

A Viewpoint on Disclosure of Malpractice Insurance by Texas Lawyers

By:

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On April 14, 2010, the Texas Supreme Court informed the Texas State Bar that it would not require mandatory disclosure of professional liability insurance by Texas attorneys. In a letter to State Bar President Roland Johnson, Chief Justice Jefferson wrote, "Having considered the State Bar's recommendation and the materials' supporting the recommendation, the Court will retain the status quo."ⁱⁱ

It is significant that Chief Justice Jefferson chose the words "retain the status quo" because it helps us understand why Texas rejected the ABA's recommendation to disclose professional liability insurance.

Background

The U.S. is undergoing a shift in values that moves away from rugged individualism toward a collaborative community. Studies by Clare W. Gravesⁱⁱⁱ suggest that this just one of the cultural shifts that has shaped our nation and the State of Texas. In the 1800s, Texas progressed from the frontier "wild west" to a culture of "law and order." In the 1900s, Texas capitalized on its natural resources and ingenuity to achieve a rank of fourth in the nation in the number of billionaires (behind New York, California, and Washington).^{iv} Now, in the 2000s, portions of the U.S. and Texas are moving into the culture of openness and transparency, which first caught our nation's attention in the 1960s. The new attitude is one of reconciliation and collaboration; it seeks to protect the helpless and provide justice to the downtrodden.

ABA Model Rule Illustrates the Values Shift

In August of 2004, the ABA House of Delegates approved a new Model Rule on Insurance Disclosure requiring lawyers in private practice 1) to inform the highest court in their jurisdiction whether they maintain professional liability insurance and 2) to make that information available to the public.^v

The ABA Standing Committee on Client Protection provided the following rationale for the rule:

"The purpose of the Rule is to provide a potential client with access to relevant information related to a lawyer's representation in order to make an informed decision

about whether to retain a particular lawyer. The intended benefit of the Model Court Rule is to facilitate the client's ability to determine whether a lawyer is insured.... The Model Court Rule on Insurance Disclosure would reduce potential public harm by giving consumers of legal services an opportunity to decline to hire a lawyer who does not maintain professional liability insurance."^{vi}

The language of the model rule is clearly part of the new culture – "facilitate the client" and "reduce potential public harm."

The ABA reports that 26 states and the District of Columbia have adopted the rule in various forms.^{vii}

States requiring disclosure directly to client	7	AK, CA, NH, NM, OH, PA and SD
States requiring disclosure on annual registration statement	18	AZ, CO, DE, HI, ID, IL, KS, MA, MI, MN, NE, NV, NC, ND, RI, VA, WA and WV
States considering adoption	4	ME, NY, UT and VT
States mandating PLI	1	OR
States that decided not to adopt the Model Court Rule	5	AR, CT, FL, KY and TX
States that have not indicated a decision	15	AL, GA, IN, IA, LA, MD, ME, MO, MS, NJ, OK, SC, TN, WY, and WI; also DC

Texas was Divided

Texas was divided in its decision about disclosure of professional liability insurance. Those in favor of disclosure included the Grievance Oversight Committee, the public (65 – 75 percent), and a few attorneys. Those opposed to a rule included the Texas State Bar Board of Directors and the majority of Texas lawyers (as much as 95 percent). The State Bar appointed Task Force on Insurance Disclosure was divided in its decision, voting 6 to 5 against requiring lawyers to inform potential clients of whether they were covered by PLI.

The Grievance Oversight Committee (appointed by the Supreme Court of Texas) stated, "This recommendation is based upon our study of the growing effort among states to provide a greater level of transparency and public protection for persons who have been harmed through the negligent acts of lawyers."^{viii} The Committee's language clearly reflects the new value system, challenging the status quo by recommending a "greater level of transparency and public protection." The State Bar appointed Task Force reported survey results, listed the pros and cons, and made its recommendation against disclosure, but it did not state its rationale for the decision.^{ix} This may be because members of a status quo value system do not see the need to defend what has been unquestioningly accepted for so long.

Opinions Gathered by the Texas State Bar

When the decision of the Task Force and the recommendation of the Grievance Oversight Committee reached the Texas Supreme Court, the Court requested the Texas State Bar to make a recommendation about requiring disclosure of professional liability insurance.^x

The Texas State Bar conducted several polls, hearings, and focus groups to gather opinions about disclosure of professional liability insurance. First, the State Bar advertized opportunities to express opinions.

