

Why You Should Never Say Never to Malpractice Insurance — The True Cost of “Going Bare”

by Mark Bassingthwaighe

I will admit I honestly don't understand why a lawyer would ever decide to not buy a malpractice policy, but many lawyers do just that and the reasons I hear are many. Some try to justify their decision by declaring that malpractice premiums are beyond affordable. They'll tell me “just look at what docs have to pay.” Others have decided that if they ever get sued they'll just declare bankruptcy in order to avoid the loss. Then there are those who choose to self-insure thinking that the premium savings will more than offset any possible loss. I've even had attorneys tell me they've chosen to protect their assets in others ways. And then there's this one. “Having a malpractice policy simply invites claims. No insurance means no one will ever sue me because there's no deep pocket.” I just shake my head over the naivety of that belief.

As lawyers, we are to protect the interests of our clients. In addition, lawyers and those in their employ can and will make a mistake from time to time. None of us are perfect. In fact, even good lawyers who do great work can still get sued. It happens. We've handled such claims. The question, however, is this. Should a significant misstep ever occur on one of your client matters, what might the fallout be? Think about the answer as a member of our learned and honorable profession. Clearly if and when a significant misstep occurs, the client will be harmed in some fashion. Now put yourself in the client's shoes and ask yourself who should be held responsible, particularly if a financial loss is part of the equation? You know darn well what the answer is. After all, if a lawyer representing you on a personal

injury matter blew a statute that resulted in a lost opportunity for any kind of recovery you would expect to be made whole and you know it. You see, insuring for malpractice isn't about protecting yourself. It's about protecting your clients should something go wrong and that's the way it's supposed to be.

Now let's talk about a few specifics. While numbers vary between the states and over time, approximately 4 percent to 5 percent of lawyers practicing in the United States will face an allegation of malpractice in any given year. Yes, it's true that a significant number of these allegations will resolve without any loss being paid, but this doesn't mean the claim has no impact. Time and money are going to be in play. Claims can easily take six to twenty-four months to resolve and defense costs on a claim with any merit at all can break that \$100,000 mark before you know it. But that's not all. Lawyers who are sued often see their income drop for a period of time, particularly if they're self-insured and forced into devoting precious time defending

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themselves or if the situation has made it into the local news. Making matters worse, if the claim becomes something of a topic among the local bar and part of the story is that the involved lawyer is bare, it's pretty much a given that good referrals from other lawyers are going to drop off.

Next, let's discuss the affordability issue. While I get that the term “expensive” is relative to one's financial reality, legal malpractice policies are nowhere near as expensive as some medical malpractice policies. In addition, the initial premium is going to be much less than what lawyers who have been in practice and insured for a number of years will be charged. This is simply due to the fact that coverage will start from the date a policy is first purchased because you can't buy coverage for work you've done in the past. In other words, newly insured lawyers have limited exposure because they don't have a substantial amount of covered legal work under their belts yet. The odds of a covered claim arising from a newly insured practitioner are going to be much lower than those for a lawyer who has been insured and in practice for ten years or more. Yes, premiums will rise for a period of years as the newly insured lawyer does more and more work, but all things being equal, it should stabilize about six years in.

Finally, let's take the “it's the right thing to do” argument off the table for a moment and just focus on the financial risks and realities in order to address those who buy into the de facto self-insure approach. If you count yourself as

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a member of this group, are you religiously setting aside whatever you would have spent on premiums to deal with an allegation of malpractice? All I can say is that I've never come across a situation where that was happening. And truth be told, unless that pool is well into the six digits it's not going to be enough to put on a good defense let alone cover a sizeable loss. Leverage those dollars and buy a policy. You will never be able to build a pool of funds in the small firm self-insure model that comes close to the amount of coverage (not to mention peace of mind) that those same dollars could buy. But of course, we can't take the "it's the right thing to do" argument off the table because we are professionals who still have the privilege of self-regulation and our rules require that we protect the interest of our clients. The most cost effective way to do so is through the purchase of an appropriate level of malpractice coverage.



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the Virginia State Bar's upcoming TECHSHOW (April 25, 2016, at the Richmond Convention Center). The TECHSHOW provides a unique opportunity for lawyers to simultaneously discuss the latest technology, how to use it, and how to protect information. We want all of you to be contemplating these interesting and challenging issues.

Endnotes:

- 1 Voice Over Internet Protocol (VoIP)



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