

Opinion: Private Practitioners Should Have Malpractice Insurance

by Bruce M. Marshall

The following commentary offers the writer's reasons for supporting mandatory malpractice insurance for lawyers who represent the public. A commentary by an opponent of mandatory insurance will be published in the June/July issue of *Virginia Lawyer*.

Whether the Virginia State Bar will require attorneys in private practice who provide legal services to the public to have malpractice insurance has been an issue of debate at the VSB Council since 2005.

This question arose from two independent events. The bar received an inquiry from the Supreme Court of Virginia to examine whether the public is adequately protected when malpractice occurs. Also, a bill introduced in the House of Delegates would have required any uninsured Virginia lawyer who represents the general public to pay \$1,500 annually into a newly created client protection fund. Oversight of the fund's collection and distribution was not addressed in the bill. The bill's sponsor had a constituent with an unpaid judgment that arose from legal malpractice. This proposed bill passed through the House and was being considered by the Senate when the VSB intervened and assured the legislature that we were looking at the issue. The bill was withdrawn, but the House of Delegates then passed a resolution (on a vote of 92–6) to encourage the Supreme Court and the bar to consider some form of mandatory malpractice coverage.¹

With these events, the VSB inquiry began. The Special Committee on Lawyer Malpractice Insurance was directed to study the Court's and legislators' concerns and report its findings. I have had the

pleasure of serving on the committee. It has diligently sought to examine the issue and apprise the council of its progress. The council, at its October 19, 2007, meeting, asked the committee to develop one or more proposals "for mandating malpractice insurance for Virginia attorneys engaged in private practice drawing clients from the general public."

The council, in making this request, had not decided whether it would recommend mandatory malpractice coverage.² It asked for a proposed model that it could examine as a vehicle for debate. That proposal is summarized in an article by Darrel Tillar Mason on page 9 of this publication.

This article sets forth my view that private practitioners should be required to maintain malpractice insurance.³ I am a member of the VSB Council as well as the committee, and I have been engaged for almost thirty years in private practice, representing clients drawn from the public.

Currently, approximately 90 percent of the VSB members covered by the proposal—lawyers in private practice who represent clients drawn from the public—report that they maintain malpractice coverage. Mandated coverage would not affect this overwhelming majority at all. It is the remaining 10 percent, who do not maintain coverage, that would be required to do so in order to be able to continue rep-

resenting clients drawn from the public.⁴ The committee's proposal would require policies with minimum limits—policies that are currently offered by the two predominant malpractice insurance providers in Virginia.⁵ The committee has been assured that there are insurance products for practitioners who have been dropped or refused renewal by their malpractice carriers. These policies will carry a higher premium—perhaps three or four times more expensive.

Let us not forget that we are licensed to provide legal services to the public. That license is a privilege and an honor. With that license comes great power that we wield every day in order to protect the public from the wrongdoing of others. With that power also comes the responsibility to not harm our own clients in the process. As hard as we may try, we are capable of making mistakes that harm our clients. Not even the most vocal opponents to this proposal have argued that people injured by legal malpractice should be left without any possible recovery.

It is our responsibility to step up and differentiate ourselves from all other professionals in the commonwealth who have shied away from protecting the public for damages incurred by their mistakes. In so doing, we will discharge our duty to protect the public—even from ourselves.⁶

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Lawyer Malpractice Insurance Debate

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Endnotes:

- 1 In the June 2007 meeting of the VSB Council, I warned the body that if we failed to address this issue adequately, it would be only a matter of time before the legislature would make the decision for us. Adopting a policy of our own making would be far more palatable than one imposed upon us.
- 2 Curiously, lawyers engaged in residential closings are currently required to have a minimum of \$250,000 in malpractice coverage *and* a CRESPA bond of \$100,000—to be increased to \$200,000 on July 1, 2008. Likewise, lawyers who provide services under the Virginia Lawyer Referral Service are required to have coverage comparable to that suggested under the current proposal before the VSB Council.
- 3 A question recently arose as to how this proposal might impact attorneys not regularly engaged in private practice who perform pro bono services. The committee assures the bar that such an issue will be addressed in the process so as not to negatively impact the good work of providers of those services.



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- 4 The reasons why that 10 percent is uninsured have not been the subject of any in-depth study. The committee has been told anecdotally that malpractice insurance was unaffordable, unavailable, or not something that a "good lawyer" needs.
- 5 \$100,000 per claim with expense allowance of at least \$50,000 outside the policy limits or \$200,000 per claim with claims expenses within the policy limits.
- 6 The most common argument being made against the proposal is, "Why fix a system that does not seem to be broken?" My response is, "Why wait until it is broken and then implement the change while apologizing for allowing the system to break?"