

An Overview: A Possible Mandatory Malpractice Insurance Rule

by Darrel Tillar Mason
Chair, Lawyer Malpractice Insurance Committee

The Supreme Court of Virginia and the Virginia General Assembly have requested the Virginia State Bar to examine the issue of whether a mandatory malpractice insurance rule should be imposed on lawyers in private practice in Virginia. In response, the VSB Council directed the Special Committee on Lawyer Malpractice Insurance (LMI) to study the issue and report on its findings.

The committee's first comprehensive report was presented in June 2006.¹ The report summarized the results of ongoing VSB efforts designed to promote the voluntary acquisition of malpractice insurance by Virginia lawyers. In addition, the report identified measures to strengthen the existing certification rule — measures that have been adopted in other states, such as requiring direct disclosure to clients if a lawyer is uninsured. Finally, the 2006 report outlined four possible models for expanding the VSB's efforts if the bar council concluded that current efforts were insufficient to protect the public from the mistakes of lawyers and to protect lawyers from their own mistakes.²

In October 2007, the council debated — without reaching a conclusion — the philosophical issue of whether it is appropriate for the bar to impose a mandatory malpractice insurance rule that incorporates any of the identified models. The council ultimately directed the LMI Committee to develop a specific proposal or proposals so that the council would not be debating an abstract concept. It was anticipated that having an actual proposal would help inform the debate over whether any new insurance rule should be adopted.

Consequently, the LMI Committee went back to work and developed the proposal

outlined in this article. The committee itself has taken no position on whether this proposal should be adopted. Rather, the committee has suggested that, of four identified models, an "open market" model would be most suitable in Virginia if a mandatory malpractice insurance rule were adopted. Under this model, all lawyers subject to the rule would be required to obtain malpractice insurance through the existing commercial market. This proposal would involve renaming and amending current Paragraph 18 Financial Responsibility in the Organization and Government of the VSB. The new title would be Paragraph 18 Mandatory Malpractice Insurance Rule.

Who would be subject to the rule?

If adopted, the rule would require every active member of the Virginia State Bar engaged in the private practice of law who represents clients — individuals or entities — drawn from the general public to be covered by a professional liability insurance policy written by a company authorized by state or federal law to offer such insurance in the jurisdiction in which the member practices.

The proposal is based on the premise that any mandatory malpractice insurance rule, if adopted, should apply to all active members meeting the above description who seek the privilege of holding a Virginia license, regardless of whether the member's practice is full time or part time and regardless of whether the member is located in Virginia or specifically serves Virginia clients. The rule would not apply to associate members, judicial members, disabled and retired members, emeritus members, in-house corporate counsel, or counsel employed by governmental entities. While acknowledging that some

members may allege that compliance with the rule imposes a significant hardship and may result in their inability to practice law in private practice, the LMI Committee concluded it would not be advisable to establish a protocol for obtaining a "good cause shown" waiver.

The committee is sensitive to the need to encourage, not discourage, pro bono representation. It is not the intent to mandate that a member who is not otherwise required to have insurance coverage obtain coverage in order to provide such representation. Efforts are currently under way to ensure that those who wish to offer pro bono representation have access to insurance so that their pro bono clients enjoy the same protection as paying clients.

The corporate organization of insurers may vary; they include mutual companies, risk retention groups, and surplus line carriers. The proposal's only limitation, therefore, is that members obtain insurance from a company generally allowed by law to sell malpractice insurance in the jurisdiction in which the member practices.

How much coverage would a member have to carry?

Under the proposed rule, the policy covering the member would need to provide minimum policy limits of either \$100,000 per claim with a claim expense allowance of at least \$50,000 costs outside the policy limits, or \$200,000 per claim where claims expenses are inside the policy limits. An extended reporting endorsement, or tail coverage, is insufficient to satisfy this coverage requirement.

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These minimum coverage standards mirror the basic policy currently offered by the two insurance companies that insure the majority of solo and small-firm practitioners in Virginia. The committee opted not to impose any maximum deductible limit. Under an open market model, insurers would continue to determine appropriate deductibles on an individual case basis and in accordance with their own underwriting standards and the insured's preferences.

While higher levels of per claim coverage would be desirable in most instances, as would an aggregate limit reflecting some multiplier of the per claim limit, the committee's focus was on making the transition from uninsured to insured as economical as possible. The present proposal, while minimal, arguably would afford an alleged victim of legal malpractice a greater opportunity to be compensated than the victim would obtain without the insurance. The proposal also would afford the member the benefit of experienced claims handling and defense.

What insurance information would the member be required to report to the VSB?

Each active member subject to the mandatory malpractice insurance provision would be required to certify to the bar on or before July 31 of each year that he or she is covered by a professional liability insurance policy that meets the specified minimum standards. The member would be required to provide the name of the insurance company — not the agent — and the policy number.

