I'm unaware of any outcry. To me, the idea that the Legislature would or would not act is speculation. It makes as much sense to assume it won't. In my years of private practice, I do not recall a single client asking if I had insurance. If they had, I would question whether I wanted to represent them. If we disclose insurance, do we have to disclose other issues? Substance abuse? Health? We have a program that assists those struggling with substance abuse or depression. How long before we require disclosure of that? In my experience with workers' comp cases, it's easier to get a settlement out of insureds than non-subscribers. I'm also concerned about the anti-competitive implications. Where does it end? Do government lawyers have to comply? I oppose the idea and urge the Board to oppose it.
- The longtime director of Public Citizen Texas said he has fought with and against the bar on numerous occasions during his career. I think that people assume that lawyers have insurance and that there would be some method for recompense. Mistakes are made. Read the disciplinary actions. Just as lawyers are required to disclose the grievance process they should be required to disclose insurance. Good questions have been raised about complexity, but the key piece is: Are you insured? Whether legislation will be filed, I don't know, but it should. I attend a lot of public hearings. Typically it takes 6 months to 2 years of organizing to turn out 50–100 people. People trust the State Bar to do the right thing. They assume you will be in favor of consumers' right to know. That's the reputation you have.
- A sole practitioner who handles primarily estate planning and probate work opposed the measure on economic grounds. I have never had a grievance filed against me and have never been sued. When I left the large firm I was practicing with and obtained malpractice insurance, it was a reasonable premium for the first few years. I have high net-worth individuals as clients. Soon my premiums were doubling every year. I inquired and the answer I got back is that insurance companies don't want to insure those with high net-worth individuals. Finally, I reached the point where, as a matter of principle, I discontinued carrying insurance. I'm not hearing anyone proposing to go to the insurance companies and advocate on my behalf. If this proposal passed, I would be interested to know what the minimum coverage will be. Also, if the proposal passes, I think it's important that website notification will suffice.

- A plaintiff's lawyer who has always carried insurance opposed the disclosure requirement. When I first read about it, I thought it sounded like a good idea. I now believe this is a backdoor attempt to curb the rule of law. There's a captive audience: these people have to buy insurance. If I try a case against an insurance company, does it kick me in the backside and raise my premiums so that I can't practice? When they wanted a med-mal overhaul, it worked. There isn't a lot of that today. The fox is guarding the henhouse. Insurance companies aren't going to care about lawyers and it's going to end up hurting the public.
- A lawyer who attended the hearing without his mind made up and not intending to testify said he thought he represented the silent majority. We don't have staff. We're constantly cutting the bottom line. When this issue came out, I thought, "This is not a big deal." I carry PLI. Maybe this will actually help me. Some can afford. Some cannot. At the end of the day, clients are not going to know what having insurance means. Does this hurt me? I carry insurance because I don't want clients to suffer. But there's always going to be someone who is unhappy. Maybe this will prompt them to file claims. I don't know of any other profession that does this. Every year, my malpractice rates change. Every year, there's a new stack of papers to go through. If this proposal goes through, it will create an incentive to sue and premiums will go up. Therefore, I will drop coverage. The profession has thrown up too many obstacles. I want people to be treated fairly — including lawyers. At the end of the day, we'll come full circle and what will we really have accomplished?