

APPENDIX

Insurance Disclosure Task Force – Final Report and Recommendations

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September 20, 2004

Honorable Ronald M. George
Supreme Court of California
350 McAllister Street
San Francisco, CA 94102

Re: ABA Model Court Rule on Insurance Disclosure

Dear Chief Justice George:

On August 9, 2004 the American Bar Association House of Delegates adopted the ABA *Model Court Rule on Insurance Disclosure*. The Model Court Rule requires lawyers to disclose on their annual registration statements whether they maintain professional liability insurance. Attached is a copy of the Model Court Rule and the accompanying House Report.

To date, twelve jurisdictions have addressed the issue of reporting the maintenance of professional liability insurance. (See attached Chart for specifics). The Model Rule suggests that the information submitted by lawyers be made available by such means as designated by your Court. For example, in Virginia, information regarding a lawyer's professional liability insurance can be accessed on the state bar's website. Additionally, the Report suggests that the bar or the lawyer regulatory agency educate the public about the nature of legal malpractice insurance as there was some concern that the public would not understand that "claims made" policies do not cover dishonesty or other intentional acts and that such a policy may no longer be in force when a claim is made.

On behalf of the Standing Committee on Client Protection, I hope that your Court will consider implementing the ABA *Model Court Rule on Insurance Disclosure* or an equivalent rule. If the Committee can be of any assistance, please contact me or John Holtaway, the ABA Client Protection Counsel.

Thank you for your consideration.

Respectfully,


Robert D. Welden, Chair

Cc: Judy Johnson

Enclosures

RECEIVED

SEP 23 2004

Office of the Executive Director
The State Bar of California

RECOMMENDATION

1 RESOLVED, That the American Bar Association adopts the *Model Court Rule on Insurance*
2 *Disclosure*, dated August 2004.

Model Court Rule on Insurance Disclosure
August 2004

1 **RULE ____.** **INSURANCE DISCLOSURE**

2
3 A. Each lawyer admitted to the active practice of law shall certify to the [highest
4 court of the jurisdiction] on or before [December 31 of each year]: 1) whether the
5 lawyer is engaged in the private practice of law; 2) if engaged in the private
6 practice of law, whether the lawyer is currently covered by professional liability
7 insurance; 3) whether the lawyer intends to maintain insurance during the period
8 of time the lawyer is engaged in the private practice of law; and 4) whether the
9 lawyer is exempt from the provisions of this Rule because the lawyer is engaged
10 in the practice of law as a full-time government lawyer or is counsel employed by
11 an organizational client and does not represent clients outside that capacity. Each
12 lawyer admitted to the active practice of law in this jurisdiction who reports being
13 covered by professional liability insurance shall notify [the highest court in the
14 jurisdiction] in writing within 30 days if the insurance policy providing coverage
15 lapses, is no longer in effect or terminates for any reason.

16
17 B. The foregoing shall be certified by each lawyer admitted to the active practice of
18 law in this jurisdiction in such form as may be prescribed by the [highest court of
19 the jurisdiction]. The information submitted pursuant to this Rule will be made
20 available to the public by such means as may be designated by the [highest court
21 of the jurisdiction].

22
23 C. Any lawyer admitted to the active practice of law who fails to comply with this
24 Rule in a timely fashion, as defined by the [highest court in the jurisdiction], may
25 be suspended from the practice of law until such time as the lawyer complies.
26 Supplying false information in response to this Rule shall subject the lawyer to
27 appropriate disciplinary action.
28

REPORT

Continuity of judicial regulation of the legal profession depends on action taken by the profession itself.
Robert B. McKay, 1990

The ABA Standing Committee on Client Protection ("the Committee") recommends that the American Bar Association adopt the *Model Court Rule on Insurance Disclosure* ("the Model Court Rule").

OVERVIEW

The ABA *Model Court Rule on Insurance Disclosure* requires lawyers to disclose on their annual registration statements whether they maintain professional liability insurance. The purpose of the Rule is to provide a potential client with access to relevant information related to a lawyer's representation in order to make an informed decision about whether to retain a particular lawyer. The intended benefit of the Model Court Rule is to facilitate the client's ability to determine whether a lawyer is insured. While the Model Court Rule does not require a lawyer to disclose directly to clients whether insurance is maintained or to maintain professional liability insurance, it does impose a modest annual reporting requirement on the lawyer. The information reported by lawyers will be made available by such means as designated by the highest court in the jurisdiction. While this information could be sought during the initial retention process, many clients are unsophisticated and may be reluctant to raise such issues.

Paragraph A of the Model Court Rule requires a lawyer to disclose on the annual registration statement whether professional liability insurance is maintained. Excluded from the Rule's reporting requirement are those lawyers who are not engaged in the active practice of law and those who are engaged in the practice of law as full-time government lawyers or as counsel employed by an organizational client and do not represent clients outside that capacity. A lawyer who is employed to represent an organization on an ongoing basis generally represents a knowledgeable and sophisticated client. Additionally, organizational or governmental clients may have their own professional liability insurance policies.

Finally, Paragraph A places an affirmative duty upon lawyers to notify the highest court whenever the insurance policy covering the lawyer's conduct lapses or is terminated. This ensures that the information reported to the highest court is accurate during the entire reporting period.

Paragraph B of the Model Court Rule requires lawyers to certify to the accuracy of the information reported. Paragraph B also requires that the information submitted by lawyers will be made available by such means as designated by the highest court. For example, in Nebraska and Virginia, information regarding a lawyer's professional liability insurance is made available to a potential client if the client telephones the bar association and requests it. The information can also be accessed on the bars' websites. (See, www.vsb.org, under the headings Public Information, Attorney Records Search, Attorneys without Malpractice Insurance). It was reported to the Committee that this Virginia Bar website receives 1250 visits per month.

Paragraph C of the Model Court Rule clarifies that failure or refusal to provide the required information would result in a lawyer's administrative suspension from the practice of law until such time as the lawyer complies with the Model Court Rule. The Committee is not recommending that a court amend its current Rules of Professional Conduct. Failure or refusal to make the required disclosure would, therefore, not be considered a disciplinary offense. Nevertheless, providing *false* information in response to the Model Court Rule would subject the lawyer to appropriate disciplinary action, pursuant to ABA *Model Rules of Professional Conduct*, Rule 8.4(c), that prohibits, "conduct involving dishonesty, fraud, deceit or misrepresentation."

Prior to proposing the adoption of this Model Court Rule, the Committee recognized the importance of engaging in an objective and comprehensive inquiry and of encouraging as many others as possible to lend assistance. To stimulate discussion, in July 2002, the Committee circulated a proposed amendment to Rule 1.4 of the ABA *Model Rules of Professional Conduct*. The proposed amendment to Rule 1.4 would have required that lawyers disclose directly to their clients whether they maintain professional liability insurance. The Committee invited written submissions by state and local bar associations, ABA entities, and other representative organizations of the legal profession and the public. The Committee's proposal received little support.

