

ABA Profile of Legal Malpractice Claims

Every four years, the ABA Standing Committee on Lawyers' Professional Liability surveys US professional liability carriers, including Swiss Re Corporate Solutions, and then compiles its Profile of Legal Malpractice Claims. The Committee reviews legal malpractice claims by area of law, type of activity giving rise to a claim, firm size and amount of expense/indemnity payment. The 2015 – 2019 quadrennial study was recently released. The following may be of interest:

- The "Top Ten" areas of practice for claims frequency are as follows:
 1. **Personal Injury Plaintiff** (16.30%)
 2. **Family Law** (12.81%)
 3. **Real Estate** (12.37%)
 4. **Estate, Trust and Probate** (11.98%)
 5. **Collection and Bankruptcy** (8.21%)
 6. **Business Transaction/Commercial Law** (7.03%)
 7. **Criminal** (5.95%)
 8. **Corporate/Business Organization** (5.22%)
 9. **Patent, Trademark, Copyright** (3.05%)
 10. **Personal Injury – Defense** (3.01%)

This Top Ten list is largely consistent with prior profiles. Interestingly, however, the number of Family Law claims has continued to rise, with **Family Law** moving from third in the 2011-2015 study to second place. Conversely, **Real Estate** claims moved from second to third place. Some of the respondents anticipate that claims in both areas will rise in 2020 and beyond given the current economic environment.

- Though not in the Top Ten, **Insurance Defense** claims saw the largest rise in frequency from .73% in 2015 to 2.76% in 2019. This uptick appears to reflect a trend across the US with insurance carriers suing defense counsel for an unanticipated result. Many states now allow insurers to sue their attorneys directly. Practitioners in this area should be cognizant of the increased exposure as a result.
- Claims against **Immigration** attorneys increased from .91% in 2015 to 1.78% in 2019. This rise may be due to the United States' changes in immigration policies over the past several years.
- Turning to **Size of Firm**, the Profile revealed that firms with five or fewer attorneys are responsible for the majority of claims (62.51%) with solo practitioners ranking first in claims with 32.33%. While 1 – 5 attorney firms make up the majority of claims, they also had the net largest decrease from the 2015 study. Claims against firms of larger size increased since 2015.

- The **Type of Activity** giving rise to claims was also examined. Activities that have consistently stayed in the Top Five since 2003 are as follows:
 1. **Preparation, Filing, Transmittal Documents** (35.24%)
 2. **Commencement Action/Proceeding** (16.16%)
 3. **Advice** (13.59%)
 4. **Settlement/Negotiation** (8.78%)
 5. **Pre-Trial/Pre-Hearing** (6.95%)

The Committee noted that claims due to **Preparation, Filing and Transmittal of Documents** activities continue to rise with no foreseeable end. Notably, claims arising out of **Settlement/Negotiation** have also increased as fewer cases head to trial and more litigants attempt a second bite at the apple by pursuing a "settle and sue" strategy. Litigation attorneys must ensure that there is a good paper trail reflecting the client was fully informed about all aspects of a negotiated settlement.

- With respect to the actual errors made by attorneys, **Substantive Errors**, including failure to know or properly apply the law and inadequate discovery/investigation, represent over half of all alleged errors. **Administrative Errors**, including failure to calendar properly, clerical errors and procrastination comprise almost 20% of reported claims. The Profile also noted a rise in **Intentional Torts** asserted against attorneys with **Malicious Prosecution and Fraud** claims increasing from prior studies. The Committee surmised that this rise may correlate to failed business deals as well as attorneys engaging in improper conduct. Further, the uptick may be due to aggressive pleadings by the Plaintiffs' bar with the goals of creating a wedge between a carrier and insured, as well as inflaming a jury.
- Finally, the 2019 Study found growth in large claims with increased indemnity payouts. Claims with combined indemnity and expense payouts of over **\$2,000,000** have continued to rise with respondents reporting 105 such claims. Further, the number of \$0 claims has decreased, reflecting that claimants have become more tenacious in pursuing legal malpractice claims.

Past experiences have shown us that in the event of an economic downturn, legal malpractice claims will increase. Given the results of the 2019 Study, risk management must be an integral part of the practice of law. Proper file documentation, including memorialization of settlement discussions and accepted/rejected advice, is crucial. Further, use of engagement, disengagement and closing letters, along with conflict screening, is necessary. While we can never fully prevent a disgruntled party from making malpractice allegations, proper risk management techniques can assist in defending and mitigating the claim.

Summary by Ellen McCarthy, Senior Product Underwriter and Risk Management Leader