

“Med mal” concerns

Issues in the Medical Liability Insurance Debate

Premiums that physicians pay for medical malpractice insurance have risen sharply in the past few years, as confirmed by the Texas Department of Insurance’s (TDI) April 2002 survey of companies writing medical liability policies in the state. According to the study, insurers are finding it more expensive to cover physicians, and fewer insurers are writing broad policies.

Texas physicians say the jump in “med mal” premiums is jeopardizing access to health care. Doctors in the Rio Grande Valley say they have been hit particularly hard and, according to the Texas Medical Association, specialists there have retired or moved away. Insurers blame rising premiums on operating losses due to more and larger malpractice claims.

In a recent survey of states’ medical malpractice premiums and the number of insurers writing policies, the American Medical Association cited 12 states as being in “crisis,” including Texas, Florida, New York, and Oregon, and listed 31 states as showing “problem signs.”

Physicians, hospitals, and insurers call for Texas lawmakers to change the state’s civil liability laws to remedy the situation. They maintain that capping the amount of noneconomic damages a jury could award to a plaintiff in a medical malpractice case, limiting attorneys’ fees, and other measures would help ease the insurance crisis by reducing premiums and encouraging more insurers to do business in the state.

Opponents, including plaintiff attorneys and consumer groups, say such measures would not solve the problem of rising premiums, which they say primarily are an attempt to offset investment losses in a falling stock market, but would limit patients’ ability to obtain redress for harm caused by physicians’ negligence. They question anecdotal evidence about the effect of premium rates on

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Local Government Handgun Bans Spark Debate Over 1997 Amendment

Do local governments have authority to prohibit people from carrying licensed, concealed handguns in public places? Controversy over this issue arose when local governments and other entities began to cite a 1997 amendment to Texas’ “concealed carry” statute as authorizing them to post signs stating that concealed handguns were prohibited in certain places. Cities, counties, and transit authorities have posted signs in an effort to keep concealed handguns out of public places such as libraries, municipal and county buildings, and buses. Others challenge this practice, saying that local governments have overstepped their authority.

In 1995, the 74th Legislature enacted SB 60 by Patterson, et al., allowing people to be licensed by the Department of Public Safety to carry concealed handguns. However, portions of the Penal Code prohibit licensees from carrying concealed handguns in certain places.

Penal Code, sec. 46.03 lists places where all firearms — including handguns — and other weapons are prohibited. It is not a defense to prosecution that the person was licensed to carry a concealed handgun. The prohibited places include:

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the number of practicing physicians. They also maintain that premiums can be reduced without compromising Texans' fundamental right to a day in court, such as by better policing of the medical profession.

Industry problems

Between 1999 and 2002, TDI's survey found, malpractice insurance premiums more than doubled on policies written by the Texas Medical Liability Trust (TMLT), a not-for-profit trust owned and managed by physicians. Premiums rose by an average of 64 percent for commercial carriers and by 3 percent for the Joint Underwriting Association (JUA), the state-run insurer of last resort. Insurers' average claim cost per insured physician has risen by 15 percent since 1996, according to the survey. Most areas have experienced little growth in the number of claims, but in Hidalgo County, the number of claims has grown at a rate of 60 percent per year.

As a result of these trends, 11 insurance carriers have announced their withdrawal from the Texas market or plan not to renew medical liability insurance. These actions will affect about 6,500 physicians, or 18 percent of the 36,000 physicians in Texas. The first nonrenewals began in March 2001 and are expected to be complete by the end of 2003.

Legislative responses.

Texas and the nation have faced periods of rising premiums in the past. In the mid-1970s, many states experienced sharp increases in the number of medical malpractice cases and the size of jury awards, rising premiums, and insurers' dropping medical liability lines.