In July 2002, the Committee circulated a proposed amendment to Rule 1.4 of the ABA *Model Rules of Professional Conduct*. The proposed amendment required lawyers to disclose directly to their clients whether they maintain professional liability insurance. The Committee invited written submissions from state and local bar associations, ABA entities, and other representative organizations of the legal profession and the public. The Committee's proposal received little support.

In December 2003, the Committee circulated a proposed ABA *Model Rule on Financial Responsibility* to state and local bar associations, ABA entities, and other interested organizations and was posted on the Committee's website. The Rule required lawyers in private practice to disclose on their annual registration statement whether they maintained insurance of at least \$100,000/\$300,000 and to disclose any unsatisfied final legal malpractice judgments against them or the law firm where they were employed.

The majority of the comments the Committee received favored the concept of requiring lawyers to disclose to the highest court in the jurisdiction whether they maintain professional liability insurance or another form of financial responsibility. The Committee did receive comments that the Model Rule should not contain specific policy limits. There was also concern raised that the requirement to report unsatisfied final judgments would place too harsh a burden on lawyers, particularly those that had been employed at several different law firms. Finally, there were comments that it would be difficult to determine the value of "another form of financial responsibility."

Based upon those comments, the Committee re-named the proposed Model Court Rule as the *Model Court Rule on Insurance Disclosure*. This was to clarify that the Committee did not intend for the Model Court Rule to be incorporated into a jurisdiction's *Model Rules of*

Professional Conduct. The Committee also eliminated reference to specific policy limits or other forms of financial responsibility and does not require the reporting of unsatisfied final judgments. The currently proposed Model Court Rule only requires lawyers to disclose whether they maintain professional liability insurance.

INSURANCE REPORTING REQUIREMENTS IN UNITED STATES JURISDICTIONS

To date, ten jurisdictions have addressed the issue of reporting the maintenance of professional liability insurance. The highest courts in five jurisdictions, Delaware, Nebraska, North Carolina, Michigan and Virginia, require lawyers to disclose on their annual registration statements whether they maintain professional liability insurance. The Committee's proposed Model Court Rule is patterned after the reporting requirements in these jurisdictions.

The highest courts in four other jurisdictions, Alaska, New Hampshire, Ohio and South Dakota, have amended their Rules of Professional Conduct to require lawyers to disclose directly to their clients whether they maintain professional liability insurance. The Rule in South Dakota, effective January 1, 1999, is the most comprehensive.¹

In addition, the Oregon Supreme Court, while not having a disclosure rule *per se*, mandates professional liability insurance as a condition precedent to practicing law.

EXISTING ABA POLICIES

On three previous occasions, the American Bar Association has adopted policies requiring lawyers in some circumstances to maintain professional liability insurance. In August 1989, the ABA House of Delegates adopted *Minimum Quality Standards* for lawyer referral services. The minimum standards were adopted as client protection measures. One of the standards is that participating lawyers maintain malpractice insurance coverage.

In August 1992, the ABA House of Delegates adopted *Model Supreme Court Rules Governing Lawyer Referral And Information Services*. Rule 4 of the *Model Rules* requires that in order for a lawyer to participate in the service, the lawyer shall maintain in force a policy of errors and omissions insurance, or provide proof of financial responsibility, in an amount at least equal to the minimum established by the Committee that oversees the service. The Comment to Model Rule 4 states that the intent of the insurance requirement is to ensure that, in the event errors are made by the participating lawyer, the client has redress through the lawyer's policy of insurance. The requirement is contained in the ABA *Minimum Quality Standards* for lawyer referral

¹ Rule 1.4 of the South Dakota Rules of Professional Conduct requires South Dakota lawyers to promptly disclose to their clients if they do not maintain professional liability insurance with limits of at least \$100,000, or if during the course of the representation, the insurance policy lapses or is terminated, lawyers shall disclose to their clients by including a component of the lawyers' letterhead, using the following specific language, either that: (1) "This lawyer is not covered by professional liability insurance;" or (2) "This firm is not covered by professional liability insurance." The required disclosure is to be included in every written communication with clients. Rule 7.5 (Firm Names and Letterheads) of the South Dakota Rules of Professional Conduct provides that the disclosure *shall be in black ink with type no smaller than the type used for showing the individual lawyer's names.*

services (*See above.*). The Comment notes, that only by requiring such insurance, or a showing of financial responsibility, can a client best be protected. In states where lawyer referral services are not immune from lawsuits for negligent referral, this requirement will help protect the lawyer referral service from such suits; in states where such immunity exists, it ensures that a client may find redress against the principal negligent party, the lawyer.

In August 1993, the ABA House of Delegates adopted the ABA *Model Rule for the Licensing of Legal Consultants*. The Model Rule sets forth the requirements for a foreign lawyer to practice law as a foreign legal consultant in the United States on a permanent basis. The Model Rule requires that foreign legal consultants maintain professional liability insurance.

THE PROPOSED MODEL COURT RULE ON INSURANCE DISCLOSURE

The Model Court Rule properly places the burden for reporting the maintenance of insurance on the lawyer. Potential clients should not be required to inquire of a lawyer if professional liability insurance is maintained. Many unsophisticated clients either assume that a lawyer is required to provide malpractice insurance or do not even think to inquire if they lawyer is covered.² The proposed Model Court Rule would provide potential clients with the ability to independently determine whether a lawyer maintains professional liability insurance. The Model Court Rule is a balanced standard that allows potential clients to obtain relevant information about a lawyer if they initiate an inquiry, while placing a modest annual reporting requirement on lawyers.

Lawyers in the United States, except in Oregon, are not required to maintain professional liability insurance. While clients have the right to hire lawyers who do not maintain professional liability insurance, those who do so will likely have no avenue of financial redress if the lawyer commits an act of negligence. Lawyer disciplinary proceedings primarily offer prospective protection to the public. They either remove lawyers from practice or seek to change the lawyers' future conduct. Protection of clients already harmed is minimal. While lawyer-respondents are sometimes ordered to pay restitution in disciplinary cases, in many jurisdictions the failure of lawyers to make restitution ordered in disciplinary proceedings will not bar subsequent readmission to practice. Clients can also seek restitution from client protection funds when dishonest conduct is involved. Client protection funds are an innovation of the legal profession unmatched by any other profession. Unfortunately, the ability of client protection funds to compensate clients is limited. Restitution is generally available only when a lawyer has misappropriated client funds. Legal malpractice claims are the only manner by which clients can seek redress for acts of negligence. Prospective clients should have the right to decide whether they want to hire lawyers who do not maintain liability insurance. The Model Court Rule offers the prospective client the ability to make an informed decision.

Lawyers who lack insurance are not immune from malpractice liability. Claims against uninsured lawyers are often abandoned, precisely because there is no available insurance.

