October 2, 2007

MEMORANDUM

TO: Executive Committee and Members of Bar Council

FROM: Darrel Tillar Mason, Chair
       Special Committee on Lawyer Malpractice Insurance

RE: Mandatory Malpractice Insurance Issue

Please accept this memorandum as a supplement to the “Report on Study Undertaken by Client Protection Subcommittee of the Special Committee on Lawyers Malpractice Insurance” submitted to Council in June 2006. I have attempted to summarize the available information relevant to the discussions on the issue of mandatory malpractice insurance that have taken place over the past two years.

There appear to be two distinct approaches to addressing the question whether the Virginia State Bar (VSB) should require all active members in private practice representing clients drawn from the general public to be covered by a professional liability insurance policy. One approach is to address the question from a “data driven” perspective -- asking is there data to support a conclusion that the absence of a mandatory coverage rule has or is creating a problem for lawyers or their clients. The other approach is to address the question from a “principle driven” perspective -- asking is it incumbent upon the Bar to protect consumers of legal services in Virginia by requiring lawyers to insure against their own possible negligence as part of the fiduciary duty owed to their clients. As you would expect, both proponents and opponents of required malpractice insurance draw their own conclusions from the available data and their views about the scope of the bar’s public protection responsibilities.

Data Driven Perspective

The percentage of private practitioners self-reporting that they do have professional liability insurance (other than an extended reporting endorsement) has been constant. Attachment One depicts in graph format for the past five years the total number of lawyers reporting that they are in private practice, the total number reporting that they have malpractice insurance, and the total number reporting that they do not have coverage. The number of private practitioners reporting that they do not have insurance has remained under 2000. Attachment Two depicts the same information by percentages. The percentage of private practitioners reporting that they have such insurance has remained above 87%.
In June 2007 Council was provided with a breakdown by circuit of the responses to the insurance disclosure of private practitioners with in-state locations. What this data reveals is that: 1) on a statewide basis, 11.8% of our active private practitioners reported not having insurance in 2006, slightly higher than the 10.85% figure for all such active members including those located out of state, and 2) there is tremendous disparity among the different parts of the Commonwealth when it comes to the percentage of active private practitioners who report they do not have coverage. While the private practitioners in the Norfolk, Richmond, Roanoke and Abingdon areas report a very low incidence of no malpractice insurance, ranging from 4.7% to 8.7%, such lawyers in a few locations like Hampton and Petersburg and surrounding environs report a very significant incidence of no coverage, up to a high of 26.4%. Several other circuits came in with figures in the teens. **Attachment Three** depicts by circuit in graph format a 5 year average percentage of private practitioners reporting no malpractice insurance. **Attachment Four** is simply a map showing the geographic area(s) included in each circuit.

It bears repeating that the VSB’s Clients’ Protection Fund does not cover a loss caused by the negligent conduct of a lawyer, only the dishonest conduct. To be considered a potentially reimbursable loss, the lawyer has to have either died, disappeared, been judged mentally incompetent, been declared bankrupt, been disbarred or suspended from the practice of law, or voluntarily resigned from the practice of law. During the 2005-2006 fiscal year, 75 claims were acted on by the Clients’ Protection Fund Board: 41 claims (55%) were paid and 34 claims (45%) were denied. Many of the denied claims (approximately 25%) involved allegations of attorney negligence as opposed to dishonesty.

Opponents of the Bar requiring malpractice insurance of all Virginia lawyers in private practice often cite the small number of unsatisfied malpractice judgments reported each year under the present disclosure rule, ranging during the past five years between 3 and 17, as evidence that there is not a serious problem that would be solved by requiring insurance. Proponents counter that these numbers are just the tip of the iceberg, with many other valid claims of attorney negligence likely not being pursued by injured clients in circumstances where there is no source of recovery even if a judgment is obtained. These include the clients referred to above who unsuccessfully seek recovery from the Clients’ Protection Fund and are turned away because of the absence of any dishonest conduct on the part of the lawyer. It is also the case that some negligent lawyers who are sued for malpractice, and face disciplinary action by the Bar, either lose or surrender their licenses. In such cases, any unsatisfied malpractice judgments would not be reported to the Bar, because the lawyers would not be renewing their licenses.

