

STATE BAR OF TEXAS

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PRESIDENT



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February 2, 2010

Chief Justice Wallace B. Jefferson
Supreme Court of Texas
201 West 14th Street
Austin, TX 78701

Dear Chief Justice Jefferson,

On behalf of the State Bar of Texas Board of Directors, thank you for the opportunity to engage the members of the legal profession and the public in the professional liability insurance disclosure question. It has been a pleasure to listen, learn, and process what Texas lawyers and Texas citizens have to say on this issue. It is with gratitude and respect that the State Bar Board of Directors reports back to the Court.

A process was established to provide information and receive feedback in a variety of methods. The process included personal communications with Texas lawyers, official communications through the Texas Bar Journal and State Bar website, numerous presentations, public hearings, focus groups, blog posts, and outreach to sections and other law-related organizations. State Bar directors committed to listen and withhold taking a position until the process was complete.

During this process, the State Bar of Texas learned a great deal from its members and the public.

Texas lawyers overwhelmingly expressed their opposition to a requirement that they disclose whether or not they have professional liability insurance. There were many reasons for that opposition. Some believed that it would cause confusion to clients and potential clients who might not understand the intricacies of insurance coverage. Others expressed the economic reality of practicing law at this time and worried that they already could not afford health insurance, that providing pro bono legal services was already cutting into their billable time, and that the reality of informing a client might be more problematic than it seemed on the surface. This opinion was repeated most often by solo, small practice, and minority attorneys, who believe that implementation of such a proposal would be more perplexing than informative to the public. They did not believe that only requiring disclosure (versus requiring insurance) resolved the issue of minimizing the impact on those who were not covered by professional liability insurance, regardless of the reason. Many lawyers related they had never had a client or potential client ask whether they had

professional liability insurance and believed that this proposal would interfere with the attorney client relationship before it had an opportunity to begin.

The public is largely unfamiliar with the issue of professional liability insurance disclosure. Most people who hire attorneys do not ask them if they have professional liability insurance. When asked for the top things they look for in hiring an attorney, professional liability insurance is not mentioned even in the top 10 answers received. Once the public has more understanding of what professional liability insurance is, the percentage that think lawyers ought to disclose drops to about 54 percent.

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. In an effort to assist the Court and to ensure Justices have all the materials and input gathered by the State Bar of Texas, attached are the motions voted on, an audiotape of the board deliberations, as well as all of the background information collected by the Bar in its effort to understand the various perspectives on the issue.

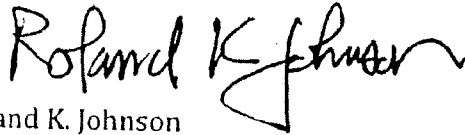
After the vote to recommend against disclosure, the Board of Directors in its effort to respond to the Court's inquiry, voted unanimously by voice vote (one director abstained after unavoidably missing the discussion) to recommend that *if* professional liability insurance disclosure were to be required, that disclosure should be implemented through an administrative rule. The Board was hesitant to answer this question after voting to recommend against disclosure and respectfully recommends that if the Court determines that disclosure should be required, that it seek the Board's input and recommendation as to the details of the implementation of such requirement.

Although the Board voted against disclosure, the Bar learned several things in this process. Its members are serious about self-governance and are pleased to be asked for input and consideration. Their commitment to access to the justice system and serving their clients well is paramount. Even when there is disagreement this thoughtfulness is clear. The public would like more information about the legal profession and issues to consider when hiring an attorney. Much about the justice system, hiring a lawyer, and what is going to happen during representation and trial remains a mystery. The public wants more information about lawyers, the State Bar of Texas, and the judicial system. The State Bar is working to make its website more friendly to the public and will create an easy-to-find FAQ of issues to consider when retaining an attorney.

It has been a great privilege to participate in this important process for the profession and the public. We are available to further discuss the process employed by the board, the input received, and the final recommendation, if that would be helpful. We believe that the information collected will be useful to the Court and any

other entity or individual interested in this issue. Thank you for your confidence in asking the Bar to complete this important task and to make a recommendation on this important issue.