By signing the required certification, a member would authorize the Virginia State Bar, at its discretion, to verify with the named insurer the existence of the disclosed policy. Each active member would submit the required certification upon admission to the bar, as well as with each application for renewal thereof. If a member becomes engaged in the private practice of law offering legal services to clients drawn from the general public, that member would have thirty days in which to

notify the bar and obtain insurance. Additionally a member who intends to continue representing clients drawn from the public would be required to notify the bar and obtain new insurance within thirty days if the member's coverage lapses, is no longer in effect, or terminates for any reason — unless the policy is replaced with another policy and no lapse in coverage occurs.

To be fully in compliance with the proposed rule when it goes into effect, members who already certify that they have insurance coverage need only provide the name of the carrier and the policy number. Large firms that currently “batch” the required annual renewal paperwork can simply have the firm administrator supply the name of the insurance carrier and policy number prior to the member's certification. New admittees who are not yet employed or have not yet established a practice would indicate that they are not currently engaged in practice and would be instructed to notify the bar and obtain insurance within thirty days of any change that brings them under the rule. Other members who in a given bar year previously certified they were not subject to the rule would also have an affirmative obligation to report within thirty days a change in status that brings them under the rule.

There is no change proposed to the existing requirement that members notify the bar in writing within thirty days if their malpractice insurance policy is no longer in effect. Under the proposal, however, members would be required to provide the name of the carrier and policy number of any replacement policy. Members who make lateral transitions during the course of a year would have an obligation to confirm and report their coverage under the new firm's policy. An extended reporting endorsement would not satisfy this requirement. The committee considers the benefits of this rule to outweigh any minimal burden it imposes on the approximately 90 percent of affected bar members who currently report having malpractice insurance coverage.

The committee opted to forego requiring any documentation in the form of a certificate of coverage or copy of a declaration page because of its trust that Virginia lawyers are truthful. The committee considered it appropriate to specify that, if a question arises as to the accuracy of a member's certification of insurance, the certification would be deemed authorization for the bar to verify the policy's existence and for the insurer to provide the information. It is not anticipated that this authority would be invoked frequently.

Would any current requirements be eliminated?

If a mandatory malpractice insurance rule were adopted, the need for the current attorney record search option related to disclosure of lack of malpractice insurance would be obviated. The committee's proposal also eliminates the current provisions in Paragraph 18 related to the disclosure of “the date, amount, and court where rendered, of any unsatisfied final judgment(s) against such member, or any firm or professional corporation in which he or she has practiced, for acts, errors or omissions (including, but not limited to, acts of dishonesty, fraud, or intentional wrongdoing) arising out of the performance of legal services by such member.” The current requirement has not yielded particularly useful information and has contributed to the underestimation of situations in which a member of the public has suffered an uncompensated loss as a result of an attorney's professional actions.

What are the consequences for failure to comply with the proposed rule?

Under this proposal, the consequences for failure to comply with a requirement for mandatory malpractice coverage would be the same as the consequences for failure to comply with the requirement for mandatory continuing legal education. The lawyer would be subject to the penalties set forth in Paragraph 19 Provision for the Administrative Suspension of a Member. It is recommended that the delin-

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quency fee for a member who does not timely comply with the requirements of amended Paragraph 18 be \$100, and the reinstatement fee be \$250. An untruthful certification or unjustified failure to notify the bar of a lapse or termination of coverage would subject the member to appropriate disciplinary action.

How soon would such a rule be implemented?

The committee anticipates that the effective date of any rule change would coincide with the commencement of the bar's fiscal year. (While the rule would be effective July 1, the certification itself would not be due until July 31.) The committee believes that at least six months would be necessary to promote member education and to allow sufficient time for previously uninsured lawyers to apply for insurance, satisfy underwriting requirements, and obtain an insurance policy that meets the prescribed standards.



Darrel Tillar Mason has a solo practice in Richmond that focuses on representing children in special education law. She is chair of the Virginia State Bar's Lawyer Malpractice Insurance Committee, and she previously served on the VSB Council, the Legal Ethics Committee, and other bar committees. She holds a bachelor's degree in English and a master's in education from Virginia Tech and a law degree from the University of Virginia.

What are the next steps?

In the next few months, information about this important issue will be widely disseminated and feedback will be solicited from all members of the VSB. The bar council will further debate the pros and cons at its June meeting, with no vote possible before October 2008. Whether a mandatory malpractice insurance rule should be adopted in Virginia and, if so, whether an open market model is the appropriate approach are questions that should be given thoughtful consideration. ♪

Endnotes:

- 1 The full report is available on the VSB website at <http://www.vsb.org/site/news/item/committee-reports-on-malpractice-insurance/>.
- 2 Those models are:
 - a. create an Uninsured Lawyer Malpractice Claims Fund (similar to the Clients' Protection Fund);
 - b. require all lawyers in private practice who represent clients drawn from the public to obtain malpractice insurance mandatory coverage through a bar-controlled fund, or "captive," similar to the current program in Oregon;
 - c. require all lawyers in private practice who represent clients drawn from the public to obtain malpractice insurance either through the open (commercial) market or through an assigned risk group policy to be developed by the VSB; and
 - d. require all lawyers in private practice who represent clients drawn from the public to obtain malpractice insurance through the existing open (commercial) market.