

Mr. Tom Vasaly
Attorney General's Office
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Dear Tom:

This is to confirm our conversation on Friday, February 20, 2004, wherein you requested that I provide a summary of my experiences with the screening of legal malpractice cases. You indicated that you like to receive such a summary by 3:30 p.m. today, and listed below are my preliminary thoughts.

1. Based upon my experience of suing attorneys since 1996, it is a foregone conclusion that every consumer of legal services in the State of Minnesota presumes that the lawyer they hire is insured. It is also a given that virtually none of the consumers of legal services ever ask or receive any confirmation as to the insurance status of their lawyer at the time of retention.
2. At present, our office is screening 8 to 10 potential legal malpractice cases per month. During this initial call, I inform the potential client that I will not sue an attorney who is not insured. When the potential client then asks "How can my attorney not have insurance?", I inform them that, to cut hair in Minnesota, a barber has to have insurance, to drive a car in Minnesota the law requires you to be insured, but to practice law in the State of Minnesota you do not have to have insurance. These people are astonished to learn of the potential that no insurance exists, and that the ability to find a new lawyer is hampered by no insurance. The reason I do not sue lawyers who are uninsured has to do with collection. I am unwilling to accept a case on a contingency basis where the lawyer has no insurance, because even if we prevail, the lawyer can hide assets or file bankruptcy. These cases are difficult enough to win without a collection problem at the end.
3. If the potential case has merit as deduced on the telephone, I request of the potential client to find out if the lawyer is insured. Such information can be difficult to obtain prior to commencing suit. For example, I know of one attorney, Mr. Ed Kautzer, who takes the position that the present or former client is not entitled to know whether the attorney has insurance. Thus, suit must be commenced to find out. Since I am unwilling to commence suit without knowing the insurance status first, their case is turned down. On one occasion I have violated this rule, and sought to withdraw after I learned there was no insurance. The trial court refused my right to withdraw, the case went to the Court of Appeals, and I was allowed to withdraw. Now, my Retainer Agreements are even more clear, and state that, if at any time it is learned that there is no insurance, I have the right to withdraw.
4. During our discussion, you indicated that you need statistics that prove that victims of malpractice have gone uncompensated. All I can tell you is that there are not that many plaintiff legal malpractice lawyers, and if I turn the down the case because of no insurance, and they do not or cannot find another lawyer, then they went uncompensated. I have personally turned down at least 10-15 cases a year due to the lack of coverage. It should also be noted that I automatically turn down any potential case where the underlying case is a family law dispute. I also turn down any potential case where the underlying case is criminal.

5. During our discussion, I informed you that I was a proponent of requiring an attorney to disclose his lack of insurance on the retainer agreement. I understand that such a proposal is dead, but many of the arguments still apply. The Certification of Insured Status on the Annual Registration is self-policing. Rather than require mandatory insurance, or having it on the retainer, it requires lawyers to report they don't have insurance and most attorneys will not want to make such a disclosure. The Certification of Insured Status on the Annual Registration also gives rise to a new claim if the information given is incorrect. One reason I was in favor of the retainer disclosure is that, if the lawyer gave false information as to the insured status, a new claim under § 481.071 existed, and those claims are not dischargeable in bankruptcy. Similarly, if wrong information is given in the license renewal, and the client checks and relies thereon, a new claim may exist.

We also discussed that it is not fair for one lawyer to have higher overhead because he has insurance. We also discussed that uninsured lawyers have told me that they do not obtain insurance because they know lawyers like me will not sue them.

To conclude, the proposal before you is pro-consumer. In my opinion, the insured lawyers will not oppose such a rule.

Let me know if I can be of any further assistance.

Very truly yours,

Patrick H. O'Neill, Jr.
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