The 64th Texas Legislature in 1975 addressed the problem of decreasing availability of medical malpractice insurance by creating the JUA as an insurer of last resort. To obtain coverage through the JUA, a physician must show evidence of rejection by two licensed insurers. As of July 2002, about 1,000 Texas physicians held liability

insurance through the JUA, up from 142 in July 2001. Historically, the JUA's rates have been higher than those in the commercial market but have remained relatively steady. In 1981, physicians established the TMLT as a not-for-profit trust to offer affordable medical liability insurance, distinct from the state-run JUA. The TMLT has grown to be the largest insurer of Texas physicians, with more than 10,000 doctors as policyholders.

The 65th Legislature enacted the Medical Liability and Insurance Improvement Act (Art. 4590i, V.T.C.S.). This law capped noneconomic damages — pain-and-suffering and punitive awards, as opposed to economic damages such as lost wages or medical bills. The cap is indexed to the Consumer Price Index and has grown from \$500,000 at the time of enactment to about \$1.3 million today. Though the cap was intended to apply to all malpractice cases, the Texas Supreme Court in 1990 ruled the cap unconstitutional except in cases of wrongful death. In *Lucas v. U.S.*, 757 S.W.2d 687, the high court found that limiting recovery for people injured by medical negligence for the purpose of reducing malpractice premium rates was unconstitutional. The court held that the Texas Constitution, Art. 1, sec. 13, called the Open Courts Doctrine, guarantees meaningful access to courts whether or not liability rates are high.

Civil Practice and Remedies Code, sec. 41.008 caps exemplary or punitive damages in a tort case at twice economic damages plus an additional award of up to \$750,000. Thus, if a jury awarded \$1 million in economic damages, the cap on exemplary damages would be \$2.75 million. This general cap does not apply to pain-and-suffering damages awarded in medical malpractice judgments.

Also in the 1970s, California enacted its Medical Injury Compensation Reform Act (MICRA), considered the nation's most comprehensive set of medical malpractice revision initiatives. Some of the most visible components of MICRA are caps on damage awards and on attorney fees, requiring periodic payments of awards, and requiring disclosure of a plaintiff's collateral sources of income.

Texas' and California's current laws on medical malpractice originated during the 1970s, an earlier period of rising premiums.

MICRA caps noneconomic damages at \$250,000. It also limits the amount that an attorney can collect in a contingent fee arrangement to 40 percent of the first \$50,000 of damages awarded, 33-1/3 percent of the next \$50,000, 25 percent of the next \$500,000, and 15 percent of any amount above \$600,000. MICRA allows periodic payments for judgments in excess of \$50,000. Under collateral source disclosure, a California jury can be informed of other sources of compensation, such as social security benefits, workers' compensation, health insurance, or accident insurance, that the patient has received, and the patient may offer evidence of any amounts paid to secure the right to the benefits.

Nevada and Mississippi recently enacted legislative packages to address their medical malpractice insurance problems. During a special session that ended in August 2002, Nevada enacted a law that includes caps on noneconomic damage awards with judicial exceptions, periodic payments, and other provisions. In October, Mississippi enacted a similar law.

In September, the U.S. House of Representatives approved H.R. 4600, a comprehensive medical malpractice bill. This bill would preempt state laws, although some provisions are the same as in Texas' current law. H.R. 4600 would place a three-year limit on the time frame for filing a claim following an alleged injury. Texas law allows two years in cases involving adults, but the statute of limitations for minors does not begin until age 18. The federal bill would cap noneconomic damages at \$250,000, as in California. Other provisions in H.R. 4600 include periodic payments, limits on attorney fees, and more stringent limits on the award of punitive damages. However, the Senate is unlikely to pass a medical malpractice bill before the 107th Congress adjourns.

Approaches to premium reduction

While TDI's survey confirms that "med mal" insurance premiums have risen in Texas, it does not explain why. Some of the most often identified culprits include higher

awards by juries, market factors affecting insurers, heavy advertising by lawyers, and lax oversight by the state.

High verdicts in malpractice cases often are cited as driving up premiums because such awards make it more expensive for insurers to write policies. A March 2000 report by Jury Verdict Research, a database of verdicts and settlements resulting from personal injury claims, found that jury awards in malpractice cases nationally rose by 43 percent from 1999 to 2000, to a median of \$1 million, while the median settlement amount actually fell during the same period. The survey also found that plaintiffs more often than not lost cases that went to trial.

