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## **The (High) Cost of Discipline, Part 1: The Numbers**

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Many lawyers instinctively associate “law firm risk management” with efforts to avoid damage claims. That is certainly a key component of risk management. The PLF reported that in 2008 there were 903 new claims asserted against Oregon lawyers. The PLF also reported that the average cost per claim in 2008 for defense and indemnity payments was \$19,000. Those are significant numbers and we all shoulder that economic burden through our annual PLF assessment.

At the same time, lawyers sometimes forget that there are also very real economic costs with bar complaints. A complete risk management program, therefore, should also take into account internal policies aimed at lessening the risk of bar complaints. This month, we’ll look at the “cost” of discipline primarily in terms of defense costs. Although defined narrowly for present purposes, it is critical to stress that discipline can have other severe economic consequences ranging from direct costs such as lost income during a period of suspension to indirect costs such as fewer referrals stemming from a diminished reputation. Moreover, unlike civil claims, most malpractice policies (including the PLF) do not cover defense costs for regulatory complaints. Therefore, a firm will usually bear the costs of discipline alone. After examining the cost of discipline this month,

next month we'll turn to the principal areas drawing regulatory complaints and suggest how risk management can be tailored to address them.

***Incidence of Regulatory Complaints.*** As with malpractice claims, it is important to look at both the frequency and the severity of bar complaints in assessing economic cost. In terms of frequency, it is first important to appreciate how often bar complaints are filed against Oregon lawyers. The ABA's annual disciplinary survey, which, in turn, is based on statistics provided by state bars and other state regulatory agencies (in those jurisdictions where state bars do not handle regulatory discipline), reported in 2008 (the last year for which the ABA statistics are currently available) that Oregon had 1,735 complaints for 13,550 active licensees. (Oregon's number is based on the number of complaints filed with the Oregon State Bar's Client Assistance Office, which is the central intake point in our regulatory system.) This equates to roughly 13 complaints for every 100 Oregon lawyers. By contrast, the ABA reported that nationally the incidence of bar complaints per lawyer is approximately 8 for every 100. The incidence of bar complaints in Oregon is especially noteworthy when compared to our neighbors in Washington and Idaho. The comparable numbers in those states are, respectively, 8.5 complaints for every 100 Washington lawyers and 10.5 complaints for every 100 Idaho lawyers.

***Severity of Regulatory Complaints.*** Turning to severity, Oregon again is well above the national average. Measured by the number of lawyers

publically sanctioned, the ABA reported that Oregon had 101 in 2008 as against the national average of 65. Further, measured in terms of per capita formal prosecutions, Oregon's ratio of roughly 1 for every 100 lawyers puts us at or very near (individual state reporting of this varies) the top nationally. Again for comparison, Washington and Idaho formally prosecuted their lawyers at per capita rates of, respectively, .28 and .29 for every 100.

***The Cost of Discipline.*** Oregon's disciplinary statistics are quite stark whether measured in terms of either frequency or severity: Oregon lawyers stand both a much greater statistical chance of having a bar complaint filed against them than our counterparts nationally and formal discipline here is both pursued and imposed at a much greater rate as well. Moreover, the number of bar complaints filed in 2008 (1,735) was nearly twice the number of malpractice claims asserted (903). In short, firms here would be remiss if they did not include avoiding regulatory complaints as a key element of risk management.

The PLF reports that it spent an average of \$9,000 per claim in 2008 for defense costs. No similar statistics are available for the defense of bar complaints—in part precisely because that risk is not typically insured. Further, because regulatory complaints are usually not insured, some lawyers defend themselves while others hire outside counsel. Even those who defend themselves, however, incur the real economic cost of having time diverted away from other work. The Oregon State Bar's 2008 economic survey reported that

the average hourly billing rate in Oregon was between \$250 and \$274. Taking the lower end of that range at \$250 and multiplying it against what is very likely an unrealistically low (in light of comparable malpractice experience) number of 5 hours per bar complaint results in an economic cost (either in out of pocket defense expenses or the equivalent imputed to self-defense) of \$1,250 per bar complaint. In sum, even modest steps to avoid regulatory complaints can yield economic dividends.

#### **ABOUT THE AUTHOR**

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