

# Law Firm Risk Management by the Numbers

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## Introduction

State bar associations and insurance carriers have long compiled detailed statistics on, respectively, discipline and claims. The statistics available include data by practice area and asserted error. Similarly, the ABA publishes its national Survey on Lawyer Discipline Systems annually and updates its Profile of Legal Malpractice Claims periodically. Statistics of this kind have long guided bar associations in providing general advice to their members and insurance carriers in structuring loss prevention programs and premiums for their insureds. Increasingly, the statistics of law firm risk management are available on or via the Internet. This ready access suggests their use by firms and individual lawyers to tailor risk management to their particular circumstances.

This article will address two facets of the statistical side of law firm risk management. First, the resources available are briefly cataloged. Second, the adaptation of those resources to individual law firm settings is then discussed.

## Available Statistics

Disciplinary statistics are available from individual state bar associations or regulatory agencies and are typically posted annually on their web sites. They vary widely in format and content, ranging from comparatively bare statistical summaries to illustrated annual reports.<sup>1</sup> Most are broken out by practice area and type of misconduct and some include additional statistical analysis by Rule of Professional Conduct involved.<sup>2</sup> Many either include comparative statistics from earlier periods or prior reports (usually adjusted for lawyer population surveyed), both of which are useful for evaluating overall trends. The state reports are especially illuminating in evaluating regulatory risk precisely because they cover all lawyers in a given jurisdiction.

Nationally, the ABA Standing Committee on Professional Discipline compiles its Survey on Lawyer Discipline Systems ("SOLD") annually from information submitted by states in a uniform format. Although the SOLD data is not divided by practice area, it is useful for multistate firms (or practitioners) in gauging overall disciplinary risk and trends by state. The annual SOLD reports can be downloaded from the ABA Center for Professional Responsibility web site at: [www.abanet.org/cpr/discipline/sold/home.html](http://www.abanet.org/cpr/discipline/sold/home.html). Annual SOLD reports are available via the Center for Professional Responsibility's web site dating back to 1998.

Claims statistics on a state-by-state basis are generally less readily available than regulatory statistics because they are compiled by individual insurers. Claims experience by state or region, however, is often available to firms directly from their carriers. Further, member-owned carriers specializing in legal malpractice coverage often include general claims

statistics in their public annual reports that are available via the Web. At least some of these focus on particular states, regions or similar firms nationally.<sup>3</sup> Many of these annual reports also contain claims experience by practice area measured by both frequency and severity and comparative data from prior years.<sup>4</sup> The principal caveat with claims statistics is that not all lawyers in any given state carry malpractice insurance and, therefore, the statistics do not present as uniform a portrait of civil damage risk as their disciplinary counterparts do for regulatory risk. A notable exception for both requiring all lawyers in private practice to carry malpractice insurance and mandating primary coverage through a state bar affiliated insurer is Oregon and its Professional Liability Fund. The Oregon PLF posts annual reports on its web site ([www.osbplf.org](http://www.osbplf.org)) going back to 2000. Although Oregon's demographics do not mirror those of all other states, for those it does Oregon's annual report affords a unique snapshot of trends precisely because all lawyers in private practice must obtain their primary layer of coverage through the Oregon PLF and, therefore, the report captures all claims presented (whether filed or not) for that lawyer population. The Oregon PLF annual reports also include statistics on both indemnity payments and defense costs.

Nationally, the ABA Standing Committee on Lawyers' Professional Liability has published a survey of claims periodically since 1985. Its most recent Profile of Legal Malpractice Claims ("Profile") was published in late 2008 and focuses on the period from 2004 through 2007. The Profile includes data provided by a number of insurance carriers in both the United States and Canada. The Profile contains a wide variety of statistical information, including claims by practice area, firm size and type of error asserted. It also includes data on both indemnity payments and defense costs. The Profile is available for a nominal charge through the ABA Web Store.