There is some new data available from the Bar’s disciplinary records. In 2005-2006, 109 private practitioners were the subjects of complaints which resulted in a disciplinary sanction being imposed. Of those 109 lawyers, 67 (61%) reported having malpractice insurance, 42 (39%) did not. **Attachment Five** depicts this data in a pie chart format. It was noted in our 2006 report that lawyers who have been disciplined may be required to obtain and maintain a malpractice insurance policy in an amount and for such term as set by the Disciplinary Board (Para. 13). However, this provision has not been used in discipline cases based on the premise that the public is better served by suspending or disbarring such lawyers. The 2006 discipline figures reported in this paragraph suggest that it might be timely to re-examine that premise if a mandatory coverage rule is not pursued.
Principle Driven Perspective

Proponents of mandatory malpractice insurance most often cite as their basis a commitment to protect the public. This commitment arises from a belief that it is a privilege to be licensed to practice law, and that as a profession we must set and adhere to high standards for both our conduct and for the quality of the legal services we offer to the public. To further these high standards, we already require Virginia lawyers to participate in a professionalism course and continuing legal education programs. In spite of these efforts, it is universally recognized that ethical, competent attorneys can and do make mistakes which harm their clients. Requiring lawyers to have insurance to cover such losses to clients seems to many an essential component of the commitment to protect the public. Certainly, having such a policy also benefits the lawyer, in that any claims filed are defended by the company and any judgments awarded are satisfied by the company up to the policy limits.

Opponents of mandatory malpractice insurance point out that other professionals, most notably doctors, are not required to have malpractice insurance as a condition to licensure, though doctors are required to have such insurance in order to have admitting privileges at any accredited hospital. While acknowledging this fact, proponents indicate that setting a higher standard for lawyers is justified. Proponents also insist that a majority of the public believes that both doctors and lawyers are required to have insurance.

The VSB does currently require certain subsets of licensed attorneys to have malpractice insurance – those participating in the Bar’s lawyer referral service and those covered by the Consumer Real Estate Settlement Protection Act. Proponents of mandatory malpractice insurance are not comfortable with a “caveat emptor” attitude toward other consumers of legal services.

As an alternative to mandatory coverage, there has been some discussion of increasing the efforts to educate members of the public regarding the benefits of using the services of a lawyer who has malpractice insurance. Other states in an effort to promote client awareness have gone as far as requiring lawyers to report directly to their clients that they do not carry insurance. Such affirmative disclosure rules are viewed as an incentive to motivate lawyers to acquire insurance in order to avoid having to make the disclosure repeatedly. Critics of this approach state that if a state bar believes it is that important to inform the public of the potential loss that could arise from employing an uninsured lawyer, the bar should go ahead and simply require insurance coverage.

Since 1990, the VSB has been requiring private practitioners to disclose to the Bar whether or not they have malpractice coverage. This information was available to the public by calling the Bar’s membership department. The volume of calls to the bar for this information has declined over the years. Since July 2005, this same information has been available on the Bar’s website. The VSB’s internet attorney record site received 18,254 “hits” during its first year of operation (July 2005 through June 2006). The number of hits averaged 1,521 per month. For the period July 2006 through June 2007, the number of hits was down slightly—17,802 hits, averaging 1,483 per month. For the three month period beginning July 2007 through September 2007, the numbers are up considerably—7,118 hits, averaging 2,372 per month. Some additional public information efforts have been discussed by the Special Committee on Lawyer Malpractice Insurance, but have been put “on hold” pending direction from Bar Council.
The Committee stands ready to respond in whatever manner requested by Council.

Attachments:

One - Malpractice Insurance Status of Private Practitioners (numbers)
Two - Malpractice Insurance Status of Private Practitioners (percentages)
Three - Malpractice Insurance Status of Private Practitioners (by Circuit)
Four - Map of Circuits
Five - Malpractice Insurance Status of Private Practitioners with Discipline Imposed in 2005-2006 (numbers and percentages)
Malpractice Insurance (MIP) Status of Private Practitioners

2003 - 2007

Attachment One
Malpractice Insurance (MPI) Status of Private Practitioners 2003-2007
District Committees of Judicial Circuits

Judicial Circuits and Districts of Virginia
Attachment Five

Of those 67 had malpractice insurance, 42 did not.
109 private practitioners were disciplined in 2005-2006

2005 - 2006
Private Practitioners With Discipline Imposed