

STATE BAR OF TEXAS

Council of the General Practice, Solo and Small Firm Section

Chair

Roy B. Ferguson
P.O. Box 1151
Marfa, Texas 79843
432.729.3775
rferguson@lawyerline.com

Chair Elect

Thelma Clardy
1229 E. Pleasant Run Road
Suite 222
Desoto, Texas 75115
972.298.6001
thelclardy@aol.com

Vice Chair

Joyce Stevens
4381 W. Green Oaks Blvd.
Suite 108
Arlington, TX 76016
817.478.1033
jestevens@sbcglobal.com

Secretary/Treasurer

James Mosley
P.O. Drawer 707
Borger, TX 79008
806.273.2857
james@mgjim.com

Immediate Past Chair

Wendy K. Buskop
4511 Dacoma
Houston, TX 77092
713.275.3419
Wendy.buskop@buskoplaw.com

Terms Expire 2010

Ron Bunch - Waxahachie
John Roades - Wharton
Hugh Lindsay - College Station
Wayne Rohne - Arlington
Zollie Steakley - Sweetwater

Terms Expire 2011

Charles Awalt - Plano
Larry Collister - Denton
Al Harrison - Houston
Kyle Lewis - Dumas
Bill Crout - El Paso

Terms Expire 2012

Tom Curtis - Harlingen
Brandon Earp - Bowie
Ken Lewis - Beaumont
Leigh Meineke - Houston
Kevin Mutscher - Brenham

Ex-Officio Members

Gary Reeves-Kellar
Irene Jackson-Irving
Mark Berry-El Paso

Webmaster

Charles H. Awalt - Dallas

Website – <http://www.gpsolo.com>

Ladies and Gentlemen of the State Bar Board of Directors:

This letter states the position of the General Practice, Solo, and Small Firm Section of the State Bar of Texas on the issue of mandatory disclosure of malpractice insurance.

The Council of the General Practice, Solo and Small Firm Section discussed this issue at length in regular meetings in January and April of 2008, and June and September of 2009, as well as during two special meetings called for the singular purpose of considering this issue in October and November, 2009. Council members reviewed: (1) materials submitted to the Task Force by its various members; (2) surveys conducted by the Task Force and their results; (3) the Supreme Court Grievance Oversight Committee proposal; (4) the reports and responses submitted by other State Bar sections; and (5) reports regarding public response at public meetings held across the state. The council also made these materials available to our membership at large.

Individual council members attended the public hearings organized by the State Bar of Texas, and reported their observations to the entire council. The Council has twice polled its section members, seeking opinions and statements of position on the issue, and council members have made concentrated efforts to speak in their respective communities spanning the State to other persons – including licensed attorneys and members of the general public – to obtain a broader understanding of opinions on the issue. We believe the Section, its Council, and its over 2000 members constitute a representative cross-section of the 60+% of licensed attorneys in the state of Texas who practice in solo or small firm environments.

For a variety of reasons, the Council and the Section members responding to our inquiries overwhelmingly oppose mandatory disclosure. The Council called this matter for a vote on November 14, 2009, after having specifically considered the following: (1) information cited above, (2) the realities of the solo and small firm practice of law in Texas, (3) the quality of legal services provided by members of the profession, and (4) the goals of (a) fostering high standards of ethical conduct for lawyers, (b) assuring all citizens of equal access to justice, (c) providing efficient and effective delivery of quality legal services to clients, (d) protecting the public interest, and (e) improving the reputation of the legal profession as a whole.

By unanimous vote of the Council-members, the General Practice, Solo, and Small Firm Section of the State Bar of Texas opposes the mandatory disclosure of the existence, nonexistence, or extent of a lawyer or law firm's malpractice insurance coverage, in any form.

Our reasons follow.