Supporters of changing Texas' civil liability laws complain that plaintiffs and juries view the legal system as a "lottery" and that insurers are liable for the entire amount of a windfall. Limiting insurers' liability, they say, would allow premium rates to decline. Opponents counter that jury awards are not the main driver of premium rates and that some states that have enacted comprehensive tort-reform packages still have seen a rise in premiums. One state on the "crisis" list, West Virginia, and many on the list of "problem" states already cap noneconomic damages.

Nationally, some have argued that the insurance industry's financial problems have nothing to do with the tort system. They blame the industry's woes in part on the stock market's decline. Insurers invest the monies they receive from premiums and use the proceeds to pay claims and to generate profits. With stocks performing poorly and interest rates remaining low, insurers have less income with which to pay claims and remain profitable. Some observers also say that insurers' intense competition for market share during the 1990s drove premium rates down to artificially low levels. Thin margins, coupled with the lack of a cushion from financial markets, have forced insurers to pass higher costs on to policyholders. Rather than seeking to fix the rate problem by changing tort law, they say, legislators should tighten regulation of the insurance industry.

Supporters and critics of changing medical malpractice laws disagree on the causes of and solutions for rising insurance premiums.

Insurers say that blaming the financial markets and competition oversimplifies the problem. They say that the growth in malpractice claims has left them facing higher payouts from a shrinking pool of funds and that they cannot solve this problem by passing on the costs to policyholders. Managed health care has forced physicians to operate with very thin margins and does not allow them to pass the cost of higher premiums on to their patients. In their view, the only solution is to limit the liability of insurers, who then could pass on the savings to physicians.

Some suggest that heavy advertising by lawyers in the Rio Grande Valley has driven the growth in malpractice claims there. Regional disparities in the pattern of malpractice claims, they say, are due to the litigious nature of the community, not to the competence of the physicians practicing in those areas.

Opponents of changing Texas' civil liability laws say the state's first step in seeking to reduce premium rates should be toward protecting patients from negligent doctors through better oversight. They say the Texas State Board of Medical Examiners (TSBME) does not address problems with physicians adequately and, as a result, insurers cannot be assured that all licensed physicians in Texas should be practicing. According to TSBME data, the board received more than 6,000 malpractice complaints against physicians between January 2001 and May 2002, yet opened no investigations during that period. Between 1997 and mid-2002, the board did not revoke the license of any Texas physician as a result of a claim filed because of malpractice or medical error.

Tort-reform supporters respond that the trend in malpractice claims has little to do with the competence of physicians and that additional regulatory oversight likely would not affect insurance premiums. A TSBME survey showed that from 1998 to 2001, more than half of physicians in McAllen, El Paso, Odessa, Abilene, and Beaumont had liability claims, while only about one-third of physicians in Temple-Killeen had claims. Doctors in areas with higher claims are no less competent than those in Temple-Killeen, these advocates say.

In 1995, the 74th Legislature enacted HB 1988 by Duncan, establishing flexible rating for certain lines of insurance. That law contained a provision introduced by

then-Rep. Mark Stiles requiring insurers to estimate the amount of money saved through the civil liability revisions also enacted that session and to apply that amount to a temporary rate reduction. Critics of changing Texas' civil liability laws say that any bill aimed at limiting medical malpractice insurers' liability should require that reductions in tort costs be applied directly to reducing premium rates. Some doctors, however, say that such a requirement may not be necessary in the case of Texas' medical malpractice insurance industry. They note that the TMTL, as the largest single medical malpractice insurer, writes about 30 percent of all policies in the state. The not-for-profit trust must pass savings on to policyholders and is likely to do so quickly, since it is owned and managed by physicians. If the TMLT lowered its rate, they say, other insurers would follow suit to remain competitive, or physicians would turn to the TMLT for cheaper insurance.

Proposals for change

The Texas Medical Association, the Texas Association of Business, and other groups have proposed changing civil liability laws in regard to medical malpractice. Most such proposals are based on California's MICRA and include caps on damage awards, limits on attorney fees, periodic payments, and collateral source disclosure.

