Hearing Report
Houston, October 16

By Kevin Priestner

Thirty-five people, almost all of whom were lawyers, attended a public hearing in Houston on whether attorneys should be required to disclose to clients whether 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.

Ten attendees testified publicly. All expressed opposition to a disclosure requirement, with a few offering their preferences should such a policy take effect. An additional 17 attendees registered their opinions in writing. Fifteen of those expressed opposition to disclosure, with two indicating "No opinion." No one offered support for disclosure, although State Bar President Roland Johnson, in the interest of fairness, read into the record from a task force report the primary arguments in support of disclosure.

Several State Bar directors were on hand, including Glenn Ballard, Tim Belton, Warren Cole, Bert Jennings, Bill Ogden, Tommy Proctor, and Travis Sales. Johnson moderated the discussion, which took place at South Texas College of Law. A digital recording of the hearing is available at www.texasbar.com/plidisclosure.

Among the points raised during public testimony:

- The president of the Texas Criminal Defense Lawyers Association said the organization strongly opposes any requirement to disclose, but, if disclosure is required, believes criminal defense lawyers should be exempt from the requirement. To sue for malpractice, you must prove innocence, he said. Moreover, falsely accused individuals have recourse up to $80,000. A disclosure requirement would open the floodgates to frivolous litigation.
- A family law practitioner said many people involved in family law matters are not happy. Sometimes justice is served when your client loses, he said. It doesn't mean you're a bad lawyer. These are claims-made policies, not occurrence policies like car insurance. If disclosure were required, the public would be confused and think, "If there's a bad result, I can make a claim." A disclosure requirement would cause even more confusion than the "Not Board Certified" requirement for lawyer advertising did. All of these policies are self-eating — they're reduced by all payments, including defense costs. This doesn't even take

into account the arcane terminology in these policies. It may take two hours to explain to a client. Does the lawyer bill for this time?

- A young lawyer who handles mostly personal injury and collections work said that in five years, he has almost never had an individual ask about insurance. If disclosure is required, it will mislead the public about what is important in the attorney-client relationship. As an individual practitioner, I will be at a competitive disadvantage, along with other sole practitioners who don't have insurance, he said. You're going to cut out sole practitioners for a reason that's not that important.
- A sole practitioner with 15 years' experience expressed concern that disclosure would be prohibitively expensive to his practice. It would very likely end my practice, he said. I do work for many insurance companies. Not once has one of them asked me if I have malpractice insurance. I am wary of an increasing nanny state. We all should have freedom to contract. If I have to start affirmatively telling clients that I don't have insurance, my business will drop significantly. It leaves the perception of lack of professionalism. I have never had a grievance filed against me. That doesn't mean all clients have been 100 percent happy. But I know what I'm doing. Please do not endorse this proposal. If clients think it's important, they will ask.
- A newly licensed lawyer with a general practice said he does carry professional liability insurance, but only because as a new lawyer it is comparatively affordable. I want to discuss the issue from the consumer's side, he said. Will costs go up? I believe so. My clients tend to be those who have never had representation before. They make just enough not to qualify for legal aid. Disclosure will increase the costs of practice. It will interfere with certain clients' being able to afford legal representation. When I opened my practice, I asked several lawyers for advice on whether to carry insurance. They said: "If you want to get sued, get insurance." Disclosure would create a market for lawyers suing other lawyers.
- A sole practitioner who has been practicing for 24 years and carried insurance that entire time said she was "totally and absolutely against" the proposal. It seems aimed at sole practitioners, she said. I will really question whether I go on, despite the fact that I've always carried it.
- A lawyer licensed since 1983 said the proposal was simply "a bad thing." You would be adding a layer of negativity to the legal profession. I read recently in the *Texas Bar Journal* that we're serving only 24 percent of those in need. Let's get rid of this disclosure issue and get back to real issues.
- A criminal defense lawyer licensed since 1996 who handles a lot of court appointments was concerned that she didn't see any exclusions in the proposal. PLI disclosure would foster litigation, she said. In most cases, people incarcerated are "not guilty." This would create a new industry, with additional lawyers doing additional work. It would be an unreasonable burden on criminal defense lawyers and small-business owners.
- A lawyer in his 30th year of practice without PLI coverage said the proposed disclosure requirement would negatively affect public policy cases. I don't know if we could have advanced some of the cases I've worked on absent an incredible

discount of fees. From a public policy standpoint, I'm opposed. If the idea behind the proposal is to create for consumers a way of knowing how judgment-proof a lawyer is, couldn't that be better achieved, hypothetically speaking, if mandatory disclosure of net assets were required? If the public wants a pot of money to shoot at and to know how big the pot is, wouldn't that be a better solution? I throw that out there not out of support, but to test the integrity of the concept.

- A law professor opposed the measure for two reasons: First, dislosure puts an attorney taking a new client in a bind. Because the attorney has immediate responsibilities to the client, the attorney must explain that the attorney's and client's interests differ. It immediately puts that relationship in conflict. Second, I don't see much benefit. I talk with a lot of general counsel. If they're interested, they ask. If disclosure is made, the immediate inference in uninsurability. The negative inference is unwarranted.