² A Minnesota lawyer reported to the Committee that based upon his experience in handling legal malpractice actions since 1996, it is a foregone conclusion that every consumer of legal services in the State of Minnesota presumes that the lawyer they hire is insured. He further stated that it is also a given that virtually none of the consumers of legal services ever ask or receive any confirmation as to the insurance status of their lawyer at the time of retention.

Plaintiff's counsel know that in evaluating whether to file such a claim, a threshold issue is whether the lawyer is insured. If the claim for damages is modest, many plaintiff's legal malpractice lawyers will elect not to file suit because the risk that any judgment will prove to be uncollectible, in light of how difficult these claims are in other respects, simply makes such claims not worth pursuing. The data on malpractice claims reported by the ABA Standing Committee on Lawyers' Professional Liability is incomplete since potential claims not pursued due to a lack of insurance are not factored.³

Malpractice insurance is not a panacea for injuries caused by lawyer negligence. Nevertheless, whether a lawyer maintains professional liability insurance is a material fact that potential clients should have a right to know in retaining counsel. Professional liability insurance does ensure that a client *may* find financial redress against the principal negligent party, their lawyer. The proposed Model Court Rule provides the public with access to relevant information; it does not mandate that lawyers maintain malpractice insurance. The Model Court Rule incorporates a provision requiring an entity designated by the highest court to make the reported information available to the public. The information would presumably be available by telephone, or preferably, by Internet access.

The bar or the lawyer regulatory agency should also inform the public of the limits on the usefulness of this information, e.g., that most policies are "claims made" policies and that policies generally do not cover dishonesty or other intentional acts. Given the nature of claims-made coverage, it is possible that the insurance policy a lawyer has in place at the time when a prospective client is likely to inquire about it, may have lapsed at the time a claim for legal malpractice is made. Most lawyers will probably purchase "tail" coverage to protect themselves from this situation but the public should be made aware of the unique nature of professional liability insurance. The Committee was advised that the experience in Alaska has been that most lawyers who have malpractice insurance today will most likely have it in the future and that, therefore, the value of making the information available to the public outweighed its potential to be misleading by the fact that the policy had lapsed by the time a claim was made.

The Committee recommends that each jurisdiction adopting the Model Court Rule decide if it wants to include, in its version of the Rule, minimum limits of professional liability coverage. Alaska, New Hampshire and Ohio require lawyers to disclose to their clients if the lawyer does not maintain a policy with limits of at least \$100,000 per claim and \$300,000 annual aggregate.⁴ South Dakota requires its lawyers to disclose to their clients if the lawyer does not maintain a policy with limits of at least \$100,000.⁵ The Committee was also advised that a professional

³ Data has been collected on legal malpractice claims from the National Association of Bar-Related Insurance Companies and commercial insurers for the period January 1, 1996 through December 31, 1999. During that period, there were reported to be 36,844 legal malpractice claims nationally. This data did not cover the entire lawyer population: a significant percentage of practicing lawyers have no malpractice coverage and not all U.S. malpractice insurers provided data. *Profile of Legal Malpractice Claims, 1996-1999*, American Bar Association, Standing Committee on Lawyers' Professional Liability.

⁴ Alaska Court Rules, Rule 1.4 (c), Alaska Rules of Professional Conduct; Rule 1.17, New Hampshire Rules of Professional Conduct; and Ohio Rules of Court, Code of Professional Responsibility, DR 1-104.

⁵ South Dakota Rules of Professional Conduct, Rule 1.4.

liability insurance policy with limits of liability of \$200,000/600,000 is the smallest policy limit now offered by Minnesota Lawyers Mutual, the largest legal malpractice insurer in Minnesota.⁶

CONCLUSION

The *Model Court Rule on Insurance Disclosure* would reduce potential public harm by giving consumers of legal services an opportunity to decline to hire a lawyer who does not maintain professional liability insurance. Under this Model Court Rule, a lawyer would inform the highest court in the jurisdiction, or designated entity, whether insurance is maintained. The court would make this information available to the public. During the reporting year, if the policy is terminated or modified, the lawyer would be required to inform the court. The ultimate decision whether or not to maintain professional liability insurance remains with lawyers.

Robert D. Welden, Chair
Standing Committee on Client Protection
August 2004

⁶ Letter dated February 27, 2004, to the Committee from the Minnesota State Bar Association Rules of Professional Conduct Committee.

AMERICAN BAR ASSOCIATION
 STANDING COMMITTEE ON CLIENT PROTECTION

STATE IMPLEMENTATION OF
 ABA MODEL COURT RULE ON INSURANCE DISCLOSURE

	Requires Disclosure Directly To Client (4)	Requires Disclosure On Annual Registration Statement (7)	Other (1)	Information Made Available To Public
AK	X Alaska Rules of Professional Conduct, Rule 1.4 (Communication)			N/A
DE		X Registration Form		No.
IL		X Amended Illinois Supreme Court Rule 756		Probably on attorney registration commission website.
KS		X Registration Form.		Through the Clerk of the Court
MI		X Administrative Order No. 2003-5, dated August 6, 2003		No. For statistical purposes only.
NE		X Rules Creating, Controlling, and Regulating Nebraska State Bar Association, Article III, Membership, paragraph (f).		Shall be made available to the public.
NH	X New Hampshire			N/A

	Rules of Professional Conduct, Rule 1.17. (Disclosure of Information to the Client)			
NC		X North Carolina-Rules and Regulations, Subchapter A, Organization of the North Carolina State Bar, Section .0204, Certificate of Insurance Coverage		On the Bar's website: http://www.ncbar.com/home/member_directory.asp
OH	X Ohio Code of Professional Responsibility, Amended DR 1-104 (Disclosure of Information to the Client)			N/A
OR			All lawyers required to maintain professional liability insurance.	
SD	X South Dakota Model Rules of Professional Conduct, Rule 1.4 (Communication)			N/A
VA		X Rules of the Virginia Supreme Court, Part 6 § 4 Paragraph 18. Financial Responsibility		Yes, on Bar's website: (See, www.vsb.org , under the headings Public Information, Attorney Records Search, Attorneys without Malpractice Insurance).

Insurance Disclosure – Survey Questions

1. Has anyone measured the impact of the insurance disclosure requirement adopted in your state? If so, how has that impact been measured?

 2. We are particularly interested in knowing whether you have any basis to believe that certain results have been caused by or are related to the adoption of the insurance disclosure requirement. For each of the questions below, please let us know whether (i) you have insufficient information to respond, one way or the other; (ii) you have collected specific data or other information relating to the question, have sufficient information to confirm or deny that the identified result has occurred since adoption of the insurance disclosure requirement, and, if it has occurred, have a basis to believe that it was caused by or is related to adoption of that requirement. Please provide details; or (iii) the impact of the insurance disclosure requirement adopted in your state has not been measured, but you have anecdotal evidence relating to the question. Please provide details.
 - a. Have you noted any increase in the assertion of malpractice claims against attorneys?

