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## **Statistically Speaking: Using Statistics to Guide Risk Management**

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State bar associations and insurance carriers have long compiled detailed statistics on, respectively, lawyer discipline and legal malpractice claims. Increasingly, these statistics are available on the Internet or other easily accessible public sources. The numbers are illuminating because they offer a snapshot of both practice areas that are most at risk and the kinds of activities that most often draw bar grievances or civil claims. The ready availability of these statistics and their equally understandable implications suggest that lawyers should use them in guiding risk management for their firms.

In this column, we'll first briefly survey the regional and national public sources available on lawyer discipline and malpractice claims. We'll then examine those statistics to highlight the most common risks by practice area and source of asserted error. Finally, based on these statistics, we'll outline some simple practical steps lawyers can take to reduce risk.

### ***The Statistics***

On the regulatory side, the WSBA Office of Disciplinary Counsel publishes a comprehensive annual report reflecting its activities over the previous year. The report is available on the WSBA web site ([www.wsba.org](http://www.wsba.org)). ODC's annual report includes key statistical data on both grievances by practice area and the

most common areas of complaints against lawyers. Prior year reports are also available to chart trends. Regionally, the Oregon State Bar Disciplinary Counsel's Office publishes a similarly detailed report that is also available on its web site ([www.osbar.org](http://www.osbar.org)). Although Alaska and Idaho do not have directly analogous summaries prepared by their disciplinary offices, their respective state bar associations publish more general annual reports that include overall regulatory statistics that are helpful in looking at broad trends. The Alaska and Idaho bar annual reports are available on their web sites ([www.alaskabar.org](http://www.alaskabar.org); [www.isb.idaho.gov](http://www.isb.idaho.gov)). Nationally, the ABA publishes an annual survey of lawyer discipline systems that is available on its web site ([www.americanbar.org](http://www.americanbar.org)). Although the ABA data looks primarily at state statistics in aggregate, it is useful to multistate practices in assessing comparative risk of regulatory complaints across practice jurisdictions.

On the malpractice side, there is no public Washington resource that corresponds to the WSBA's grievance statistics. Individual private carriers, however, normally can provide comparable claim experience information to their insureds. A useful proxy is also available in the form of the Oregon State Bar Professional Liability Fund annual report. Oregon is unique in requiring all lawyers in private practice to carry malpractice insurance and to buy the initial

required layer through the PLF. The PLF annual report, therefore, provides a relatively complete portrait of claim experience across private practice throughout the state. Although the Oregon bar is smaller than in Washington, there are more practice similarities than differences and the PLF annual report affords valuable insights to Washington firms as well. It is available electronically on the PLF web site ([www.osbplf.org](http://www.osbplf.org)). Nationally, the ABA has for many years periodically published a “profile” of legal malpractice claims that compiles statistics from cooperating insurance carriers. It is available for purchase through the ABA on-line bookstore for a relatively modest price. The most recent ABA profile very usefully breaks the statistics out by source of error and tracks those categories over time.

***Practice Areas and Activities at Risk***

Both the grievance and civil claim statistics reveal that no practice area is immune from risk. But, they also highlight that some areas are more vulnerable than others. They also underscore that particular activities draw a disproportionate share of grievances and claims.

With grievances, for example, WSBA statistics illustrate that consumer-oriented practice areas such as family law, personal injury and criminal defense account for over 60 percent of all grievances. Washington is by no means

unique in this regard—with Oregon’s comparable summary reporting a similar share of regulatory complaints targeting lawyers in consumer practice areas. As for the nature of grievances, the WSBA reports that over half of the grievances received complained of either “unsatisfactory performance” or “personal behavior” of the lawyers involved. Oregon tracks the type of conduct alleged somewhat differently but broadly reinforces the Washington data—with asserted “inadequate communication” and “neglect” included in over half the complaints filed annually.

With civil claims, the Oregon PLF data reveals that lawyers practicing in consumer areas are again most at risk in terms of the frequency of claims filed while their counterparts in business practice areas are most at risk in terms of severity of the claims asserted. The ABA profile data reflects similar patterns nationally. As for the type of conduct leading to claims, the latest ABA profile reports that over 25 percent of all claims involve “administrative errors,” such failing to calendar key deadlines and other purely clerical problems. Even more surprisingly, this category has remained stubbornly persistent in the ABA surveys dating back to 1985.

***Practical Steps to Reduce Risk***

Competence in handling client matters is, of course, central to reducing risk. For lawyers in firms large and small, that often translates into focusing on a manageable portfolio of practice areas and understanding the nuances of those areas well. As both the disciplinary and civil claim statistics illustrate, however, simply being substantively competent is not enough to avoid either grievances or claims.

With grievances, the significant percentage that involve communication issues suggests that lawyers should systematically invest the time necessary to explain what clients should—and should not—expect. For example, a client in a consumer area may not necessarily understand that when a court takes a matter “under advisement,” the lawyer may not have anything to report until the court rules. In that instance, it can be important to explain that so the client will understand the dynamic rather than think that the lawyer is simply ignoring the client. Similarly, if the lawyer is in trial or depositions, a quick return call by an assistant letting the client know that can often defuse natural human impatience that has only accelerated in an era of “instant” communications. The consistent use of written engagement agreements can also foster communication by clearly defining the scope and objectives of the representation, setting realistic

expectations and spelling out the financial aspects of the relationship. Often equally important if a grievance is filed later despite the lawyer's best efforts, it can be crucial to be able to document the fact of communication in defending yourself through a contact log, an email file or the equivalent.

With civil claims, the administrative error category is the most obvious target for improved law firm risk management. Most lawyers and firms now have electronic calendaring systems available. The best calendaring system on the market, however, will do no good if key dates are not routinely entered.

Approaching deadlines also need to be consistently monitored so that appropriate actions are taken in a timely fashion. Although some deadlines are "soft" and can be waived by a cooperative opposing counsel, many are harshly unforgiving and, once missed, cannot be resurrected. Given the importance of deadlines in a wide variety of practices, a central tenet of law firm risk management is also to have more than "one set of eyes" to both verify the dates calendared and track their approach. This can be an assistant, a paralegal or another firm lawyer working on the matter concerned. Having more than one person involved in calendaring, however, will reduce the risk of a mistake in calculating a key date at the outset cascading into a catastrophic error later such as a missed statute of limitation.

### ***Summing Up***

Even if the lawyer or firm involved is ultimately vindicated, both grievances and claims are expensive. Moreover, the costs are usually not just in “hard dollars.” There is an inherent “distraction factor” when defending against a regulatory grievance or a civil malpractice claim that is difficult to quantify but very real in personal and economic terms by diverting attention from other work. Taking simple practical steps such as systematic client communication and conscientious calendaring will not eliminate the risk of a grievance or a civil claim altogether, but they can dramatically reduce the chance of “becoming a statistic.”

### **ABOUT THE AUTHOR**

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