Sincerely yours,

A handwritten signature in black ink that reads "Roland K. Johnson". The signature is written in a cursive style with a large, sweeping initial "R" and a long, horizontal flourish at the end.

Roland K. Johnson
President

Enclosures

Executive Summary

On June 23, 2009, outgoing State Bar of Texas President Harper Estes and incoming President Roland Johnson received a letter from the Supreme Court of Texas asking the State Bar Board of Directors to make a recommendation on the issue of professional liability insurance disclosure.

The issue of professional liability insurance disclosure is not a new issue and has been debated by other states, on the national level, and by task forces and committees in the state of Texas. In 2008, a State Bar of Texas task force narrowly voted, by one vote, against requiring lawyers to inform potential clients of whether or not they were covered by PLI. The Board accepted that report and forwarded it to the Court. In June 2009, the Grievance Oversight Committee, a Supreme Court committee, reported in favor of requiring attorneys who do *not* carry professional liability insurance to inform their potential clients in writing prior to taking the case.

The discussion among law professionals on this matter has led to good arguments both for and against disclosure, with many thoughtful arguments on both sides of the issue. To ensure that current directors had thorough insight into the issue and to provide the Court with accurate information about the perspectives of Texas lawyers and Texas citizens, the State Bar of Texas worked throughout the summer, fall, and winter of 2009-2010 to gather information and solicit input from across the state prior to the Board's vote on January 29, 2010. This executive summary provides an overview of the State Bar's efforts to understand the issue and the perspectives of individual lawyers, sections, local bar associations, and members of the public.

Communications

State Bar Directors sent first-class letters to each of their constituents that provided an overview of the issue, timeline, and information on where to find additional

resources. Directors personalized the information but essentially sent the same information to every licensed Texas lawyer, including those who practice outside the borders of Texas. Attorneys could respond to their director(s), post comments to a blog on the State Bar of Texas website, email the State Bar president, or send written responses to the State Bar president. One director wrote a column for a major city business newspaper informing the public of the issue and asking for input.

Pro and con articles were published in the November issue of the *Texas Bar Journal*. An email letter from State Bar President Roland Johnson was sent to all members in December. Numerous sections and local bar associations polled their members and discussed this issue at council and board meetings.

The Texas Bar Blog was active with 204 comments posted as of Jan. 15, 2010 — 187 (92 percent) were opposed to mandatory disclosure; 16 (8 percent) were in favor of disclosure (10 of those appear to be by doctors or other non-lawyers who find the idea that lawyers are worried about getting sued “ironic”); one neutral (written by an independent insurance broker specializing in legal malpractice insurance” detailing why attorneys should consider insurance).

The email set up for responses to be sent to the State Bar president generated 182 letters and comments, 151 (83 percent) opposed to mandatory disclosure, 21 (12 percent) in favor of disclosure, and 10 (5 percent) were neutral.

Eight responses were received from State Bar Sections and Committees with six against and two neutral (letters encouraging members to send feedback). Likewise, six responses were received from local bar associations with five against (in the form of resolutions and polls) and one neutral (an informational newsletter article).

Public Hearings

In an effort to ensure that both lawyers and members of the public had an

opportunity to provide input, the State Bar conducted a series of public hearings around the state. The seven hearings were publicized through press releases, community calendars, the *Texas Bar Journal*, the State Bar website, and other social media avenues (blogs, Facebook, Twitter). The information was published and printed in various newspapers and on radio and television news programs prior to the hearings.

Beginning in October 2009, the State Bar held public hearings in San Antonio, Harlingen, Houston, El Paso, Dallas, Lubbock, and Austin. Directors from districts surrounding each public hearing were in attendance at each of the hearings. All attendees were afforded the opportunity to speak and, in addition to or in lieu of testifying, submit their position or comments in writing. One-hundred and twenty-five people signed in at the hearings, with six indicating they were for requiring disclosure, 12 indicating no position, and the remainder of those signing in indicating they were against required disclosure. Of those in attendance at the public hearings, 61 testified. All of the hearings were audio-recorded and within 24 hours of each hearing, the full recording was made available on the State Bar website for download, and a written report on the hearing was posted to the Texas Bar Blog.