The Council approves of and adopts the reasons enumerated in the article written by Bill Miller and published in Vol. 72, No. 10, pp. 824-826 of the Texas Bar Journal, November 2009 edition. We furthermore hereby incorporate the initial response of the Section, submitted in May of 2008, and adopt all of the arguments raised by our Council at that time in opposition to mandatory disclosure. The 2008 response is attached hereto. Please take a moment to read that attached letter, as those comments form an important part of the basis for the opinion of our Section. The concept of mandatory disclosure inverts the intention and beneficiary of insurance coverage. The purpose of insurance is to protect the insured against a loss, and the only legitimate beneficiary of a decision to carry insurance is the insured. While the Council strongly supports the arguments addressed in those documents, we choose not to elaborate on them herein, so as not to duplicate or echo the well-reasoned explanations. Instead, we hereafter focus on issues of particular importance to attorneys in a solo or small firm practice.

The percentage of solo and small firm practitioners among Texas attorneys is on the rise. Law students are graduating without jobs, and large firms are downsizing and eliminating entire departments. In 2008, solo and small firm practitioners accounted for approximately 60% of practicing attorneys. That number has undoubtedly increased during the recent economic downturn. The number of practicing attorneys is on the rise, while the number of available jobs is declining. As a result, competition for clients, and more particularly clients with the ability to fund litigation, grows more fierce. Lawyers are streamlining their practices and cutting overhead, in an attempt to remain financially viable, or in some cases solvent. As a result, stipulations imposed upon Bar membership as a whole may have a more meaningful and profound negative effect on solos and small firm attorneys than on Bar membership at large.

We believe that disclosure will have a negative impact on lawyers – individually and as a profession – and if imposed, will go against the collective will of a vast majority of Bar members. Disclosure will plant the seed in the minds of clients that there is a guarantee of results or an alternate avenue of recovery – a belief that lawyers are taught to expressly disabuse. Lawyers and law firms are also financially impacted by the downturn of the economy – solos and small firm practitioners (who often rely on personal monthly income for survival) disproportionately so. Any proposal that results in a decreased ability to generate income or collect receivables, or increase in monthly overhead, puts their financial survival at risk. And, because malpractice cases will likely increase, and insurance premiums typically increase in relation to the number of claims, the impact on solo and small firm practitioners will grow, over time.

Mandating public disclosure will serve to denigrate, and not improve, the reputation of the profession as a whole. Realistically, there are few scenarios where a lawyer can portray his decision not to carry insurance as anything but a negative when he is forced to disclose his “failure” to provide it. As a result, the general public will know, if they don’t already, that lawyers have been forced to disclose this “failure” against their will, or put another way, that they would choose to hide this fact from their clients. The logical inference is thus that lawyers are not honest unless forced to be so. In addition, the increase in malpractice cases that will likely result from mandatory disclosure (discussed below) may be interpreted by the media or general public as evidence of an increase in the frequency of wrongful conduct, thus further depressing public faith in the justice system. This will serve to validate the negative stereotypes of lawyers, not combat or undermine them.

Despite what some may describe as a negative public perception of the legal profession, there has been no public outcry for mandatory disclosure. Anecdotal evidence gathered from our members indicates that rarely, if ever, do potential clients ask prior to retaining counsel whether malpractice insurance coverage is available. Consumers are more concerned with the skills, experience, education, reputation, and character of an attorney, than whether he or she has insurance. Indeed,

mandatory disclosure of whether coverage exists may distract members of the public from the more important issues in selecting counsel, resulting in poor selection decisions, and leading to more malpractice claims. While it may be true that, when prompted, a majority of the general public supports mandatory disclosure by attorneys, it is most likely also true that a majority of the general public would, if offered, support a rule that requires the losing attorney to pay the prevailing side's legal fees, or even a rule that disbars an attorney after 5 consecutive unsuccessful trial verdicts. In today's economy, where the legal profession is being blamed for everything from the failure of the automotive industry to the necessity for universal healthcare, it seems unlikely that a majority of the general public would oppose any proposal that punishes lawyers. Accordingly, public approval alone should not be enough to justify imposing such a far reaching and important dictate on the legal profession of this state.