- October 5, 2009: State Bar Directors sent first class letters to each of their constituents, providing an overview of the issue, timeline, and information on where to find additional resources.^{xi}
- November 2009: The Texas Bar Journal published pro and con articles.^{xii}
- December 2009, State Bar President Roland Johnson sent an email letter to all members.^{xiii}

In response, 204 comments were posted on the Texas Bar Blog — 92% were opposed to mandatory disclosure; 8% were in favor of disclosure. The email set up for responses to be sent to the State Bar President generated 182 letters and comments, 83% opposed to mandatory disclosure, 12% in favor of disclosure, and 5% were neutral. The State Bar Sections and Committees received eight responses — six against and two neutral. Local bar associations received six responses — five against and one neutral.^{xiv}

Telephone Surveys

In telephone survey of attorneys, "65% of the attorney respondents believed that Texas lawyers in private practice should not be required to disclose whether they carried professional liability insurance."^{xv}

The State Bar of Texas commissioned the University of North Texas (approximately November 2009) to conduct a survey of 500 Texas residents regarding their opinions on the issue of professional liability insurance disclosure by lawyers. The top five factors the public considers when hiring an attorney: price, success rate, experience, specialty, and personality/character. 64% indicated that lawyers should be required to disclose whether or not they have professional liability insurance. 36% would be willing to pay more in legal fees to ensure that their attorney carried professional liability insurance.^{xvi}

These surveys reflect the gap between the prevailing value systems — attorneys prefer the status quo while the public prefers more openness of information.

Public Hearings

Seven hearings were announced through press releases, community calendars, the Texas Bar Journal, the State Bar website, social media avenues (blogs, Facebook, Twitter), newspapers, radio and television news programs.

Beginning in October 2009, the State Bar held public hearings in San Antonio, Harlingen, Houston, El Paso, Dallas, Lubbock, and Austin. One hundred and twenty-five people signed in at the hearings (nearly all were attorneys) — 95% were opposed to disclosure, 5% were in favor requiring disclosure, and 10% were neutral.^{xvii}

The most frequent objections to disclosure were 1) the possibility of increased litigation against lawyers and 2) the possibility that lawyers would need to raise their fees to cover the cost of insurance. These concerns are based on assumptions and are not necessarily based on fact. For example, South Dakota requires disclosure and has not experienced an increase in malpractice claims or in the cost of legal services.^{xviii} Further, there appears to be a significant misperception concerning the cost of malpractice insurance. Andrew Biggio of First Indemnity Insurance Services, Inc. explains that a \$100,000/\$300,000 policy for a solo practitioner could cost about \$800 to \$1,100 per year, assuming no adverse prior history, and that the premiums could be finance by paying twenty percent down and making seven monthly installments of as little as \$91 for seven months. The monthly payments are thus less than most lawyers pay for a car payment. And, professional liability insurance would be an expense that could be easily offset by one additional billable hour each month.

Focus Groups

The Texas State Bar commissioned focus groups to determine public opinion about the issue of insurance disclosure. After Roland Johnson presented the pros and cons of E & O insurance, 65% of the members of the focus group responded that they were still in favor of requiring disclosure.^{xix} Thirty-six percent also indicated that they would be willing to pay higher fees to ensure that their attorney would have insurance.^{xx}

The Recommendation of the State Bar

On February 2, 2010, Texas State Bar President Roland Johnson wrote to the Texas Supreme Court, "The culmination of the Board process of collecting information, listening to both members and the public, and discerning the various issues was a 39-to-1 roll call vote to recommend that attorneys not be required to disclose whether they are covered by professional liability insurance."^{xxi}

Texas Supreme Court Advisory

On April 16, 2010, the Texas Supreme Court issued its advisory, "The Supreme Court of Texas has decided against a proposal that would have required attorneys in the state to disclose whether they have professional-liability insurance."^{xxii}

Conclusion

Texas is one of five states that have decided not to require attorneys to disclose the presence or absence of professional liability insurance. As it stands, the decision by a Texas lawyer to not carry professional liability insurance does not violate any rule or professional conduct. Inasmuch as there presumably is no attempt to deceive clients, the decision is not a decision governed by the ethical rules proscribing the conduct of lawyers. Instead, the decision merely reflects the current value system of the great majority of Texas lawyers.