 - b. Have you noted any increase in the cost of legal services?

 - c. Have you noted any decrease in access to low-cost legal services, or any limitation on legal services being provided to certain segments of clients?

 - d. Have you noted any impact on the ability of attorneys to maintain their law practice, as it existed before the insurance disclosure requirement was adopted?

 - e. Have you noted any decrease in the percentage of uninsured attorneys who are practicing law?

 - f. Have you noted any impact on the private insurance market, e.g. carriers entering or leaving the market, premiums for professional liability insurance increasing or decreasing, etc.

 - g. Have you noted any other impact, positive or negative? If so, please provide details.

 3. What steps, if any, has your state taken to address the uninsured attorney? Is there a carrier of last resort? Has any type of fund been created as a potential source of recovery -- by a governmental entity or otherwise -- to cover claims asserted against attorneys who do not maintain professional liability insurance? Have discussions taken place about these issues? If so, what was the outcome?

 4. Has your state taken any steps, or considered taking any steps, to address the issue of affordable professional liability insurance for all attorneys who are practicing law? If so, what was the outcome?
-

COMPANY	BEST'S RATING	RESTRICTIONS BASED ON SPECIALTY PRACTICE AREA FROM SITE	LIMITS OF LIABILITY	COVERAGE	RIGHT ALLOWED IN SELECTION OF COUNSEL	IS THERE A PROGRAM TO PREVENT REPEAT VIOLATIONS	YES, GOVERNING BY BY-LAW	ADMITTED BY STATE
Admiral Insurance Company 847/686-6591 www.admiral.com	A+	Firms with bars or return addresses	Up to \$50 million	\$50 million or higher	Yes, provided by endorsement	Yes, underwritten by underwriter	11	No
Arch Insurance Company (licensed by the State Bar) 800/453-0102 www.arch-coburn.com	A-	None, but available deductible and limit of liability options may vary depending on size of firm, areas of practice, and claim history	Up to \$10 million per claim/annual aggregate	\$10 million per claim/annual aggregate deductible available for qualifying firms	Yes	Yes, members in cooperation with the State Bar and a former malpractice hotline available to policyholders	2+	Yes
Attorneys' Liability Assistance Group, Inc. (ALAAG) www.alaag.com 201/463-6725 or Bruce Nelson, 212/543-6533	Not rated	Firms with 15 or more practicing attorneys	\$5 million to more than \$100 million	\$50,000	Yes, insured has choice	Yes	8	Yes
Attorneys' Liability Assurance Society, Inc. (ALAS) A Risk Retention Group 32/697-6500 www.alas.com	Not rated	Firms with 35 or more practicing attorneys	Up to \$75 million per claim/\$50 million aggregate	Retiree: \$100,000 per claim/\$300,000 aggregate to \$5 million per claim/\$5 million aggregate	Yes, firm selects defense counsel subject to approval by ALAS	Yes	26	N/A
AUS US Insurance Companies Adam Storz, 650/734-0707 www.auscpd.com	A	Firms with ten or more attorneys	Up to \$25 million	Minimum of \$25,000	Yes, if provided by endorsement	Yes, malpractice hotline	71	Yes
Carling Casualty Insurance Company 847/686-6530 www.monitorability.com	A	Firms with three or more attorneys	Up to \$10 million	\$5,000 or higher	Inquired by the firm to choose counsel, but no defense expense may be accrued without underwriter's consent	Advice from Risk Management Council available to insureds upon request; e-newsletter; seminars	10	Yes
The Chubb Group of Insurance Companies 800/409-2000 www.chubb.com	A++	Firms with ten or more attorneys; does not cover intellectual property firms. Note: New firm introduced in 2004.	Up to \$10 million per claim; limit up to \$100 million per claim; excess basis; Excess basis also available	\$25,000 minimum per claim. No aggregate maximum being offered at present.	Yes, on an exception basis by endorsement	Yes, re-management seminar program, malpractice hotline, and biannual newsletters	20+	Yes
Continental Casualty Insurance Company (CNA) Michael J. Mitchell (firms with 1 to 24 attorneys) Dan McGraw, 800/240-1403 CNA Pro (firms with 25 or more attorneys) Stuart Pittman, 202/340-3467 www.cna.com	A	None	Up to \$5 million	\$5,000 or higher	Yes, on an exception basis by endorsement	Yes, re-management seminar program, malpractice hotline, and biannual newsletters	33	Yes
CE Insurance Solutions (subsidiary of Western Insurance Company) 800/223-2255, ext. 414 www.ceinsurancesolutions.com	SE (not rated; Westport (rating) A)	Linked interest based on size of firm, areas of practice, and geographic location	Up to \$10 million	Minimum of \$1,000	Limited	Firm, confidential hotline for defense firms, in-house and outside	14	Yes
Great American Insurance Company (GAIC) 800/295-4531 www.greatamericanliability.com	A	None	Up to \$10 million per claim/aggregate	Minimum of \$2,500, maximum of \$50,000	Yes	Yes, re-management seminar program, malpractice hotline, and biannual newsletters	2	No
Inevitable Risk & Casualty Company Dwayne D. Freeman (lead underwriter) Beth Graham, 800/652-5702, ext. 135 www.inevitable-capital.com	A	None	Up to \$10 million	Minimum of \$5,000	No	Yes, re-management seminar program, malpractice hotline, and biannual newsletters	26	Yes
Lawyer's Mutual Insurance Company 800/252-2945, 818/555-5532 www.lawyersmutual.com	A	None	Up to \$10 million	\$1,000 to \$100,000 per claim for standard program up to \$2 million per claim for other aggregate for members' program	No	Yes, re-management seminar program, malpractice hotline, and biannual newsletters	19	Yes
Lawyer's Protector Plan (underwritten by Mutual Group, Inc.) 800/535-5522, ext. 4207 www.lawyersprotectorplan.com	Lawyer's Protector Plan (underwritten by Mutual Group, Inc.)	None	Up to \$10 million	\$1,000 to \$100,000 per claim/aggregate for other aggregate; up to \$25 million aggregate	No	Yes, re-management seminar program, malpractice hotline, and biannual newsletters	11	No
Liberty Service Insurance Corporation 800/453-0102 www.libertyservice.com	A	5 to 75 attorneys (primary); 5 attorneys and up (cross)	Up to \$10 million	Starting at \$25,000 per claim	At underwriter's discretion, insured's first considered	Loss prevention and risk-management seminars, bulletins, books, newsletters, articles	30*	No
Lloyds of London Underwritten by Professional Practice Insurance Brokers 650/955-9500 www.lloyds.com	A	None	\$50 million per claim/aggregate	Minimum of \$5,000	Yes, but not underwritten by company	Self-study risk-management video	4	Yes
Navigators: Pro/ALC Insurance Company Sarah Chang, Mark Galt, Chris Duda, or Michael Chermans 202/241-2533 www.navigators.com	A	Firms of up to 75 attorneys. No SEC, P/Systems or class action work	\$1 million	Minimum of \$5,000	Insured's requests will be considered	No	14	Yes
Philly Legal PFC Alan & Cassie (broker) Margaret Hepler, 201/660-0723 www.phillylegal.com	Not rated	Available to firms of commercial, professional property, and research defense firms with 20 to 200 attorneys contingent upon successful completion of R/R review	\$50 million	Negotiable	Yes, insured has choice	Yes, annual risk-management program, on-site risk-management presentations, and annual risk reviews	2	Yes
ProSource® (not rated; General Star rated A++) Mary Whiteland, 800/671-2246 www.prosource-lawyers.com	ProSource® (not rated; General Star rated A++)	Covers solo lawyers and small law firms that have difficulty placing coverage in the current marketplace due to claims, practice areas, or other underwriting/risk factors	Up to \$2 million per claim/\$2 million aggregate	Minimum of \$5,000, maximum of \$250,000 per claim	Yes, unless specifically underwritten	Education and risk-management seminars	9	Yes
S. Paul Fire & Marine Insurance Company (owned by National Insurance Administration) San Quentin, 714/714-7147, 650/554-5015 www.sfm.com	A	None, but company specializes in hard-to-place firms with claims, trial practice, or ethics problems	Up to \$2 million per claim for primary coverage; up to \$2 million per claim for excess coverage	Minimum of \$5,000 per wrongful act	Negotiable	Risk-management materials and video may be arranged	14	No
United National Insurance Company (underwriting agent) Michael McCrohan, Black/White & Associates, 972/655-0559 www.u-n.com	A	None, but company specializes in hard-to-place firms with claims, trial practice, or ethics problems	Up to \$2 million per claim for primary coverage; up to \$2 million per claim for excess coverage	Minimum of \$5,000	Yes	No	5 (2 as AL, 3 underwriting (partner))	Yes
33 Select Professionals, a division of XL American, Inc. (underwritten by the Bar Association of San Francisco and the San Diego County Bar Association) Greg Hayden, Vice President, 241/651-6525 www.33select.com	A+	None for standard program (part-time), although increasing limits of coverage and "topping off" policies available to qualified attorneys	\$100,000 per claim/\$300,000 aggregate, up to \$10 million per claim/aggregate	\$5,000 to \$100,000	No provision, but suggestions considered	Loss prevention advice hotline and Veritas Law Legal Research Database on Internet, both at no charge to policyholders	10	Yes
Zurich North America 800/453-0102 www.zurichna.com	A	None for standard program (part-time), although increasing limits of coverage and "topping off" policies available to qualified attorneys	Up to \$10 million	Downside on policy form and firm size; many options available	No provision, but suggestions considered	Loss prevention advice hotline and Veritas Law Legal Research Database on Internet, both at no charge to policyholders	10	Yes