Capping damages. Seventeen states cap awards for noneconomic damages, and five cap total damages. Proponents of capping noneconomic damages in Texas would like to set the limit at around \$250,000, the cap in California. Some supporters say a cap should be indexed, as is Texas' cap in wrongful death cases; others say the cap should be a fixed amount for a specific period of time, as in Mississippi. Some say the state also should limit total damages.

Supporters say limiting the amount of an award in a medical malpractice case would reduce premium rates. They say juries often are sympathetic to plaintiffs and award them much more than a settlement would provide because that is what the jurors would want to receive in similar circumstances. Given that economic damages would not be capped, they say, a limit on noneconomic damages would ensure that plaintiffs received the compensation they deserved, rather than winning a "lottery."

Unlimited noneconomic damages undermine the state's health-care system, according to these advocates. They say that lawyers pursue medical malpractice cases because they know they may be able to reap a large sum of money in an emotional case with unsophisticated jurors who do not understand the impact of multimillion-dollar settlements on the entire health-care system. When premiums rise too high, doctors stop practicing, thereby threatening access to medical care for all Texans. They also argue that capping damages would encourage insurers to do business in Texas by ensuring that they would not incur losses because of large damage awards. As more insurers joined the market, they say, competition would reduce premiums.

Opponents say there is no evidence that caps on damages reduce insurance premiums; rather, caps only hurt patients by limiting the amounts they can receive. They note that state lawmakers tried capping damages in the past but the measure was found unconstitutional, and they argue that it would be impractical to enact another measure that the courts likely would strike down.

Others suggest that lawmakers could enact a *quid pro quo* measure in return for limiting the recovery of noneconomic damages. For example, such trade-offs could involve allowing the protection of damage caps only for physicians who carried specific levels of insurance or establishing a compensation fund for patients. According to these observers, the courts might view more favorably improving access to care as the *quid pro quo* for limiting access to courts.

Limiting attorney fees. Currently, attorneys' contingency fees in medical malpractice cases in Texas are not limited by statute but are determined by the contract between the plaintiff and the lawyer. Some other states have set limits on contingency fees to reduce the amount of an award that an attorney can receive.

Supporters argue that limiting attorney fees would ensure that most of an award goes to the patient and would reduce the total amount of the award. Currently, if

jurors in a case wanted to award the plaintiff \$50,000 and thought the attorney would receive half of that amount, they might award \$100,000 to ensure that the patient's portion remained the same.

A limit on attorney fees, supporters say, would make attorneys more selective in accepting cases rather than taking "long-shot" cases in hopes of a big payout. They say this would help reduce premium rates because insurers would be paying awards only on legitimate cases. Limiting the financial incentive to go to court, they say, would reduce the number of claims and equalize them across the state, thereby reducing premiums.

Opponents argue that the government should not regulate a contractual relationship between a lawyer and a patient. They say the percentage fee reflects the risk a

lawyer takes when accepting a case and that patients with difficult cases might be unable to secure representation if lawyers could not cover their risks. They also say that limiting attorney fees has not been shown to prevent the rise of medical malpractice premiums. Three of

the states now identified as in crisis, New York, New Jersey, and Florida, set caps on attorney fees.

Limiting attorney fees, opponents say, would be unlikely to reduce the number of claims because disincentives already exist for lawyers to take long-shot cases. Under the contingency system, they say, a lawyer must invest a significant amount of money and time in trying a case and will not make such an investment unless a case is legitimate.

Periodic payments. Under current law, the present value of a jury award for damages may be paid in a lump sum or through a periodic payment schedule, also known as a structured payment. Other states have enacted laws allowing litigants to request periodic payments over time for awards greater than a certain amount. If the plaintiff dies before the payment schedule ends, any remaining payments of economic damages cease except for lost wages.

Most proposals for changing Texas' medical liability laws are based on California's MICRA, which supporters call a model tort-reform act.