Logically, the public would not actually benefit from the imposition of mandatory disclosure, unless either: (1) the disclosure discourages potential clients from retaining unscrupulous or less skilled attorneys, or (2) the disclosure is intended to compel attorneys to obtain malpractice insurance in an amount sufficient to cover all potential malpractice claims. The mandatory disclosure of not having insurance creates a stigma upon the disclosing lawyer, and would likely tend to discourage the hiring of the non-carrying attorney. (This appears to be the intended result of the Grievance Oversight Committee, which expressly labels this choice a "failure.") There is no evidence yet brought to light that supports a correlation between greater legal skill or ethical conduct and malpractice insurance coverage. Thus, the result to the client is impossible to determine, as discouraging a potential client from hiring an attorney without malpractice insurance is just as likely to drive them to a less skilled or unscrupulous attorney as to a better one. However, the result to the attorney is easily determined: either the loss of the potential client (irrespective of his or her level of expertise), or the decision to obtain insurance to protect his or her ability to compete.

In the ranks of solo and small firm practitioners, mandatory disclosure will likely lead to more lawyers purchasing malpractice insurance, which will subject the lawyers to control of the insurance industry. Premiums generally vary depending on the type of cases taken, the total damages sought, and the geographic region served. As a result, attorneys may choose to eschew certain types of cases in the hopes of keeping their premiums low, leaving the public largely unrepresented in those legal areas of practice. Policies often forbid litigation in pursuit of fees from nonpaying clients. Failure to comply with policy terms and conditions can result in increased premiums, denial of claims, or cancellation of policies. As a result, the terms and conditions imposed by the insurance industry in malpractice policies may have a direct and palpable effect on solo and small firm practitioners. At a time when the Federal government is completely reconstructing the health care industry because of the abuses and mismanagement of the insurance industry, it seems illogical and dangerous to contemporaneously subject the legal profession to the insurance industry's oversight and control.

Questions of practicality make the proposal unworkable, and oversight would require voluminous new regulations as to "acceptable" coverage, minimum policy limits, applicability to pro bono representation, applicability to representation by court appointment, retroactive penalties for denied or cancelled coverage, and specific verbiage for disclosure of claims-made versus occurrence policies, among others. The Bar would further be continually measuring these levels to ensure sufficient and appropriate limits. Simply put, for disclosure to be meaningful, the Bar would be forced into the insurance regulation business. This would constitute a strain on the Bar leadership and its resources, and divert it from its stated Mission, one element of which is to assure all citizens equal access to justice.

The plan may actually denigrate, rather than improve, public access to justice. Attorneys who feel compelled to obtain malpractice insurance to remain competitive would likely pass this expense on

to their clients, along with the burden of lost income and collections as described above. This may result in fewer citizens being capable of affording qualified legal representation. The ability of solo and small firm practitioners to provide free or low-cost legal services to the poor may be negatively impacted by a decrease in the lawyer's income stream, or increase in monthly overhead. This would result in an increased burden on legal aid services, which are also suffering in this economic downturn. At a time when the Bar is calling on all attorneys to increase their pro bono hours, a plan such as this may result in a crisis of access to justice in Texas.

It bears mentioning that the proposal advanced by the Grievance Oversight Committee goes far beyond their stated goal of informing the public. We consider the comparison of malpractice insurance to automobile insurance to be a fundamentally flawed argument. The Grievance Oversight Committee report states, in relevant part:

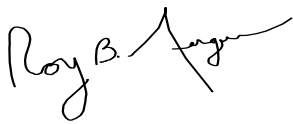
"From the public perspective, the question is asked why the public is mandated to maintain insurance for public protection if they own and drive a car and why lawyers should not be held to the same standard...."

The same argument could be made for all types of insurance, in every conceivable context. By that logic, every person in America should be required by law to insure against every conceivable potential injury, no matter how remote. Although the issue at hand is mandatory *disclosure*, these comments, as well as the Grievance Oversight Committee's definition of the decision not to obtain malpractice insurance to be a "failure" on the part of the lawyer, seem to expose the Grievance Oversight Committee's true agenda – using disclosure as an "foot in the door" to ultimately require mandatory malpractice insurance for all Texas attorneys. The somewhat draconian measures proposed by the Grievance Oversight Committee (including verbal pronouncement, written acknowledgement by the client which must be kept by the lawyer for a number of years, and technical violation by the lawyer of the rule even if disclosure was given and no claim was made) could be interpreted as attempting to make it so difficult to comply that "mandatory disclosure" will intimidate uninsured attorneys into obtaining coverage, thus accomplishing the same goal as mandatory insurance. We specifically oppose the proposal advanced by the Grievance Oversight Committee, and the concept of mandatory malpractice insurance, as well.