*ALAS, Liberty Mutual, Zurich, and other companies are not rated as a result of a change in their status. For more information, visit www.aia.com. For more information, visit www.aia.com. For more information, visit www.aia.com. For more information, visit www.aia.com.

Bercovitch, Saul

From: Bercovitch, Saul
Sent: Wednesday, September 14, 2005 4:28 PM
To: Bercovitch, Saul
Subject: Statistics on Number of Lawyers Maintaining Professional Liability Insurance

-----Original Message-----

From: Thomas Barnett [<mailto:thomas.barnett@sdbar.net>]
Sent: Monday, August 08, 2005 11:30 AM
To: Holtaway, John
Subject: Re: Statistics on Number of Lawyers Maintaining Professional Liability Insurance

South Dakota has 7 years of certification to our Supreme Court - 97% have at least \$100,000 in coverage, together with name and policy number of the policy. Over the past 7 years, the percentage has never dropped below 96% nor been higher than 97.5% in any given year. Those private practitioners who practice w/o insurance must disclose same on their letterhead.

Holtaway, John wrote:

- > The Standing Committee on Client Protection would appreciate receiving
- > any "hard" statistics that you may assemble on the number of lawyers
- > that maintain professional liability insurance in your jurisdiction.
- > Thanks.
- >
- > John A. Holtaway
- > Client Protection Counsel
- > American Bar Association
- > 321 N. Clark Street, 15th Floor
- > Chicago, IL 60610-4714
- > (312) 988-5298
- > Fax: (312) 988-5491
- > jholtaway@staff.abanet.org <<mailto:jholtaway@staff.abanet.org>>
- >
- > *Visit us on the web at ****www.abanet.org/cpr/prconf.html****
- > <<http://www.abanet.org/cpr/prconf.html>>* for details about the 22nd
- > National Forum on Client Protection and the 32nd National Conference
- > on Professional Responsibility, May 31-June 3, 2006, Vancouver,
- > British Columbia.*

Bercovitch, Saul

From: Bercovitch, Saul
Sent: Wednesday, September 14, 2005 4:27 PM
To: Bercovitch, Saul
Subject: FW: VIRGINIA STATE BAR.doc

From: Balch, Diana [mailto:balch@vsb.org]
Sent: Tuesday, August 09, 2005 8:36 AM
To: Holtaway, John
Subject: FW: VIRGINIA STATE BAR.doc

VIRGINIA STATE BAR

Professional Liability Certification Report

Total Members Answering PL Questions: 23,326 - FY2001

<u>QUESTION</u>	<u>YES</u>	<u>%</u>	<u>NO</u>	<u>%</u>
Private Practice	15,953	68	7,373	32
Malpractice Insurance	14,199	61	9,127	38
Unsatisfied Judgments	9	0	23,326	1

Private Practice - No Insurance: 1,754 (11%)

Private Practice - With Insurance: 14,199 (89%)

Total Members Answering PL Questions: 23,944 - FY2002

<u>QUESTION</u>	<u>YES</u>	<u>%</u>	<u>NO</u>	<u>%</u>
Private Practice	16,306	68	7,638	32
Malpractice Insurance	14,592	61	9,352	39
Unsatisfied Judgments	3	0	23,941	1

Private Practice - No Insurance: 1,714 (11%)

Private Practice - With Insurance: 14,592 (89%)

Total Members Answering PL Questions: 24,320 - FY2003

<u>QUESTION</u>	<u>YES</u>	<u>%</u>	<u>NO</u>	<u>%</u>
Private Practice	16,536	68	7,784	32
Malpractice Insurance	14,827	61	9,493	39
Unsatisfied Judgments	3	0	24,317	1

Private Practice - No Insurance: 1,709 (10%)

Private Practice - With Insurance: 14,827 (90%)