Survey

In an effort to update and expand on information gathered in a survey of Texans in 2008, the State Bar of Texas commissioned the University of North Texas (in November 2009?) to conduct a survey of 500 Texans regarding their opinions on the issue of professional liability insurance disclosure by lawyers. Responding to some of the issues raised during the public hearings and in an effort to have a better understanding of how lawyers and the State Bar might better serve the public interest, the survey included open-ended questions about what individuals sought in their attorney as well as more directed questions related to professional liability insurance disclosure.

The survey found that the top five factors the public considers when hiring an attorney are price, success rate, experience, specialty, and personality/character. While professional liability insurance did not make the top 10 list of factors that those surveyed look for when hiring an attorney, when asked whether lawyers should be required to disclose whether or not they have professional liability insurance, 64 percent responded affirmatively. Only 36 percent of those asked would be willing to pay more in legal fees to ensure that their attorney carried professional liability insurance, compared with 49 percent who indicated they would pay more in doctors' fees to ensure that their doctor was covered by professional liability insurance.

The survey also asked questions to ascertain the public's understanding of what professional liability insurance might cover. That information is included in the survey results.

Focus Groups

In spite of numerous announcements published in numerous media and community calendars, the public essentially did not attend the public hearings. To build on the information gathered through the phone survey and to gain further insight into the public's knowledge, understanding, and opinions of the complicated issue of professional liability insurance, the State Bar conducted focus groups in four Texas cities as the final step in gathering public input on the issue of professional liability insurance disclosure.

Human Interfaces, an Austin-based professional consulting firm, obtained up to 10 participants for each focus group, based on screening criteria developed jointly with the State Bar Research and Analysis Department in order to ensure that the participants accurately reflected the demographics of their community and of the state as a whole (e.g., age, ethnicity, gender). The focus groups were held at facilities acquired by Human Interfaces and each was videotaped. The focus group was asked the same questions asked in the phone survey on a continuum of information. As the

focus groups learned more about professional liability insurance disclosure and heard arguments both for and against disclosure their opinion softened on requiring disclosure. Initially, about 70 percent of those who participated in the focus group believed that attorneys should be required to disclose whether or not they carried professional liability insurance. By the end of the presentation and open discussion among attendees, that number had decreased to about 53 percent believing that attorneys should be required to disclose.

For many participants, the issue of professional liability insurance disclosure was not on their radar. Throughout the focus group session, participants were fairly consistent as to what considerations they thought would be important when hiring an attorney. The top considerations that were listed as the most important throughout (initially and after discussion) were success rate, experience, and price. Also seen as important throughout were reputation, specialty, and honesty. (Honesty was listed more often after participants were shown the list, and again after the open discussion.) After the discussion of PLI disclosure coverage, some participants listed it in their top 5 considerations (9 of 37); however, none placed it as the most important consideration. Many of the participants had hired attorneys but had no knowledge of professional liability insurance. In addition to learning about the issue of professional liability insurance, the State Bar learned more about what people are looking for in a lawyer and their understanding of the legal system and the State Bar of Texas.

The focus groups were videotaped and are available for review. The audio files of the focus groups are posted on the website and links to the audio files are included on the flash drive.