In conclusion, the mandatory disclosure of malpractice insurance will likely have a *de minimus* effect on the quality of services provided by Texas lawyers, will likely not protect the public, may denigrate the collective reputation of the profession, and may adversely impact public access to justice in Texas. For these reasons, as well as those in the attached 2008 response and those enumerated in Bill Miller's article in the November 2009 Texas Bar Journal, the General Practice, Solo and Small Firm Section of the State Bar of Texas is opposed to the mandatory disclosure of malpractice insurance on any level.

We appreciate your detailed and thoughtful consideration of this crucial issue, and thank you in advance for your studied consideration of the comments in this letter.

Very truly yours,

A handwritten signature in black ink that reads "Roy B. Ferguson". The signature is written in a cursive style with a large, sweeping initial "R".

Roy B. Ferguson
Chair – General Practice, Solo and Small Firm Section
of the State Bar of Texas

STATE BAR OF TEXAS
Council of the
General Practice, Solo, and Small Firm Section

Chair

Gary Reaves
808 Clearwater
Keller, Texas 76248
(817) 337-8396
greaves3@verizon.net

Chair Elect

Wendy K. Buskop
4511 Dacoma Street
Houston, TX 77092
(713) 269-3535
Fax (713) 275-3419
wendy@buskoplaw.com

Vice-Chair

Roy B. Ferguson
P. O. Box 1151
Marfa, TX 79843
(432) 729-3775
rferguson@lawyerline.com

Secretary-Treasurer

Joette Furlough
3333 Lee Parkway
Dallas, TX 75219
(214) 780-1401
jfurlough@shacklaw.net

Immediate Past Chair

Irene Jackson
800 W. Airport Freeway, Suite 1100
Irving, TX 75062
(972) 445-4106
fax (972) 313-0216
ijacklaw@aol.com

Terms Expire 2008

Charles Awalt - Plano
Kyle Lewis -- Dumas
Joyce Stevens - Arlington
Kathleen Terrell - Navasota
Mack J. Travers - Katy

Terms Expire 2009

H. Mack Barnhart - Gainsville
Bill Betts - Brenham
Thomas Curtis - Harlingen
Bill Crout - El Paso
Carol T. McDonald - Edna

Terms Expire 2010

Ron Bunch -- Waxahachie
Thelma Clardy - DeSoto
Hugh Lindsay -- College Station
Wayne Rohne -- Arlington
Zollie Steakley - Sweatwater

Ex-Officio Members

Mark Berry -- El Paso
Mark T. Witcher - Austin
Stephen J. Smith - Houston

Digest Editor

Ronald L. Beal
Professor of Law
Baylor University School of Law
P.O. Box 97288
Waco, TX 76798-7288

Institute Director

Mike Rogers
Professor of Law
Baylor University School of Law
P.O. Box 97288
Waco, TX 76798-7288

Board Advisor

Carolyn Moore and David Gonzales

Webmaster

Charles H. Awalt -- Dallas

Website - <http://www.gpsolo.com>

The purpose of this letter is to inform the State Bar Board of Directors of the position of the General Practice Solo and Small Firm Section on the issue of Malpractice Insurance Disclosure.

The Council of the General Practice, Solo and Small Firm Section has discussed this issue at length in its meetings in January and April and has reviewed the materials submitted to the Task Force by its various members, the surveys conducted by the Task Force and their results, as well as reports from two Council members who sit on the Task Force.

Having due regard to quality of practice by members of the profession as well as the efficient and effective delivery of quality legal services to clients, the Council takes strong exception to the adoption of any rule requiring disclosure by a lawyer in any manner of existence or extent that lawyer's coverage by malpractice insurance. Our reasons follow.