Total Members Answering PL Questions: 24,952 - **FY2004**

<u>QUESTION</u>	<u>YES</u>	<u>%</u>	<u>NO</u>	<u>%</u>
Private Practice	16,446	66	8,506	34
Malpractice Insurance	14,513	58	10,439	42
Unsatisfied Judgments	5	0	24,947	1

Private Practice - No Insurance: 1,933 (12%)

Private Practice - With Insurance: 14,513 (88%)

Total Members Answering PL Questions: 25,921 - **FY2005**

<u>QUESTION</u>	<u>YES</u>	<u>%</u>	<u>NO</u>	<u>%</u>
Private Practice	16,595	64	9,326	36
Malpractice Insurance	14,703	57	11,218	43
Unsatisfied Judgments	17	0	25,904	1

Private Practice - No Insurance: 1,892 (11%)

Private Practice - With Insurance: 14,703 (89%)

FY2006 (YTD 7-8-2005): Total Members Answering PL Questions: 7,330

Private Practice: 6,842

Private Practice - No Insurance: 488 (7%)

Private Practice - With Insurance: 6,354 (93%)

TOTAL MEMBERS ACT (IGS)

FY2001 - 22,720

FY2002 - 23,312

FY2003 - 23,746

FY2004 - 24,197

FY2005 - 24,564

FY2006 - 25,122

Bercovitch, Saul

From: Bercovitch, Saul
Sent: Wednesday, September 14, 2005 4:26 PM
To: Bercovitch, Saul
Subject: Statistics on Number of Lawyers Maintaining Professional Liability Insurance

From: Don Hollingsworth [mailto:dhollingsworth@arkbar.com]
Sent: Monday, August 08, 2005 1:02 PM
To: Holtaway, John
Subject: RE: Statistics on Number of Lawyers Maintaining Professional Liability Insurance

John,

We have no hard numbers. But we have concluded from the gathering of various stats that at least 60% in private practice in AR have insurance. The stats are attached.

If you have any comments on this, please share them.

Don Hollingsworth
Executive Director
Arkansas Bar Association
501-375-4606
website: www.arkbar.com

-----Original Message-----

From: Holtaway, John [mailto:JHoltaway@staff.abanet.org]
Sent: Monday, August 08, 2005 10:04 AM
To: hak@sutinfirm.com; Ann Hetzler; Edmonds, Thomas; Don Hollingsworth; jjgrogan@iardc.org; Dave.Ewert@jb.state.ia.us; Gene Whetzel; Kathy Peifer; Karen O'Toole; BILL SMITH; Mark Armitage; Jane Schoenike ; Christine Morganti; vangoors@alaskabar.org; tmanter@nhbar.org; redmonson@ncbar.com; Thomas.BARNETT@sdbar.net; greenc@kscourts.org
Cc: CLIENTPROTECTION; Towery, James E.
Subject: Statistics on Number of Lawyers Maintaining Professional Liability Insurance

The Standing Committee on Client Protection would appreciate receiving any "hard" statistics that you may assembly on the number of lawyers that maintain professional liability insurance in your jurisdiction. Thanks.

John A. Holtaway
Client Protection Counsel
American Bar Association
321 N. Clark Street, 15th Floor
Chicago, IL 60610-4714
(312) 988-5298
Fax: (312) 988-5491
jholtaway@staff.abanet.org

Visit us on the web at www.abanet.org/cpr/prconf.html for details about the 22nd National Forum on Client Protection and the 32nd National Conference on Professional Responsibility, May 31-June 3, 2006, Vancouver, British Columbia.

Estimates on Private Practice Attorneys in Arkansas
June 2005

1. Approximately 5,300 active, resident attorneys in Arkansas. This is the ACLE Mailing Group" at Chris Thomas's office
2. 72.6% of our Association's members were in private law practice in 1998. (Percentage was 81% in 1987.) One assumption is that the percentage in 2005 would be 70% at most.
3. Based on the above, a rough estimate of the number of private practice attorneys in Arkansas is 3,700
4. At a minimum, 2200 Ark attorneys have professional liability insurance through two insurance writers in AR. (CNA has 1997 as of 6-20-05, and ALAS, the offshore Bermuda captive, probably has about 200.) Unsure how many are insured through St. Paul/Traveler, Chubb, Great American, London, and any others.
5. Based on the above, one can estimate that at least 60% of Ark attorneys in private practice have professional liability insurance.

Bercovitch, Saul

From: Bercovitch, Saul
Sent: Monday, September 19, 2005 5:30 PM
To: Bercovitch, Saul
Subject: Michigan malpractice insurance coverage stats

From: Victoria Kremski [mailto:VKREMSKI@mail.michbar.org]
Sent: Tuesday, August 09, 2005 1:51 PM
To: Holtaway, John
Cc: armitage@adbmich.org; vanbolt@adbmich.org
Subject: Malpractice insurance coverage stats

John:

The following stats include only Active attorney members of the State Bar of Michigan:

- 12,782 - Malpractice Insurance Not Needed
- 17,170 - Malpractice Insurance is Maintained
- 4,623 - Malpractice Insurance not maintained

The following stats include only VOLUNTAY INACTIVE attorney member's of the State Bar of Michigan. Inactive attorneys are not authorized to practice law:

- 860 - Malpractice Insurance Not Needed
- 217 - Malpractice Insurance is Maintained
- 69 - Malpractice Insurance In not maintained

Thanks.

Victoria V. Kremski
Deputy Regulation Counsel
State Bar of Michigan

+-----+ E-mail / Fax Notice: The transmitted material is intended only for the use of the addressee. It may contain confidential, proprietary and / or legally privileged information. If you are not the intended recipient, please be aware that any review, use, dissemination, distribution, or copying of this communication, in whole or in part, is prohibited. If you received this communication in error, please notify us immediately by e-mail reply or by phone (800-968-1442), delete the communication and destroy any copies. E-mail Warning: This e-mail was swept for computer viruses. However, we cannot guarantee that the integrity of this e-mail has been maintained in transmission and do not accept responsibility for the consequences of any virus contamination. +-----
-----+

Chart F: Malpractice Survey

Also as part of the 2002 registration process, the Court instructed the Commission to survey the Illinois bar concerning malpractice insurance coverage. Approximately 60,000 responses were received as reported below.