Supporters say that requiring periodic payments for settlements over a certain amount would help ease Texas' current crisis by allowing insurers to plan their payments better. Instead of paying out enormous sums of money at the end of a trial, they say, an insurer could build future payments into its business plan and adjust rates accordingly. With periodic payments, supporters say, a few unusually high jury awards would not deplete an insurer.

Periodic payments also would make the jury award system more fair, proponents say. Economic damages are designed to compensate for expenses associated with harm to the patient, including medical bills, many of which cease when the patient dies. Insurers say they should not have to pay for medical bills that never materialize. Even while the patient is alive, they say, periodic payments are more fair because the patient's future income is assured. With lump-sum payment, a patient could lose the entire settlement through a bad investment decision.

Opponents say that periodic payments already are an option for courts in the form of structured payments. In fact, most settlements involving children use structured payments. The decision to use structured payments should remain with the court, however, and not be required. Opponents say that making periodic payments mandatory would not reduce premiums because insurers still would be liable for the entire amount, and their rates would reflect that. They also say that periodic payments would remove injured patients' certainty that their bills will be covered. If insurers are losing money now, as they claim, patients should not be at the mercy of insurers' future solvency. Money awarded today should be paid today to ensure that victims can receive the medical care and lost wages they will need in the future.

Collateral source disclosure. Current law does not require a jury to be informed about other sources of payment made to the patient before the jury determines an award. Supporters of requiring disclosure of collateral sources say it is unfair to tell juries only one side of the story. They say juries hear about a plaintiff's expenses but never about other sources of compensation and thus can be misled into overcompensating victims.

Opponents say juries often do not compensate plaintiffs fully for future medical bills or other financial burdens that the plaintiff is likely to encounter, so reducing the compensation further would harm plaintiffs. They also say that responsible people who carry insurance should not be punished by having their awards reduced by that amount.

Screening panels and special courts. In an effort to reduce unnecessary lawsuits, some states have established screening panels of physicians and lawyers to review potential medical malpractice cases before complaints are filed. Supporters of such panels say that malpractice cases often are confusing, highly technical cases that take a long time for lay people in the courts to understand. By the time a case is deemed frivolous, the lawsuit has taken up much of the court's time even if the case ultimately is thrown out. Screening panels, they argue, help ensure that legitimate lawsuits receive their day in court more quickly and that a court's resources are used appropriately. Opponents of such panels say that patients who have suffered should not have to deal with additional red tape before they can go to court. In Nevada, they say, the average case took 18 months to get through the state's screening panel before the state law enacted in August 2002 abolished the screening panel. Both plaintiff and defendant usually are represented by legal counsel throughout the panel proceedings, making this an expensive and time-consuming process, they say.

States sometimes create special courts to hear specific types of cases, such as traffic courts or juvenile courts. Supporters of creating medical malpractice courts say that malpractice cases could be expedited if they were heard in courts where the judge and court officials had experience in medical malpractice law. Opponents say medical malpractice is no more complicated than modern forensics and other highly technical information that often is presented in court. They say patients should have their cases heard in regular courts, which hold medical malpractice cases to the same standards as for other liability cases.

— by Kelli Soika

Federal Election Law Change Affects Texas Voting Systems

The Help America Vote Act of 2002, approved by Congress and signed by President Bush, pledges \$3.9 billion of federal money to states over three years to help them upgrade voting systems. In October, the conference committee on H.R. 3295 by Reps. Bob Ney (R-Ohio) and Steny Hoyer (D-Md.) ended months of debate by negotiating a compromise measure, enacted in response to the 2000 presidential election stalemate in Florida. (See *Interim News* Number 77-3, December 7, 2001.)

The new federal law authorizes \$650 million in formula funding for states to replace voting machines and improve election administration and \$100 million to increase disabled voters' access to polling places. States with punch-card and lever voting systems can get money to buy upgraded machines if they choose. States that already have spent money for upgrades will be eligible to receive reimbursement funds. Every state is guaranteed a minimum of \$5 million, with the federal government paying 95 percent and states paying a 5 percent match. However, H.R. 3295 appropriates no funding. For states to receive these funds, Congress must enact and the President must sign an appropriation bill.

