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Good News, Bad News on Malpractice: Growth in claims has slowed, but more result in payouts to plaintiffs

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Malpractice claims against lawyers increased only slightly in frequency and severity over the past decade, and in some areas they even decreased, according to a new study sponsored by the ABA and lawyer-owned insurance companies.

The reported modest increase may be a sign that lawyers and insurers are taking greater care and becoming more sophisticated in limiting their exposure to malpractice claims. "It's really surprising that there wasn't a larger increase," says the study's author, Kirk R. Hall, chief executive officer of the Oregon State Bar Professional Liability Fund in Lake Oswego, near Portland.

But though the overall malpractice picture is relatively upbeat, the new study also concludes that recent trends affecting the legal profession--including an increase in economic pressure on lawyers, breakdowns in law firms' internal supervision, and lack of mentoring for new lawyers and solo practitioners--"cry out for new loss prevention programs focused on those specific problems." The report on the 1996 "National Legal Malpractice Data Study" is being released early this year.

The study was conducted during 1996 by the ABA Standing Committee on Lawyers' Professional Liability and the National Association of Bar-Related Insurance Companies, an organization of 16 lawyer-owned insurance companies in the United States and Canada. The study is the first comprehensive examination of legal malpractice since the ABA's landmark study conducted in the mid-1980s.

Also contributing information to the study were seven commercial insurance carriers.

(Data from the Canadian companies were not included in the report so that the U.S. data gathered for the 1986 report could be compared directly with the results in the new study.)

The 1986 study covered claims reported between Jan. 1, 1983, and Sept. 30, 1985, while the new study is based on claims reported in the years 1990-95. Thus, while direct comparison of raw numbers is impossible, results of the two studies can be compared in terms of percentages, Hall says.

For example, real estate transactions during 1990-95 accounted for 14.35 percent of all malpractice claims, a decrease from 23.29 percent during the 1983-85 period.

That trend may stem from the fact that fewer lawyers today are involved in title searches and escrow activities, the study suggests.

Another significant decrease was reported in claims by plaintiffs in personal injury cases against their lawyers, from 25.08 percent of all claims reported in the 1986 study to 21.65 percent in the new study.

One reason for the upturn in this area may be improved calendar and docket control systems, according to the study. Indeed, the frequency of claims in all areas arising from failures to calendar properly and failure to file documents decreased by more than a third, to 9.44 percent of claims in the 1996 study from 15.79 percent in the 1986 study.
At the same time, the percentage of claims relating to commercial law transactions and to corporate and business organization more than doubled, to 19.53 percent of total claims in the 1996 study from 8.36 percent in the 1986 study.

This pattern may reflect the fallout from the recession of the early 1990s or the greater role that lawyers have come to play in structuring increasingly complex deals.

More and Higher Awards

In terms of recoveries, a comparison of the two studies indicates that fewer legal malpractice claims are being closed without some payout to plaintiffs, and that there has been a slight increase in the portion of claims resulting in larger awards.

Of claims closed during 1990-95, only 33.45 percent were abandoned with no payment to the plaintiff, down from 49.99 percent in the 1986 study.

Lawsuits were dismissed in favor of defendants in 22.91 percent of claims in the 1996 study, an increase from 17.37 percent in the 1986 study; and judgments for plaintiffs fell to 0.26 percent from 1.14 percent. At the same time, however, settlements with payments to plaintiffs were reached in 43.38 percent of claims during 1990-95, an increase from 31.5 percent of cases during 1983-85.

Meanwhile, the proportion of claims resulting in larger payouts has increased slightly in the past decade, according to study results.

For example, the share of total claims that resulted in payouts of more than $50,000 was 8.37 percent for the years 1990-95, compared to 4.88 percent for 1983-85.

And while the vast majority of claims continue to result in payouts ranging from $50,000 down to nothing, the portion that produced payouts of $10,000 or less (including nothing) decreased from 85.57 percent of claims during the 1983-85 period to 78.55 percent for the 1990-95 period.

Payouts ranging between $10,001 and $50,000 were made in 13.07 percent of all claims in 1990-95, compared to 9.55 percent of claims in the 1983-85 period.

(One caveat concerning claim payouts is that, for both reporting periods, the highest number of claims were resolved for amounts ranging between nothing and $10,000. Neither study, however, contains a separate breakout for claims in which nothing was paid. Hall believes the vast majority of claims ended with no payment, and he expects future studies to account for that result.)

Although the patterns on legal malpractice claim payouts might mean insurance companies have decided to settle cases more often while they also are making better decisions on which cases to take to trial, Hall says another factor is that stronger claims are being made as the law of malpractice has developed significantly since the 1980s.

With stronger claims being filed, both the number of settlements and the payout amounts could be expected to increase. "Fifteen years ago, there weren't that many cases around, and the courts were just muddling along," Hall notes.

A significant qualifier to the results is that, though the 1996 study focused on specific areas of substantive law, it did not determine the relative risk levels of different types of law practice because it did not gather corresponding data on how lawyers divide their time between different substantive areas.
In other words, Hall says, while some areas of law account for a higher percentage of claims than others, it is not possible to reach conclusions on how lawyers would be affected without knowing how much time they spent in the various areas.

"The mere fact that there are a lot of claims in an area doesn't mean that type of practice is risky, because attorneys may be spending a large number of hours in that area," Hall says. Thus, the study warns underwriters calculating premiums not to use the results in determining what types of practices pose high risks.

Nevertheless, Hall says, the study is a valuable step in helping lawyers and insurers identify problem areas and plot strategies to reduce the risk of being sued and paying off claims.

Little Change in Top 10
The areas of substantive law that produce the most malpractice claims have not changed much in the past 10 years.

1996 Study

Area of Law as Percentage of All Claims
Personal Injury-Plaintiff 21.65
Real Estate 14.35
Business Transactions 10.66
Family Law 9.13
Corporate/Business Organization 8.87
Collection and Bankruptcy 7.91
Estate, Trust and Probate 7.59
Criminal 3.82
Workers’ Compensation 3.30
Personal Injury-Defense 3.27

1986 Study

Area of Law as Percentage of All Claims
Personal Injury-Plaintiff 25.08
Real Estate 23.29
Collection and Bankruptcy 10.49
Family Law 7.88
Estate, Trust and Probate 6.97
Corporate/Business Organization 5.32
Criminal 3.34
Personal Injury-Defense 3.22
Business Transactions 3.04
Workers’ Compensation 2.14

Source: 1996 ABA-NABRICO National Legal Malpractice Data Study