The statistics available both locally and nationally are useful in structuring law firm risk management programs in two broad senses.

Collectively, they allow the assessment of overall trends in terms of frequency, severity and cost. The numbers through 2007—the latest year for which national statistics from the SOLD and the Profile are both available—underscore the scope of overall risk. As to frequency, they report 117,598 disciplinary complaints in 2007 alone and 40,486 malpractice claims for the period 2004-2007.<sup>5</sup> As to severity, they report 3,640 lawyers publicly sanctioned (and another 2,069 privately sanctioned) in 2007 and 8,837 claims resulting in indemnity payments for the period 2004-2007.<sup>6</sup> As to cost, 14,404 malpractice claims involved defense costs during this period and 3,177 incurred more than \$25,000 in defense costs.<sup>7</sup> Although there is no comparable defense cost data available for disciplinary complaints, imputing even a relatively low number per complaint (for either the actual cost of retained counsel or the opportunity cost imposed by self defense) results in a large aggregate total.

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Individually, the statistics allow assessment of risk by practice area, firm type and clientele. These more specific statistics highlight that risk is not uniform. For example, the statistics suggest that firms with complex business practices catering to corporations are at relatively lower risk of disciplinary complaints than their counterparts with consumer practices catering to individuals. By contrast, the same statistics suggest that firms in the former category are at relatively higher risk of significant civil damage claims than the latter. These contrasting risks, in turn, counsel different approaches to risk management.

## Using the Statistics

The statistics can be put to effective use in two primary ways.

First, statistical data offers an empirical tool to those who counsel law firms (either internally or as outside counsel) for educating firms and their lawyers. Good doctors are often adept at recognizing trends in the patients they treat. Epidemiology, however, allows those same good doctors to reinforce their own observations with statistical data compiled from a broader population. So, too, with the statistics of law firm risk management. Good lawyers are equally adept at recognizing trends in regulatory complaints and civil claims. Like good doctors, however, “legal epidemiology” allows law firm counselors to reinforce their own observations with empirical data from a broader spectrum of firms and lawyers. It also allows law firm counselors to highlight the experience of peer group firms.

Second, statistical data allows risk management strategies to be tailored to particular practice areas and locations.

On the former, “consumer” oriented practices like family law and plaintiffs’ personal injury typically draw more disciplinary complaints than other fields.<sup>8</sup> Many of these complaints, in turn, focus on asserted deficiencies in communication with clients and alleged “neglect” of files.<sup>9</sup> This suggests that firms (or practice groups within firms) in consumer practice areas should focus their risk management activities on putting systems in place (appropriate to firm size and structure) to ensure that realistic objectives are set and documented with clients at the outset of representations and that communication with clients concerning the status of their cases occurs routinely rather than on an ad hoc basis. By contrast, “business” oriented practices like corporate transactional work typically draw relatively few disciplinary complaints.<sup>10</sup> But, transactional work appears to have a higher risk of generating relatively more severe damage claims.<sup>11</sup> This, in turn, suggests that firms (or, again, practice groups within firms) in such areas should focus their risk management activities on systems (again, appropriate to firm size and structure) to ensure adequate internal peer review, training and staffing commensurate with the nature and size of the matters involved.

On the latter, even states that are geographically contiguous and that have comparatively similar lawyer demographics can present differing risks. For an example on disciplinary risk, Oregon formally prosecuted its lawyers on disciplinary matters at per capita rates ranging from two to four times of that which Washington did for the years 2004 through 2008.<sup>12</sup> For an example on civil risk, the average cost of claims resulting in

payment was consistently higher by several thousand dollars (and on occasion even more) in Missouri than Kansas for the years 2004 through 2008 as reported by the same insurer.<sup>13</sup> For multioffice firms or multistate practitioners, therefore, comparative statistics allow risk management programs to be refined to address the nuances of the jurisdictions served.