The bill establishes a federal Election Assistance Commission to administer the grant program, issue voluntary guidelines for voting systems, certify voting systems, and study election issues, serving as a national clearinghouse for election information and procedures. Once the commissioners are appointed and confirmed, election officials say, the commission likely will take months to issue guidelines that will help states interpret the details of the law.

H.R. 3295 highlights

Voting system standards. Beginning January 1, 2006, all voting systems must give voters a "second

chance" to check their ballots and correct errors, including alerting voters to overvotes, before casting their ballots. An overvote is a ballot bearing more than one vote for a given race. Certain jurisdictions may use voter education and instruction programs to notify voters about overvotes and will not necessarily have to change to different voting systems. Each polling place must provide

at least one voting machine accessible to the disabled, and each state must define what constitutes a legal vote for each type of voting machine used in the state.

Provisional voting. By January 1, 2004, voters whose eligibility is in question at a polling place must be permitted to cast provisional ballots. These votes will be separated from other ballots and counted later if the voters are determined to be eligible.

Voter registration lists. By January 1, 2004, or 2006 if a state certifies that it has good cause for not meeting the 2004 deadline, each state must implement and maintain an interactive, statewide computerized voter registration list linked to the state's driver's license agency and accessible to all election officials in the state. Also, a person applying for voter registration must provide a valid driver's license number or the last four digits of the person's social security number. State officials must issue unique identifiers to people who do not have valid driver's licenses or social security numbers. By January 1, 2003, voters who register by mail must show identification the first time they vote.

Grievance procedure. Each state must establish an administrative complaint procedure to remedy grievances. Any person who believes that a violation of voting system standards, provisional voting, or voter registration requirements has occurred can file a complaint and request a hearing from the designated agency, which must make a final determination within 90 days.

The federal Help Americans Vote Act, enacted in October 2002, likely will require amendments to Texas' election laws.

H.R. 3295 has its detractors. Advocates for some civil rights groups opposed the bill's requirements for voter identification, asserting that these provisions would raise new hurdles for poor people and minorities who may lack any of the acceptable forms of documentation. The Congressional Hispanic Caucus contended that the identification requirements would affect Hispanic and Latino voters disproportionately.

Supporters said the identification requirements were imperative to combat voter fraud. The National Association for the Advancement of Colored People supported the bill, as did the Congressional Black Caucus, saying that it would advance voting rights on the whole.

Effect on Texas

As a result of H.R. 3295, Texas most likely will have to enact legislation to allow provisional voting, according to Ann McGeehan, director of elections at the Secretary of State's Office. Currently, a voter whose eligibility is questioned or challenged at the polling place can vote under a challenge procedure. The voter must show proof of identification and must swear to an affidavit stating the necessary facts to support the voter's eligibility. If the election judge accepts the affidavit, that person's vote is counted on election night and becomes part of the official election returns. Under provisional voting, a questionable ballot is not counted until the voter's eligibility is established.

Similarly, H.R. 3295 will require Texas to create a procedure for filing complaints about violations of election laws. The state now lacks such a grievance procedure.

The secretary of state already maintains a statewide voter registration master list that counties update each week, but the list does not meet the centralization requirements of H.R. 3295. McGeehan said she hopes that the state can build on the current system without having to devise an entirely new system. As a model, state election officials are studying Michigan's statewide voter registration database, which is considered one of the nation's best.

Some are concerned that the requirement for each polling place to provide a voting machine accessible for the disabled could prove too costly for some small jurisdictions. Although federal funds are available for assistance, Texas has more than 8,000 voting precincts, and a single direct-recording electronic machine costs about \$3,000. It is unclear whether enough money will be available to meet this need.

HB 2336 by Danburg, enacted by the 77th Legislature, requires the secretary of state to administer and distribute any federal funds received by the state in the most effective and appropriate manner. HB 1419 by J. Jones requires the secretary of state to reexamine each county's voting systems and study available voting technologies and the effectiveness of adopting a statewide, uniform voting system. The secretary plans to issue recommendations to implement this legislation by December 2002.

