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**Aging in Place:
Risk Management for Older Lawyers and Their Firms**

**By Mark J. Fucile
Fucile & Reising LLP**

Last year's Oregon State Bar Professional Liability Fund Annual Report included a fascinating observation on the correlation between years of practice and malpractice risk:

“We have . . . evaluated the frequency and severity of claims based on years of practice. The average age of a PLF covered lawyer is 50 and the average number of years of practice is 22. Lawyers practicing 31 years or more have a higher frequency and severity. There are several possible explanations for this, including that those lawyers are the ones working on the most high-stakes matters. But we also see matters coming from this demographic where the error was made because the lawyer was not performing at the level he or she had previously.”

As someone who both advises lawyers and who fits that practice tenure demographic, I was intrigued with the underlying statistics and the implications for older lawyers and their firms. In this column, we'll look at both.

The Statistics

As the PLF's annual report noted, the average age of its covered lawyers—who, to qualify for PLF coverage, must be in private practice in Oregon—is 50. This dovetails similar Oregon statistics reported elsewhere. The 2017 Oregon State Bar Economic Survey reported, for example, that 24.5 percent of responding lawyers statewide had practiced for over 30 years. Similarly, a November 2014 Bar Counsel column in the Oregon State Bar Bulletin noted that roughly a quarter of active OSB members are 60 or older.

Much has been written recently about the “graying of the legal profession” as more lawyers defer outright retirement and continue to practice at least part-time. The reasons are many, ranging from economic to personal. Technology has also made it easier for older lawyers to combine continued law practice with, in some cases, semi-retirement.

At the same time, the PLF statistics raise some potentially hard questions. Tables accompanying the provocative opening observation addressed both severity and frequency of claims. Severity of claims—measured by the average dollar cost of claims—generally moves in lock-step with years in practice. This is consistent with the PLF’s supposition that more experienced lawyers often handle more complex and substantial matters that produce higher dollar claims than their less experienced counterparts. Lawyers practicing 31 years or more, however, also lead other age brackets in the frequency of claims. This age group accounted for nearly 40 percent of all claims during the five-year period from 2013 to 2017. In short, experience doesn’t necessarily appear to equate with lower risk.

The Implications

As the PLF noted, the severity of claims for the older age group may be logically related to the complexity and size of the matters more experienced

lawyers handle. The frequency of claims, however, isn't as easily explained and suggests that other factors may be in play that warrant close evaluation by both individual lawyers and their firms.

For individual lawyers, the statistics counsel that older lawyers who are still practicing at firms should continue to use the same risk management tools that they used to build successful careers. These include consistently running conflict checks, routinely using engagement agreements that spell out the clients represented and the scope of the work taken on and staying within the specific areas in which they have developed their expertise. These are equally important considerations for lawyers leveraging technology to facilitate semi-retirement outside an "every day" law firm environment. Lawyers in this category also need to be sensitive to the fact that although they may be semi-retired, the matters they take on require the same attention as when they were practicing full-time. Finally, lawyers in both categories need to acknowledge that the success that often comes with experience can itself create unique risks. Precisely because lawyers have been successful can sometimes encourage them to take on risks that a less experienced lawyer would avoid.

For law firms, the PLF's observation about skills declining with age in at least some situations can create difficult conversations about the role of valued

lawyers who have devoted their professional lives to their firms. On one hand, firms generally have a duty to ensure that their lawyers meet the standard of care for the work the lawyers are handling. ABA Formal Opinion 03-429 (2003), which is available on the ABA web site, discusses this at length. On the other hand, the fact that a lawyer may no longer be capable of carrying the same workload as earlier in the lawyer's career does not mean that the lawyer cannot continue to make valuable contributions to the firm in other ways. Older lawyers, for example, have traditionally been both "rain makers" for firms through their longstanding connections with clients and mentors to younger firm lawyers who can draw on the older lawyer's reservoir of practical experience.

For both individual lawyers and their firms, a central implication of the PLF's findings is that the statistics cannot be ignored even if they are not completely understood. Individual lawyers need to realistically assess how long they can—and perhaps should—continue to practice. Firms need to create constructive environments that make use of the talents older lawyers provide—even if they are different than what those lawyers contributed earlier in their careers.

ABOUT THE AUTHOR

Mark J. Fucile of Fucile & Reising LLP handles professional responsibility, regulatory and attorney-client privilege issues for lawyers, law firms and corporate and governmental legal departments throughout the Northwest. Mark has chaired both the WSBA Committee on Professional Ethics and its predecessor, the WSBA Rules of Professional Conduct Committee. Mark is also a former member of the Oregon State Bar Legal Ethics Committee and is a current member of the Idaho State Bar Section on Professionalism & Ethics. Mark writes the Ethics Focus column for the Multnomah (Portland) Bar's *Multnomah Lawyer*, the Ethics & the Law column for the WSBA *NWLawyer* and is a regular contributor on legal ethics to the WSBA *NWSidebar* blog. Mark is a contributing author/editor for the current editions of the OSB Ethical Oregon Lawyer, the WSBA *Legal Ethics Deskbook* and the WSBA *Law of Lawyering in Washington*. Before co-founding Fucile & Reising LLP in 2005, Mark was a partner and in-house ethics counsel for a large Northwest regional firm. He also teaches legal ethics as an adjunct for the University of Oregon School of Law at its Portland campus. Mark is admitted in Oregon, Washington, Idaho, Alaska and the District of Columbia. He is a graduate of the UCLA School of Law. Mark's telephone and email are 503.224.4895 and Mark@frllp.com.