Mandatory disclosure inverts the intention and beneficiary of coverage. Insurance, particularly liability and casualty coverage, is the sharing of risk among individuals who are similarly situated. While the type and consequences of a particular kind of risk are statistically predictable, the impact of a particular event on a particular individual is not. Thus, the purpose of insurance is to protect the insured against a loss. For example, a homeowner carries insurance to protect himself or herself if a claim is brought against that owner. A homeowner is not legally required to maintain insurance nor are they required to publicly disclose the fact that they carry or do not carry homeowners insurance prior to any invitee coming upon the property. Similarly, malpractice insurance recognizes that professionals make mistakes and also that

STATE BAR OF TEXAS

General Practice, Solo and
Small Firm Section

Chairman's Letter
Page 2

some will be taken to task whether they have made a mistake or not. We just don't know which ones will be taken to task. Those inclined may insure against the risk, but the only legitimate beneficiary of that decision (to carry or not) is the insured. Mandatory disclosure inverts the purpose of insurance. Legal malpractice insurance is not for the protection of clients or the public but rather the protection of the insured lawyer.

Disclosure of the existence of malpractice insurance promotes litigation in principle. Malpractice lawyers will not accept cases where there is not a substantial indemnity pool to insure recovery. Forced disclosure does not benefit the appropriate beneficiary of the insurance; it benefits primarily the insurance companies and the malpractice lawyers. Moreover, a potential client who gives primary consideration to the existence of liability insurance in legal representation is not looking for personal service but a result-indemnity.

Forced disclosure of the insurance coverage creates a bargaining imbalance. If it were a legitimate concern of a client whether an attorney carried liability insurance, it would be just as legitimate a concern for a lawyer to know whether a client considers insurance a criterion for choice of a lawyer. No one is suggesting that clients be required to disclose whether they use insurance coverage as a criterion of legal representation.

The result of the imposition of such a rule would be inherently unpredictable. Imposition of a rule requiring disclosure will result in some lawyers purchasing malpractice insurance for competitive or other reasons, while other lawyers will cease carrying malpractice insurance recognizing that they become targets for litigation by virtue of the disclosure.

The impact of the rule is unfair. Recognizing the clear principle that the only legitimate beneficiary of malpractice insurance is the insured, no other "learned profession" is required to disclose the existence of malpractice insurance. Other than the self interest of those pushing the rule

STATE BAR OF TEXAS

General Practice, Solo and
Small Firm Section

Chairman's Letter
Page 3

requiring disclosure, it is self evidently clear that there is no valid principle that would require disclosure by lawyers and not other professions or trades.

A disclosure rule denotes bias. Requiring disclosure that a lawyer should disclose insurance carries with it the implication of a judgment by the State Bar that a lawyer should carry malpractice insurance for the benefit of the "public" or the client, which again is counterintuitive to the purposes of insurance. The decision to maintain insurance is a judgment appropriately left to the individual lawyer or firm based upon their assessment of their risk. But this implicit judgment by the State Bar creates a form of inappropriate market discrimination that the discredited "Not Board Certified" warning label formerly did. It took years to remove the "Not Board Certified" warning label. The bar should not be moving in this direction of branding lawyers as "lesser" or "of lesser quality" by its rules and regulations of the practice.

A disclosure rule implies a negative judgment on the profession. The clear implication of a mandatory disclosure rule is that the Bar or the Supreme Court assumes that clients should be protected from lawyers.

Requiring mandatory disclosure establishes an improper principle of legal practice. There is no basis for the imposition of the rule without accepting as an underlying principle that the purpose of insurance is the protection of third parties rather than the protection of the insured. The only place in this society in which that has taken root is the requirement of liability insurance for the privilege of driving. Once the principle that malpractice insurance is for the benefit of the client or "the public" and not the insured the next logical implication of that principle is that malpractice insurance should be mandatory for protection of the client.

Thus the General Practice, Solo and Small Firm Section is opposed to the mandatory disclosure of malpractice insurance on any level.

STATE BAR OF TEXAS

General Practice, Solo and
Small Firm Section

Chairman's Letter
Page 4

Sincerely,

A handwritten signature in black ink that reads "Wendy Busler". The signature is written in a cursive, flowing style.

Chair Elect