— by *Rita Barr*

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- schools and educational institutions, grounds where school activities are taking place, and school transportation vehicles;
- polling places on election day or during early voting;
- a government court or offices used by a court, unless authorized by written regulations or in writing by the court;
- racetrack premises;
- the secured area of an airport; and
- within 1,000 feet of a Texas Department of Criminal Justice facility that is holding an execution that day, if the person received notice that the weapon was prohibited.

Penal Code, sec. 46.035 specifically prohibits licensees from carrying concealed handguns in bars, in correctional facilities, and at high school, college, or professional sporting events. It also bans concealed handguns from hospitals and nursing homes, amusement parks, places of worship, and government meetings if the license holder was given verbal notice or written notice that complies with standardized language or a standardized sign specified in the statutes.

Trespass amendment

In 1997, the 75th Legislature created a new criminal offense called “trespass by holder of license to carry concealed handgun.” HB 2909 by Carter, et al. made it a Class A misdemeanor (punishable by a maximum of one year in jail and a \$4,000 fine) under Penal Code, sec. 30.06 for a licensee to carry a concealed handgun on another’s property without effective consent if the licensee failed to depart after receiving notice that: (1) entry on the property by a licensee with a concealed handgun was prohibited, or (2) remaining on the property with a concealed handgun was prohibited, and the licensee failed to leave. Notice can be provided orally or in writing. Written notice can be by a card, document, or sign using language specified in the Penal Code, stating that a licensee may not enter the property with a concealed handgun.

Private property owners began to use the statute to prohibit concealed handguns on their property. Cities,

counties, and transit authorities also began to cite this law as authorizing them to ban concealed handguns from their property. Local governments posted signs prohibiting concealed handguns in parks, libraries, recreation centers, and other public buildings. Local entities stated or implied that they would use the 1997 trespass law to prosecute violators. This led some to argue that the law was being misinterpreted.

Some transit authorities have banned concealed handguns on buses, citing either the 1997 amendment or their general authority to invoke police powers for public safety reasons, as outlined in a previous attorney general’s opinion, [DM-364 \(1995\)](#). Others argue that it is inappropriate for transit authorities to invoke their general police powers in this situation because they cannot legitimately make the required finding that excluding or ejecting people carrying concealed handguns is reasonably necessary and appropriate to accomplish the authority’s objective, such as safety on buses.

In January 2001, Attorney General John Cornyn determined in [Opinion JC-0325](#) that a unit of government has statutory authority to bar concealed-handgun licensees from entering its property, either by giving verbal notice to the licensee or by erecting a sign or other written communication that complies with Penal Code, sec. 30.06, and that notifies licensees that they cannot enter while carrying concealed handguns. The determination was based in part on the definitions of “person,” “association,” and “government” in Penal Code, sec. 1.07, and on reasoning in a previous attorney general’s letter opinion ([95-058](#)) that Penal Code, sec. 30.05, dealing with criminal trespass, applies to a governmental body. The opinion also said that units of government cannot bar concealed-handgun licensees from carrying weapons onto public property merely through rules, regulations, or policies.

For and against local bans

Some local governments argue that the 1997 change in the trespass law and the attorney general’s opinion authorize them to prohibit people from carrying licensed, concealed handguns in certain places, and that the Legislature should not revoke this authority. Others dispute this claim of authority and urge lawmakers to

revise the statute so that cities, counties, and other entities no longer can claim authority to prohibit licensed, concealed handguns in public places.

In 2001, the 77th Legislature considered SB 819 by Armbrister, which would have limited the 1997 trespass offense to private property and to government property listed in Penal Code, sec. 46.035, and would have stated that the Legislature had exclusive authority to regulate the carrying of handguns. The bill passed the Senate and was reported favorably by the House Public Safety Committee but died in the House Calendars Committee.