A caution worth noting: if the public continues to move in the direction of the new value system identified by the ABA, then the issue of disclosure will likely arise again. If the issue arises at a time of a watershed event, then Texas lawyers could see the tables turned on them. In a worst case situation, Texas lawyers could be put to the test of choosing to accept mandatory disclosure of professional liability insurance or risk loss of the right of self determination.

It would seem that the better course of action would be to address the issue before the right of self determination becomes the issue. Perhaps an understanding of what the real cost of carrying professional liability insurance is would allow Texas lawyers to make an informed decision on the issue and avoid the risk of loss of self determination.

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ⁱⁱ Letter from Chief Justice Jefferson to Texas State Bar President Roland Johnson:
http://www.supreme.courts.state.tx.us/advisories/pdf/WBJ_Letter_Mandatory_Insurance_Disclosure_041410.PDF.

ⁱⁱⁱ Clare W. Graves, "Human Nature Prepares for a Momentous Leap" *The Futurist*, April 1974, pp. 72-87. http://www.clarewgraves.com/articles_content/1974_Futurist/1974_Futurist.html.

^{iv} http://www.openyear.org/wp-content/themes/church_20/billionaires_2/billionaires_2.htm.

^v The vote was divided, 213 "for" and 201 "against;"

http://www.abanet.org/cpr/clientpro/malprac_disc_rule.pdf.

^{vi} Chairman Robert D. Welden, Report from the ABA Standing Committee on Client Protection, August 2004, pp. 1, 5; http://www.texasbar.com/pliflashdrive/material/9_ABA_Model_Court_Rule.pdf.

^{vii} As of April 19, 2010; http://www.abanet.org/cpr/clientpro/malprac_disc_chart.pdf.

^{viii} Report from Grievance Oversight Committee,

http://texasbar.com/pliflashdrive/material/8_Grievance%20Report.pdf.

^{ix} Memorandum from the Texas Task Force on Insurance Disclosure, June 11, 2008, p. 3,

http://texasbar.com/pliflashdrive/material/3_TaskForce_Report_June08.pdf.

^x Letter from Chief Justice Jefferson on June 23, 2009,

http://texasbar.com/pliflashdrive/material/SCt_Letter_062309.pdf; see also the response from Texas State Bar President Roland Johnson: http://texasbar.com/pliflashdrive/material/SBOT_response_0709.pdf.

^{xi} http://texasbar.com/pliflashdrive/material/Directors_Letters.pdf.

^{xii} http://texasbar.com/pliflashdrive/material/Pro-Con_PLI_72TBJ822.pdf.

^{xiii} <http://texasbar.com/pliflashdrive/material/MessageFromSBOTPresident.pdf>.

^{xiv} <http://www.texasbar.com/pliflashdrive/material/ExecSummaryFinal.pdf>

^{xv} Memorandum, Texas Task Force, p. 3,

http://texasbar.com/pliflashdrive/material/3_TaskForce_Report_June08.pdf

^{xvi} PLI Disclosure Survey of the Public, November 2009,

<http://texasbar.com/pliflashdrive/material/PublicSurvey.pdf>

^{xvii} Links to recordings and transcripts of the meetings are available online at

<http://www.texasbar.com/pliflashdrive/home.html>.

^{xviii} Memorandum, Texas Task Force, p. 3.

http://texasbar.com/pliflashdrive/material/3_TaskForce_Report_June08.pdf.

^{xix} Public Opinion Focus Group Study, Human Interfaces, Inc., p. 11;

http://www.texasbar.com/pliflashdrive/material/SBOT%20FG%20Report_Final_V3.pdf

^{xx} PLI Disclosure Survey of the Public, November 2009,

<http://texasbar.com/pliflashdrive/material/PublicSurvey.pdf>

^{xxi} Letter from State Bar President Johnson to Chief Justice Jefferson;

<http://www.supreme.courts.state.tx.us/advisories/pdf/Binder1.pdf>.

The only dissenting voice in favor of recommending a disclosure rule was Bill Ogden who was surprised by the vote because 1) the 2008 Task Force vote and 2) the 2004 ABA vote was much closer. 26 Law. Man. Prof. Conduct 105, American Bar Association and The Bureau of National Affairs, Inc., February 17, 2010, pp. 1-2. <http://www.abanet.org/cpr/texas.pdf>.

^{xxii}

http://www.supreme.courts.state.tx.us/advisories/Professional_Insurance_Disclosure_041610.htm.