

Professional Liability Insurance Disclosure



Hearing Report El Paso, October 27

By Kevin Priestner

During the fourth of seven public hearings the State Bar of Texas is holding around the state on whether lawyers should be required to disclose to clients if they have professional liability insurance, all six of the attendees who testified publicly spoke against mandating disclosure. At the request of the Supreme Court of Texas, the State Bar Board of Directors will vote to make a recommendation to the Court during the Board's January 2010 meeting.

The public hearing took place at the El Paso Commissioners Courtroom. State Bar President Roland Johnson attended, as did three members of the State Bar Board of Directors: Jeanne C. "Cezy" Collins and Cori Harbour of El Paso, and Pablo Almaguer of McAllen. Harbor is president of the Texas Young Lawyers Association; Almaguer serves as one of four minority directors on the Board. 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.

Among the points raised during public testimony:

- "If coverage becomes mandatory, you can have my bar card," a private practitioner said. It's senseless. Professional liability insurance is a notorious litigation-breeder. It advertises: "Sue me!" My clients are looking at six months in jail on DWI charges, not \$40 million contracts. I don't know what good it would do except to send cases to other lawyers. I didn't go to law school to get rich. I went to law school to help people out.
- An El Paso lawyer who served on the State Bar Task Force on Insurance Disclosure but was speaking only of his personal views, said that his litmus test is to consider if disclosure is in the best interest of clients. If so, he would vote yes. The answer, however, is unknown. There is no evidence on the issue. The American Bar Association commissioned no studies. The State Bar did a phone survey, but did not ask the questions in a manner to elicit how important insurance disclosure is when considering hiring legal representation. If disclosure is required, it should not take the form of a disciplinary rule. It should be like paying dues or fulfilling MCLE and should be posted to the State Bar website.
- A small-firm practitioner in El Paso who handles primarily real estate, probate, and bankruptcy foreclosures said he is strongly opposed to mandatory disclosure.

His firm has carried liability insurance since he joined in 1996. There has been one frivolous claim. The types of insurance coverage offered are "all over the map," he said. I don't see a reason for the State Bar to mandate. The coverage is for the lawyer. It does nothing for the client. I've never had a client ask if I carry malpractice insurance. I've questioned all the members of my firm. They all oppose. I polled 14 colleagues, five of whom are board certified. Not one wavered. They were unanimous in their opposition. It is not in the best interest of the client.

- A government lawyer who practiced seven years in private practice said he had never had anyone ask about insurance coverage. If so, I'd probably have referred the case, he said. It seems a very adversarial question to start the attorney-client relationship. If there's no benefit, why should we do it? If disclosure is required, it should not follow the Supreme Court Grievance Oversight Committee's recommendation that it be a disciplinary rule. It should be handled administratively.
- A sole practitioner said that in his 37 years of practice he had never had anyone bring up the subject of professional liability insurance and never had anyone threaten to sue. As president of the family law foundation in El Paso, he is especially sensitive to the financial burdens it would place on family law practitioners. We're in the hinterlands. We're not trying to divide \$100,000 estates. We're trying to figure out who gets custody of the Lone Star Card. Those of us in the trenches would say: If it ain't broke, don't fix it. I tell clients, If they have an issue, file a complaint. To add an additional tier to that process is not a good idea.
- A sole practitioner who has been licensed for 52 years sees the proposal as an attempt to sell more insurance. I'm not for it. This would result in the further commercialization of the practice of law. I have a part-time practice and am not making enough to pay insurance. This would hurt solos by allowing bigger firms to say, "I've got more malpractice insurance."