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Survey Results: What About Them?

By Daymon Ely

In the recent survey conducted by the State Bar Lawyers Professional Liability and Insurance Committee, the most frequently noted reason for not purchasing insurance was that the cost of purchasing malpractice insurance is too high. Let me try to put this concern to rest.

For most young lawyers, the cost of malpractice insurance is actually pretty cheap—about \$1000 per year. This is because the insurance company is not insuring these attorneys for a lengthy history (referred to as the “tail”). For the majority of attorneys, the cost is around \$2,500 per year depending on the coverage limits one is looking for. Obviously, the limits you want, the number of times you have been sued, and your area of practice (e.g., securities or class action work) are all factors that could increase the amount you spend, but a \$300,000 policy for most attorneys is not likely to be cost-prohibitive.

“If insurance is in place, the lawyers give up defense decisions to the insurance adjusters.”

On the flip side, I am still seeing lawyers suggesting that if they don’t have insurance they won’t be sued. I am a plaintiff’s attorney who sues attorneys, and I know this is not the case. I, and the other attorneys I know who sue attorneys, will sue you if there is a case. The fact that you do not have insurance will not discourage us from pursuing the case to judgment and, if necessary, into bankruptcy.

“I scored high on the Professional Liability Rules of Ethics.”

There is certainly a lack of understanding that any lawyer can be sued, even if he or she has only a limited practice. Comments in response to the survey included: “My practice does not expose me to any risk of liability.” “I develop a close and drank [sic] relationship with my clients.” My favorite was, “I scored high on the Professional Liability Rules of Ethics.” One believed he would not be sued because he is “very careful.” Unfortunately, no matter how limited, careful or wonderful your relationship is with your client, if you are practicing law, then you can make a mistake. If the mistake rises to the level of a cause of action, you are: (1) risking your assets, and (2) increasing the risk that you will wind up representing yourself.

I am consistently surprised that lawyers do not understand they have an obligation to protect their clients that exists independent of protecting themselves. The best example from the survey responses is this statement: “I am more concerned about finding and affording health insurance for . . . my family than I am about malpractice coverage.” I promise you, each and every one of your clients thinks you have malpractice coverage unless you have followed Rule 616-104 NMRA, which requires you to disclose, in writing, that you don’t have coverage. And being a lawyer is entering into a relationship of trust with clients. Your clients trust you to do the right thing, and that includes being there with insurance coverage when you have failed them.

Now remember, we were seeking comments on malpractice insurance. Keeping that in mind, some of the comments were just bizarre.

“If insurance is in place the lawyers give up defense decisions to the insurance adjusters and lawyer which [is] unacceptable.” Insurance “appears to be a scam—or practically a scam.” “Insurance premiums should not exceed \$20 a year.” Some quick retorts: (1) if you have no insurance, you will be in charge, congrats; (2) if you have insurance, your clients won’t think it’s a scam and neither will you; and (3) \$20 a year. Have you filled up your gas tank lately? It was nice that we got some specific suggestions, such as “Close the law school for a decade to balance supply and demand for lawyers so we don’t have to [deal?] with our expenses so closely.”

I know I sound frustrated. But I see many clients who simply cannot believe that, in many cases, the best we can hope for is a piece of paper, a judgment. Many of these people have lost everything because of their lawyer’s behavior. Without insurance, they get to look forward to judgments, a payment plan over many years, and bankruptcy, either the lawyer’s or their own.

There are certainly lawyers who appear not be able to afford insurance coverage, but malpractice insurance is simply part of the cost for the privilege of representing people. There are plenty of insurance companies offering competitive rates. We need lawyers to understand that it is part of their responsibility to make the call.

About the Author

Daymon Ely is a sole practitioner in Albuquerque whose practice focuses on representing plaintiffs in legal malpractice cases.