

# Professional Liability Insurance Disclosure



## Hearing Report Dallas, October 28

By Kevin Priestner

More than 50 lawyers and members of the public took part in a lively public hearing on whether lawyers should be required to disclose to clients if they carry professional liability insurance. The Supreme Court of Texas has asked the State Bar Board of Directors to make a recommendation on the issue. The Board is soliciting input in advance of its anticipated January 2010 vote on the issue.

The hearing — the fifth in a series of seven around the state — took place at the Belo Mansion, home of the Dallas Bar Association. Several State Bar directors from North Texas were on hand, including Talmage Boston, Beverly Godbey, Tim Mountz, Mark Sales, Steve Bolden, John Jansonius, and Dan Micciche of Dallas; Janna Clarke and Mark Daniel of Fort Worth; Deborah Gagliardi of Arlington; Mike Gregory of Denton; John Hatchel of Woodway; and Chad Baruch of Rowlett. State Bar President Roland Johnson of Fort Worth provided an overview of the issue. Jonathan Smaby, executive director of the Texas Center for Legal Ethics, moderated the discussion. An audio recording of the hearing is available at [www.texasbar.com/plidisclosure](http://www.texasbar.com/plidisclosure).

Ten lawyers testified publicly. With varying levels of vehemence, nine expressed opposition to a disclosure requirement while one voiced support for the measure. Other attendees indicated their positions in writing. Of those, 19 opposed making insurance disclosure mandatory while one supported the proposal.

Among the points raised during public testimony:

- A sole practitioner with 30 years' experience said she was very strongly opposed to requiring insurance disclosure. I have never had a client ask if I have insurance and I've only had a few ask if I'm board certified. All that they care about is my experience. I've asked colleagues in other fields. Not one said they would ask a lawyer about insurance coverage. No other profession requires this. We deal with people's lives. It's been said this is an issue to promote public protection. I beg to differ: It's a back-door way to require malpractice insurance. As a solo, I've decided not to carry malpractice insurance. I take as much CLE as I can. I would rather put money into a client victims' fund or pro bono. I hope the Supreme Court hears loud and clear: This is not an issue. We don't need insurance disclosure.

- A sole practitioner licensed since 1969 said he was totally against the plan. This is the proverbial "camel's nose under the tent." I remember when MCLE was just a good idea. This is another good idea that will go to the extreme. In the abstract, it sounds like a wonderful idea. It will result in endless lawsuits, three-fourths of which won't result in anything. The idea that this would be a grievable matter is another example of government-applied pressure on daily life. The cost will be paid by clients. I don't do true pro bono work; I may charge clients \$25/hour or \$50/hour so that they invested in the representation. If disclosure is required, that may end. Legal malpractice lawyers are in business to make money. They'll say, "Look, he's a lawyer, he's got liability, sue him!"
- A small-firm plaintiffs lawyer in Sherman who carried professional liability for many years said doing so only made him a big target. After 25 years of carrying a \$1 million policy, I decided to drop it. The next time I received a letter, I said I don't have insurance and never heard from the lawyer again. After tort reform, doctors are no longer a good target. All we need is a bunch of lawyers with \$1 million policies. If disclosure is required, we'd all feel pressured to get policies. I have probably done 1,500 wills. Do I have to track all of them down and disclose? What about a person who comes through door? It's going to be embarrassing for lawyers. I suspect the pressure is coming from the insurance companies.
- A Houston lawyer who could not attend the Houston public hearing said he is a proud personal injury lawyer. I was in Dallas to meet with clients. They didn't ask about insurance. They were more concerned with the Supreme Court and the Legislature taking away the right to seek compensation for negligence. You don't see a lot of legal malpractice cases on the books. There's a reason for that. Even if you have insurance, it's incredibly difficult to prove. You have to prove a case within a case. What is this issue about? It's a paternalistic Supreme Court deciding what we should do. It will be a sad day when insurance dictates what's ethical in Texas. What happens if after signing we cease to have coverage? Is that breach of contract? I don't believe this is right. I may be the only lawyer who has pursued a doctor who didn't have insurance. This proposal is misguided and should be rejected.
- A former president of the Irving Bar Association whose small firm carries professional liability insurance said the proposal is ridiculous. What is the Supreme Court trying to do? The majority of lawyers are solos or small-firm practitioners. We need to send a clear message to the Supreme Court and the State Bar Board of Directors to strike this down. In my reading, I can't find any other profession that requires this. Please vote against this.
- A lawyer who handles legal malpractice cases said that, as usual, he found himself in the minority. The absence of insurance does not stop you from being pursued. I respectfully disagree with the "camel's nose under the tent" analogy. There are many states that require disclosure. From the standpoint of one who sees a lot of people who are unhappy with their representation, I approach this from the perspective of what's best for the client. My experience is that people who have assets they need to protect have insurance. I am sympathetic to the concerns of small-firm practitioners, but I do believe disclosure would benefit clients.

- The president of the Tarrant County Bar Association, testifying in his personal capacity, said he is against the proposal. The fact that you disclose today misrepresents what coverage you will have tomorrow. Disclosure would open a Pandora's box. What's going to be next? If I have a \$1 million limit, can I not try a \$2 million case? If I don't have insurance, does that mean I'm a bad lawyer or a very good lawyer? If a client asks, I absolutely have to disclose. But do I then have to disclose what social organizations I belong to? I also believe there will be disparate impact. What about the criminal bar? You basically can't sue a criminal lawyer for malpractice.
- The president of the Ellis County Bar Association, speaking of his personal views, said he had not talked to one person in favor of insurance disclosure. Most have a general practice. What would this mean for a solo with a mixed civil/criminal practice? As a young lawyer, this is just an added burden. Most of the young lawyers I talk to plan on going bare. What if I get a tractor/trailer case that goes above my policy? Do I have to associate with other counsel? Do I have to check files monthly? Quarterly? If it's not broke, don't fix it.
- A sole practitioner agreed with previous speakers' comments and underscored the disparate affect disclosure would have on small-firm practitioners and minority lawyers.
- A former president of the J.L. Turner Legal Society in Dallas who currently serves as chair of the State Bar Council of Chairs related two questions he had received: "Are there fewer grievances in the states that have implemented insurance disclosure?" "Are there more lawsuits or fewer lawsuits in those states?"