

# Opinion: Legal Malpractice Insurance Should Not Be Mandatory

by Jeannie P. Dahnk

*Editor's Note: The Virginia State Bar Council is considering a proposal to require lawyers in private practice who regularly represent the public to carry legal malpractice insurance. An article in support of the proposal was published in the April 2008 issue of Virginia Lawyer. [http://www.vsb.org/docs/valawyer magazine/vl0408\\_debate-insurance.pdf](http://www.vsb.org/docs/valawyer magazine/vl0408_debate-insurance.pdf)  
The following article opposes making malpractice insurance mandatory.*

## **Mandatory insurance does not protect the public**

Mandatory legal malpractice insurance protects the lawyer. Malpractice insurance is not created nor designed to protect the public. An insurance company's interest is diametrically opposed to a claimant's. Malpractice insurance is not intended to pay a claimant, but to defend and protect the lawyer. Of twelve unpaid malpractice claims (for approximately twenty-six thousand lawyers in private practice), nine involved insured lawyers and three involved uninsured lawyers. Educating the public as to what malpractice insurance is and what it is not provides more benefit to the public than simply requiring a lawyer to be insured.

## **Cure in search of a disease**

There is no crisis regarding lawyers and malpractice insurance. Ninety percent of Virginia lawyers voluntarily carry malpractice insurance. The average in other states is approximately 67 percent. No other profession in Virginia, including the medical profession, requires malpractice insurance. Other professions regulated administratively by the state are not mandated to carry malpractice insurance because that insurance does not protect the public.

## **Mandatory insurance is already a remedy**

If a lawyer violates ethical rules, the Virginia State Bar already has the power to order as a requirement that the lawyer

carry malpractice insurance to continue practice or return to practice.

## **Disclosure already required**

Virginia is one of a few states that require lawyers to disclose whether they carry malpractice insurance. This information is easily and quickly obtainable by calling the bar at (804) 775-0530 or at <http://www.vsb.org/attorney/attSearch.asp?S=M>. The public can conveniently know whether a lawyer reports that he or she has insurance.

## **Violation of due process**

If a lawyer has been found fit to practice law and given a license but is required to obtain malpractice insurance and cannot, the lawyer is prevented from practicing law. This violates the due process clause of the U.S. Constitution. It is predictable then that the VSB would be successfully sued and would most likely be ordered to pay attorney's fees. The bar, improperly and unfairly, is abdicating to a private insurance carrier — whose motive is financial, not public protection — the decision as to who can and who cannot practice law. The VSB has no business doing this, and a private insurance carrier has no business making such a decision.

## **Making insurance mandatory will increase premiums for all lawyers**

If malpractice insurance is required, all premiums will go up. Whether the insurance is provided by a captive entity or private insurers, they will charge more

for "required" coverage. Insurers will raise the rates because we have to have it, because they can, and because they cover everyone. This may cause some lawyers to decrease the amount of their coverage because of increased premiums.

## **Outside the mission of the VSB**

The mission of the VSB is to regulate the profession, help the public with access to legal services, and improve the legal system. Requiring legal malpractice insurance does not fall into any of these duties. Not since the creation of the VSB in 1938 has mandating insurance ever been considered a duty of the VSB. If mandating coverage was part of the bar's duties, it would have been a requirement in 1938 or called for long before now, especially given the malpractice insurance crisis in the 1970s. The fact that it is not, nor has it ever been, required speaks volumes to its lack of application to either the bar's mission or protection of the public.

## **Frivolous lawsuits will result**

Mandatory malpractice insurance will generate unnecessary lawsuits. Claimants will file malpractice cases regardless of the merits because there is insurance. Claimants file these suits because lawyers hate to be sued and will settle just to get out of the suit. Insurance companies will pay nuisance settlements to keep their costs down, which will reflect poorly and incorrectly on the profession.

Debate continued on page 18

### **Conclusion**

Mandatory legal malpractice insurance does not protect the public. To impose mandatory insurance so the bar can appear to protect the public is disingenuous and misleading. The fact of the matter is that Virginia lawyers take their clients, the public, and their duties seriously. This is evidenced by the 90 percent of Virginia lawyers who voluntarily carry malpractice insurance and the extremely low number of malpractice claims. The statistical data shows that the greater problem is with insured lawyers, not uninsured lawyers. Mandatory insurance would not improve nor expand the current protection for the public. For the above reasons, mandatory legal malpractice insurance is a bad idea. ■

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