For more information on the PLI disclosure process and to view all of the related materials, please visit:

www.texasbar.com/pliflashdrive

Professional Liability Insurance Disclosure



BOARD OF DIRECTORS

Professional Liability Insurance Disclosure Recommendation

2009-2010

PLID Background Materials and Attorney/Public Input

Executive Summary

Board Meeting - 1/29/2010

- Board of Directors Meeting Deliberations (MP3 Audio Download) *(located on flashdrive)*
- PowerPoint Presentation to the Board

Supreme Court/SBOT Correspondence

- Letter from Chief Justice Wallace Jefferson to State Bar
- Response from State Bar President Roland Johnson

Consideration Process 09-10

SBOT Directors Charge

PLID Calendar

PLID Public Hearings

- Schedule of Public Hearings - Fall 2009
- PLID Public Hearings - Witness List
- **Public Hearing Reports and MP3 Audio Downloads** *(located on flashdrive)*
 - Austin - November 9, 2009 (Report) (MP3 Audio Download) *(located on flashdrive)*
 - Lubbock - October 29, 2009 (Report) (MP3 Audio Download) *(located on flashdrive)*
 - Dallas - October 28, 2009 (Report) (MP3 Audio Download) *(located on flashdrive)*
 - El Paso - October 27, 2009 (Report) (MP3 Audio Download) *(located on flashdrive)*
 - Houston - October 16, 2009 (Report) (MP3 Audio Download) *(located on flashdrive)*
 - Harlingen - October 15, 2009 (Report) (MP3 Audio Download) *(located on flashdrive)*
 - San Antonio - October 14, 2009 (Report) (MP3 Audio Download) *(located on flashdrive)*

Survey of the Public - 11/09

Public Opinion Focus Groups - 01/10

- Focus Group Final Report
- Focus Group High-Level Presentation

(located on flashdrive)

- Houston (MP3 Audio Download) *(located on flashdrive)*
- San Antonio (MP3 Audio Download) *(located on flashdrive)*
- Dallas (MP3 Audio Download) *(located on flashdrive)*
- Lubbock (MP3 Audio Download) *(located on flashdrive)*

Attorney Input & Comments

- Roland Johnson's "A Message From the President" email, Dec. 2009
- Letters from SBOT Directors Requesting Comments, Oct. 2009
- Attorney Correspondence, Part 1
- Attorney Correspondence, Part 2
- Attorney Correspondence, Part 3
- Attorney Correspondence, Part 4
- Attorney Correspondence, Part 5
- Attorney Correspondence, Part 6

Responses from Sections & Committees

- Law Practice Management Committee position letter
- Family Law Section position letter and resolution
- Women and the Law Section email to members
- Consumer & Commercial Law Section position letter
- Corporate Counsel Section position letter
- General Practice, Solo & Small Firm Section position
- Entertainment & Sports Law Section email to members
- Military Law Section Resolution
- Juvenile Law Section Resolution
- Asian Pacific Interest Section Survey

Responses from Local Bar Associations

- Angelina County Bar Association Resolution
- Cameron County Bar Association Resolution
- Collin County Bar Association survey
- Corpus Christi Bar Association newsletter article
- Kerr County Bar Association poll
- Smith County Bar Association Resolution
- Local Bar Association Comment Cards

Responses from Other Organizations

- Public Citizen position letter
- La Union del Pueblo Entero position letter
- Texas Criminal Defense Lawyers Association position letter

Comments from SBOT Blog

Texas Bar Journal Articles

- State Bar Update, October 2009
- Pro/Con: PLID, November 2009
- President's Opinion, November 2009
- State Bar Update, November 2009
- President's Opinion, December 2009
- State Bar Update, December 2009
- President's Opinion, February 2010

Outside Media Coverage

- Media Coverage, Articles, Blogs
- Public Hearing Notices

Background Information - 07/07 - 04/09

- Letter to Supreme Court from Charles Herring, Jr., July 2007; *Texas Lawyer* article on State Bar Task Force, May 21, 2008 *Austin American-Statesman* articles on Task Force, May 21, 2008
- Basic Considerations Regarding Lawyer PLI
- Report of the Task Force on Insurance Disclosure - June 2008
- Excerpt from the Grievance Oversight Committee 2009 Report
- ABA Model Court Rule on Insurance Disclosures
- State Implementation of ABA Model Court Rules
- Attorney Survey Findings - February 2008
- Survey of the Public - April 2008