Practice Category	Malpractice Insurance		% Of Practice Category		Number Responding In Practice Category	Practice Category % of Total Responding
	Yes	No	Yes	No		
1. Solo	6,737	4,676	60%	40%	11,413	19%
2. Firm of 2-10 Attys	10,254	461	96%	4%	10,715	18%
3. Firm of 11-25 Attys	3,560	25	99.3%	.7%	3,585	6%
4. Firm of >25 Attys	10,022	89	99%	1%	10,111	17%
5. Corporate In-house	1,662	4,528	27%	73%	6,190	10%
6. Government/Judge	1,110	6,009	16%	84%	7,119	12%
7. Do Not practice law	137	7,081	2%	98%	7,218	12%
No Practice Category reported	388	3,356	10%	90%	3,744	6%
Totals:			% Totals			
All Responding Categories	33,870	26,225	56%	44%	60,095	
Categories 1-4	30,573	5,251	85%	15%	35,824	
Categories 5-7	3,297	20,974	14%	86%	24,271	

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V. THE 2003 DATA AND COMPARISONS TO PRIOR DATA SETS

A. Table 1 – Number of Claims by Area of Law

Table 1 presents the number of claims reported in each Area of Law with the relative frequency in each area stated as a percentage. Table 1 also contains the results of prior data sets. Throughout the study, the 2000-2003 data is referred to as the "2003 Study;" the study covering 1996-1999 is referred to as the "1999 Study;" the study covering the period 1990 – 1995 is referred to as the "1995 Study;" and the 1983 – 1985 data is referred to as the "1985 Study." Table 1 contains columns comparing changes in claims frequency among the studies. A negative number means that insurers reported proportionately fewer claims in the Area for the period. A positive number represents an increase.

Table 1 reveals that the two most significant areas of law for claims, Personal Injury – Plaintiff and Real Estate, have remained constant as the number one and two areas of claims for almost 20 years since the 1985 Study. Of note in the 2003 study is an increase in the number of claims attributed to Personal Injury- Defense (up 5.86% since the 1999 Study). Although Personal Injury – Defense has always appeared in the top ten areas of claims (most frequently as the eighth or tenth ranked area of claims), this increase moves Personal Injury – Defense claims to the third highest reported claims area. With minor shuffling, the next five categories of claims have remained relatively constant over the almost twenty year period of these data studies. In order of ranking in the 2003 Study, these categories are Family Law (9.58%); Estate, Trust and Probate (8.63%); Collection & Bankruptcy (7.92%); Corporate/Business Organization (6.37%); and Criminal (4.19%).

Table 1

Number of Claims by Area of Law:1985 Study - 2003 Study

AREA OF LAW	2003 STUDY		1999 STUDY		Change	1995 STUDY		Change	1985 STUDY		Change
	Number	Percent	Number	Percent	1999 to 2003	Number	Percent	1995 to 1999	Number	Percent	1985 to 1995
Personal Injury - Plaintiff	5,916	19.96	9,065	24.60	(4.64)	4,147	21.65	2.96	7,331	25.08	(3.44)
Real Estate	4,879	16.46	6,253	16.97	(0.51)	2,750	14.35	2.62	6,808	23.29	(8.94)
Personal Injury - Defense	2,953	9.96	1,512	4.10	5.86	626	3.27	0.84	942	3.22	0.05
Family Law	2,839	9.58	3,734	10.13	(0.56)	1,750	9.13	1.00	2,303	7.88	1.25
Estate, Trust and Probate	2,558	8.63	3,196	8.67	(0.04)	1,454	7.59	1.08	2,038	6.97	0.62
Collection and Bankruptcy	2,348	7.92	2,948	8.00	(0.08)	1,516	7.91	0.09	3,066	10.49	(2.58)
Corporate/Business Organization	1,888	6.37	3,157	8.57	(2.20)	1,700	8.87	(0.31)	1,554	5.32	3.56
Criminal	1,242	4.19	1,530	4.15	0.04	731	3.82	0.34	976	3.34	0.48
Business Transaction Commercial Law	942	3.18	1,332	3.62	(0.44)	2,042	10.66	(7.04)	889	3.04	7.62
Worker's Compensation	674	2.27	687	1.86	0.41	632	3.30	(1.43)	624	2.14	1.16
Securities (S.E.C.)	536	1.81	548	1.49	0.32	368	1.92	(0.43)	582	1.99	(0.07)
Patent, Trademark, Copyright	528	1.78	382	1.04	0.74	180	0.94	0.10	167	0.57	0.37
Civil Rights Discrimination	498	1.68	406	1.10	0.58	109	0.57	0.53	319	1.09	(0.52)
Labor Law	460	1.55	819	2.22	(0.67)	271	1.41	0.81	193	0.66	0.75
Taxation	419	1.41	414	1.12	0.29	305	1.59	(0.47)	458	1.57	0.02
Consumer Claims	361	1.22	132	0.36	0.86	53	0.28	0.08	192	0.66	(0.38)
Local Government	169	0.57	163	0.44	0.13	138	0.72	(0.28)	191	0.65	0.07
Immigration/Naturalization	120	0.40	176	0.48	(0.07)	36	0.19	0.29	28	0.10	0.09
Government Contracts/Claims	103	0.35	76	0.21	0.14	42	0.22	(0.01)	101	0.35	(0.13)
Construction (Building Contracts)	94	0.32	93	0.25	0.06	133	0.69	(0.44)	228	0.78	(0.09)
Environmental Law	38	0.13	94	0.26	(0.13)	45	0.23	0.02	31	0.11	0.13
Natural Resources	30	0.10	57	0.15	(0.05)	48	0.25	(0.10)	62	0.21	0.04
Admiralty	18	0.06	55	0.15	(0.09)	43	0.22	(0.08)	86	0.29	(0.07)
International Law	12	0.04	9	0.02	0.02	16	0.08	(0.06)	13	0.04	0.04
Antitrust	12	0.04	6	0.02	0.02	23	0.12	(0.10)	45	0.15	(0.03)
TOTAL	29,637	100.00	36,844	100.00	0.00	19,158	100.00	(0.00)	29,227	100.00	0.00

B. Table 2 – Number of Claims by Number of Attorneys in Firm, 2000-2003

Table 2 breaks down the number of claims reported by law firm size. This data should be interpreted with caution. The figures in this table do not reliably forecast whether there is more or less risk for larger or smaller firms. The most claims arise from firms with fewer than five attorneys, but this information should be interpreted with the knowledge that the average firm size in many states is two to three attorneys (see Figure 2A). In 2000, the single largest percentage of attorneys are solo practitioners (48%, see Figure 2A).

Of note in Table 2 is the shift in the relative frequency of claims arising from firms larger than 40 attorneys (up 10.79% to a level of 14.89%). This returns the relative percentage of claims arising from this size firm to near the 1995 Study level of 18.4%.

Over the course of the twenty years of this study the percentage of lawyers practicing in a 2-5 size firm has shrunk (22% in 1980 to 15% in 2000) while firm size of 51 or more attorneys has grown (7% in 1980 to 18% in 2000).