Although the available statistics allow tailored risk management, it is also important to stress that sound programs share many fundamentals. The ABA Profile, for example, reports that “client relations” accounted for 11 percent of the errors alleged during the 2004-2007 study period.<sup>14</sup> In other words, attentive communications with clients is central to avoiding both civil claims and disciplinary complaints. Similarly, measured by frequency (if not necessarily severity) consumer-oriented practice areas such as family law and plaintiffs’ personal injury draw significant numbers of civil claims in addition to disciplinary complaints.<sup>15</sup> This suggests that active efforts to lessen regulatory risk (again, such as attentive communication with clients) may also reduce the risk of civil claims. Asserted lack of competency and alleged substantive errors comprise major percentages of both disciplinary complaints and civil claims.<sup>16</sup> Ensuring that firm lawyers have the skills appropriate to the matters being handled, therefore, remains a critical component of overall firm risk management. Finally, both disciplinary and claims statistics include intentional wrongful conduct.<sup>17</sup> Management programs may not be able to prevent all such conduct, but attention to systems and systematic practices in areas like client intake, trust accounting and internal supervision may at least allow the early detection of individual misconduct and thereby lessen the firm’s ultimate exposure.’

## Conclusion

The advent of readily available and detailed statistics on both disciplinary complaints and civil claims allows lawyers advising firms—and firms themselves—to assess risk on a more refined basis and to tailor programs to address the particular risks encountered in individual practice areas and locations. Although many risk management fundamentals bridge all practice areas, the disciplinary and claim statistics suggest that “one size” may not always fit all. ■

## Endnotes

1. See, e.g., statistical summaries from Florida ([www.floridabar.org](http://www.floridabar.org)) and Washington ([www.wsba.org](http://www.wsba.org)) as examples of the former and annual reports from Illinois ([www.iardc.org](http://www.iardc.org)) (Illinois Annual Report) and Massachusetts ([www.mass.gov/obcbbbo](http://www.mass.gov/obcbbbo)) (Massachusetts Annual Report) as examples of the latter. Although I have cited to the Illinois and Massachusetts reports as being particularly comprehensive, many other states, such as California ([www.calbar.ca.gov](http://www.calbar.ca.gov)) and Oregon ([www.osbar.org](http://www.osbar.org)), publish equally detailed annual reports.

2. See, e.g., 2008 Illinois and Massachusetts Fiscal 2009 Annual Reports.

3. See, e.g., Wisconsin Lawyers Mutual Insurance Company annual reports ([www.wilmac.com](http://www.wilmac.com)) for an example of state-focused statistics, The

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Bar Plan Mutual Insurance Company annual reports ([www.thebarplan.com](http://www.thebarplan.com)) for an example of regional statistics and annual reports of the Attorneys' Liability Assurance Society ([www.alas.com](http://www.alas.com)) for an example of statistics from similar firms nationally.

4. *Id.*

5. 2007 ABA SOLD report, Chart 1; ABA Profile, Table 1.

6. 2007 ABA SOLD report, Chart 2, ABA Profile, Table 7.

7. ABA Profile, Table 6.

8. *See, e.g.*, 2008 Illinois Annual report, Chart 16; Massachusetts Fiscal 2009 Annual Report, Table 2.

9. *See, e.g.*, 2008 Illinois Annual report, Chart 16; Massachusetts Fiscal 2009 Annual Report, Table 3.

10. *Id.*

11. *See, e.g.*, 2008 ALAS Annual Report at 10; 2008 The Bar Plan Annual Report at 6.

12. 2004-2008 ABA SOLD reports, Chart 1.

13. 2008 The Bar Plan Annual Report at 6.

14. ABA Profile, Table 5.

15. *Id.*, Table 1.

16. *See, e.g.*, Massachusetts Fiscal 2009 Report, Table 3; ABA Profile, Table 5 and Figure 5B.

17. *See, e.g.*, 2008 Illinois Annual Report, Chart 16; ABA Profile, Table 5.