Supporters of local governments’ authority to ban concealed handguns say:

The statutes and the attorney general’s opinion give local governments the same rights as private property owners to regulate property under their control and to prohibit concealed handguns on their property. Local governments have the same rights as private property owners to require users of the property to comply with certain criteria or to leave. For example, cities can ban smoking on public property and can ban trespassing at city-owned utilities. Rescinding the authority of local governments to ban concealed weapons on public property by changing current law would erode local control and would result in local governments being treated differently from other property owners.

Local governments, not the state, should make decisions about the use of local public property. They are in the best position to evaluate local circumstances and decide if it is appropriate to allow concealed handguns at specific public properties. People are used to following regulations that vary from city to city or county to county. For example, some but not all cities have open-container laws prohibiting the possession of open alcoholic beverages in certain areas.

Local government entities are not overstepping their authority or violating the Texas Constitution but are using authority granted to them by the Legislature. Whatever the Legislature’s intent when it enacted the original concealed-handgun law in 1995, the 75th Legislature in 1997 enacted additional legislation authorizing property owners, including local governments, to ban concealed handguns, and lawmakers have not changed the statute in subsequent sessions.

Local governments are not violating anyone’s rights by prohibiting handguns on certain public properties, because the law authorizes the governments to take such action. License holders are not being barred from conducting any necessary public business; they simply are prohibited from bringing their concealed weapons onto certain properties.

Opponents of local authorities’ regulating concealed handguns say:

Amending current law so that local governments or entities clearly could *not* prohibit licensees from carrying concealed handguns on certain properties would not broaden or weaken the concealed-carry law, but rather would clarify the law so that it adheres to the Texas Constitution and the original intent of the statutes. Cities and counties ignore the Constitution and the concealed-carry law’s original intent and overstep their authority when they interpret the law as allowing them to ban weapons in any location other than the specific places listed in the statute. Only the Legislature or a federal authority can regulate where licensees may carry concealed handguns.

Art. 1, sec. 23 of the Texas Constitution, part of the state’s bill of rights, gives the Legislature the exclusive right to regulate the wearing of arms. Art. 1, sec. 29 states that everything in the bill of rights is excepted out of the general powers of government and shall

Local governments are accused of overstepping their statutory authority and violating the Texas Constitution in using a 1997 law to ban concealed handguns in public places.

remain inviolate, and that all laws contrary to the provisions of the bill of rights shall be void. Even if it wanted to, the Legislature could not delegate the authority to regulate the wearing of arms to a political subdivision of the state through a statute. The attorney general's opinion errs in failing to consider these constitutional issues.

Local control, although an important concept in Texas, does not extend to constitutional rights. For example, a local government cannot ban the constitutionally protected right to free speech. Even under these proposed changes, local governments could retain the ability to ban concealed handguns from nonpublic areas of public buildings. Allowing local governments to implement piecemeal bans on concealed weapons would result in a hodgepodge of regulations that would be difficult to follow.

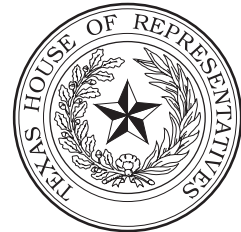
Local governments are going against legislative intent by prohibiting concealed handguns from public places. The Legislature considered and rejected bans on concealed handguns in many of the places where local governments now say they are off limits. For

example, both the House and the Senate rejected amendments that would have banned concealed handguns from public buses. Also, although some localities have tried to ban concealed handguns in city or county parks, Local Government Code, sec. 229.001 specifically prohibits cities from banning concealed handguns in public parks, and the Legislature rejected attempts to ban concealed handguns in parks, so counties should not be able to impose such bans either.

Prohibiting weapons in public places violates the rights of license holders and is similar to a local government refusing to recognize another state license, such as a driver's or medical license. A city's ban on concealed handguns in public buildings could make it needlessly difficult for a person lawfully carrying a concealed handgun to perform necessary tasks such as paying a utility bill or renewing a car registration. In addition, the trespass law cannot be used to enforce a ban on concealed handguns on buses, because buses are not real property and, by definition, trespassing can occur only on real property.

— *by Kellie Dworaczyk*

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