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The Legal Malpractice Climate is Ever Changing

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The Bar Plan has seen dramatic changes in the legal malpractice area since its formation more than twenty years ago. In the 1980s, lawyers generally were reluctant to sue fellow lawyers. Fewer lawsuits were filed, and many of those filed were aimed to spur settlement rather than lead to contentious litigation.

An Industrywide Rise in Claim Severity Seen

Today, lawyers are much less hesitant to sue other lawyers or to serve as experts in legal malpractice actions. And in a concerning trend, an increased number of malpractice claims nationwide are for amounts unseen in years past. An American Bar Association study conducted on claims between 2000 and 2003 found an alarming increase in the number of actual claims settled for more than \$2 million dollars compared to earlier years. Industry observers note that these “big” losses have grown larger and that “really bad” has gotten worse, this same ABA study noted.

A variety of reasons are offered to explain this industrywide trend, but there are no clear answers. Some industry analysts attribute the claim severity to unconventional legal theories that inflate damages while others say that escalating defense costs are responsible for the increase.

The Bar Plan has seen a similar trend in its home state of Missouri and in other states where it offers lawyers’ professional liability insurance. In 2004, much larger claims first appeared. The trend has continued in claims reported in 2005, when The Bar Plan saw an unprecedented increase in severe claims. Last year, The Bar Plan’s average claim tripled for the first time.

The Bar Plan has taken steps to cushion the unavoidable impact of these large claims. As part of a strategic response to this marketplace trend, The Bar Plan is continuing to build its capitalization while keeping its expenses down. Growth in Kansas, Indiana and New Mexico in the lawyers professional liability market and the court bond program continue to ensure The Bar Plan’s financial stability. Because of these combined efforts, The Bar Plan remains financially sound and continues its leading presence in the legal malpractice

insurance market.

The trend in increased claims severity fortunately is not paralleled with an increase in the number of claims. In fact, there has been a small decrease in the number of claims filed nationwide.

Both Plaintiffs and Defense Personal Injury Cases Lead to Claims

Nationally, personal injury plaintiffs attorneys continue to lead the list of malpractice claims followed by claims against real estate lawyers, according to the ABA survey conducted on legal malpractice claims closed between 2000 and 2003. These two practice areas have been at the top of the list since the ABA began conducting its malpractice survey nearly twenty years ago.

For the two decades surveyed, the most frequent claims arose from plaintiffs personal injury, domestic relations, trust and estate planning matters. The nature of these cases are innately more personal than business-related matters. Clients often are more disappointed with their counsel if they perceive that their lawyers failed them in handling an estate-related controversy, an emotional personal injury claim or an already painful divorce.

For the first time since the ABA began conducting this survey, claims against personal injury defense lawyers rose to third on the list. The unprecedented increase in claims against these lawyers is attributed to a breakdown in loyalty between insurance companies and their outside counsel. In the past, insurance defense lawyers considered themselves part of the insurance company they defended on a daily basis and had a close, personal working relationship with their insurance clients.

Now, these same lawyers have less direct communication with their insurance clients, in part because the insurance employees themselves have a high turnover rate. In addition, many insurance companies now hire third party business intermediaries to review and redact legal bills. Depending on the stakes and the increasingly impersonal nature of the working relationship, insurance executives are more likely to question their lawyers' performance when a case ends unfavorably.

Claims and Small Firms

As in years past, the majority of claims – 66 percent, continue to be filed against firms with five or fewer lawyers. In considering this figure, it is important to remember that 63 percent of lawyers across the country practice alone or in small law firms. In Missouri, that figure is over 70 percent. The ABA study states that it is unclear if there is anything inherently riskier about small firm practice, although there may be fewer opportunities to collaborate with colleagues about client matters or workload. Small firms also are less likely to have information technology departments or a large support personnel, which may help in docketing cases and running client conflicts.

But claims are not just for small firms, the ABA study notes. The recent data in the 2000 to 2003 study found an unexpectedly 15 percent increase in claims filed against firms

with 40 or more lawyers.

Missed Limitations Statutes and Other Common Errors

The largest number of claims last year and in the past ten years relate to the commencement of the legal action or proceeding. The failure to know or ascertain deadlines correctly was the most common reason for filing a claim. The next most frequent claims arose from a planning or strategy error, the failure to react to a calendared event and the failure to know or properly apply the law. These four errors or omissions accounted for nearly fifty percent of all claims that arose last year.

Based on the ABA's ten-year study of legal malpractice claims, identifiable trends have emerged about the types of claims and their causes. Whether the increasingly severe legal malpractice claims seen in the past few years are part of a new trend or will decrease in the next cycle remains to be seen. In either event, The Bar Plan will continue to watch and analyze the changing legal climate and adjust its business strategy to respond to any new conditions.