Table 2

**Claims by Number of Attorneys in Firm:
1999 Study - 2003 Study**

Number of Attorneys in Firm	2003 STUDY		1999 STUDY		Change 1999 to 2003
	Number	Percent	Number	Percent	
1	10,487	32.75%	13,968	34.70%	(1.94)
2-5	10,469	32.70%	15,517	38.54%	(5.85)
6-10	2,964	9.26%	4,735	11.76%	(2.50)
11-39	3,331	10.40%	4,389	10.90%	(0.50)
40-99	1,316	4.11%	590	1.47%	2.64
100 or more	3,453	10.78%	1,060	2.63%	8.15

Table 2A

**Claims by Number of Attorneys in Firm:
1995 Study - 2003 Study (Using 1995 Data Categories)**

Number of Attorneys in Firm	2003 STUDY		1999 STUDY		Change 1999 to 2003	1995 STUDY	
	Number	Percent	Number	Percent		Number	Percent
1-5	20,956	65.45%	29,485	73.20%	(7.75)	13,194	60.8%
6-10	2,964	9.26%	4,735	11.76%	(2.50)	2,259	10.4%
11-39	3,331	10.40%	4,389	10.90%	(0.50)	2,242	10.3%
40-99	1,316	4.11%	590	1.47%	2.64	894	4.1%
100 or more	3,453	10.78%	1,060	2.63%	8.15	3,101	14.3%

Figure 2

Percent of Claims by Firm Size

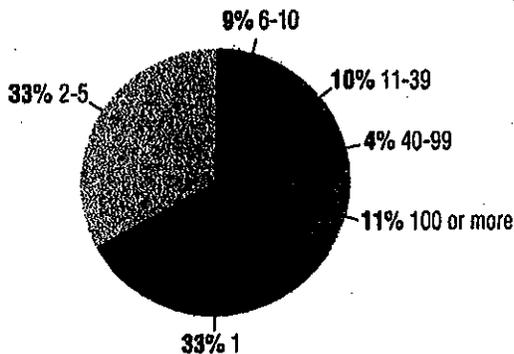
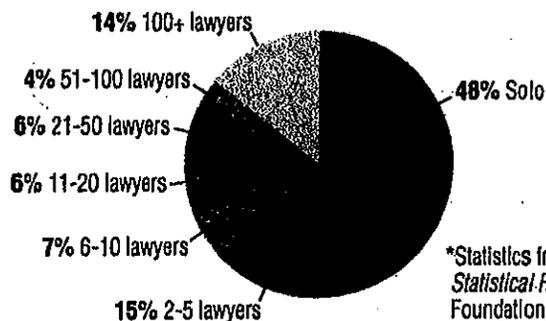


Figure 2A

Percent of Firms in the US*



*Statistics from *The Lawyer Statistical Report*, American Bar Foundation, 2004 edition.

C. Table 3 – Number of Claims by Type of Activity

Table 3 breaks down reported claims by the type of activity giving rise to a claim.

The single most notable feature of this table across the four studies is the constancy of the Preparation, Filing, and Transmittal of Documents category as the highest ranked category for type of error (ranked first twice, second twice). Before drawing too many conclusions from this factor, it should be noted that this is likely a similar issue to that noted in Table 2; this category potentially includes one of the largest categories of routine legal work.

Also of interest in Table 3 is that the top five categories for type of activity leading to a claim have been constant, if one does not include the rankings from the 1999 Study. The difference in the 1999 Study is attributed to the categories of Investigation – Other than Litigation (ranked second, 16%) and Title Opinion (ranked fourth, 13%). As displayed in Figure 3, these two categories experienced the most significant reductions, bringing their relative percentage as sources of errors back to their 1985 Study relative percentages.

The significant increase in the claims arising from Pre-Trial, Pre-Hearing activity is without precedent in the course of this almost twenty year study. The previous highest relative percentage for this category was in the 1995 Study where it was at the twelve percent level, as contrasted with its nineteen percent in the 2003 Study.

The reduction of claims arising from Commencement of Action/Proceeding first noted in the 1999 Study continues in the 2003 Study although the percentage of change is not notable (down .07%), only the continued downward decline. Over the course of almost twenty years of this study, Commencement of Action/Proceeding has dropped from the number one ranked source of errors in the 1985 Study (25%) to the third ranked area for claims by type of activity (15%) in the 2003 Study.

Table 3

Number of Claims by Type of Activity: 1985 Study - 2003 Study

TYPE OF ACTIVITY	2003 STUDY		1999 STUDY		Change 1999 to 2003	1995 STUDY		Change 1995 to 1999	1985 STUDY		Change 1985 to 1995
	Number	Percent	Number	Percent		Number	Percent		Number	Percent	
Preparation, Filing, Transmittal of Documents	5,353	23.08	5,418	25.24	(2.16)	1,656	16.21	9.03	6,175	21.52	(5.31)
Pre-Trial, Pre-Hearing	4,516	19.47	1,756	8.18	11.29	1,289	12.62	(4.44)	2,329	8.12	4.50
Commencement Action/Proceeding	3,615	15.59	3,361	15.66	(0.07)	2,924	28.62	(12.97)	7,248	25.26	3.36
Advice	3,496	15.07	1,457	6.79	8.29	1,268	12.41	(5.63)	3,244	11.31	1.10
Settlement/Negotiation	1,901	8.20	1,370	6.38	1.82	1,169	11.44	(5.06)	2,321	8.09	3.35
Trial or Hearing	1,175	5.07	1,095	5.10	(0.03)	725	7.10	(2.00)	1,986	6.92	0.18
Title Opinion	934	4.03	2,794	13.01	(8.99)	97	0.95	12.06	1,338	4.66	(3.71)
Investigation - Other Than Litigation	509	2.19	3,491	16.26	(14.07)	190	1.86	14.40	796	2.77	(0.91)
Appeal Activities	498	2.15	239	1.11	1.03	281	2.75	(1.64)	760	2.65	0.10
Ex Parte Proceeding	400	1.72	84	0.39	1.33	146	1.43	(1.04)	444	1.55	(0.12)
Post Trial or Hearing	399	1.72	231	1.08	0.64	268	2.62	(1.55)	793	2.76	(0.14)
Other Written Opinion	179	0.77	48	0.22	0.55	66	0.65	(0.42)	539	1.88	(1.23)
Tax Reporting	134	0.58	44	0.20	0.37	79	0.77	(0.57)	495	1.73	(0.96)
Referral/Recommendation	84	0.36	81	0.38	(0.02)	58	0.57	(0.19)	221	0.77	(0.20)
TOTAL	23,193	100.00	21,469	100.00	(0.00)	10,216	100.00	0.00	28,689	100.00	0.00

E. Table 5 – Number of Claims by type of Alleged Error

Table 5 presents claims data broken down by the type of error allegedly committed by the attorney. Looking at the Error Groupings, there has been a significant increase in Administrative Errors (up 11.92%) and a significant decrease in the Substantive Errors (down 9.01%), and a less significant decline in the Client Relations Error group (down 4.18%). The relative frequency of claims for Intentional Wrongs remained essentially unchanged (up 1.26%).

Figure 5a

The General Type of Alleged Error in 2003 Study

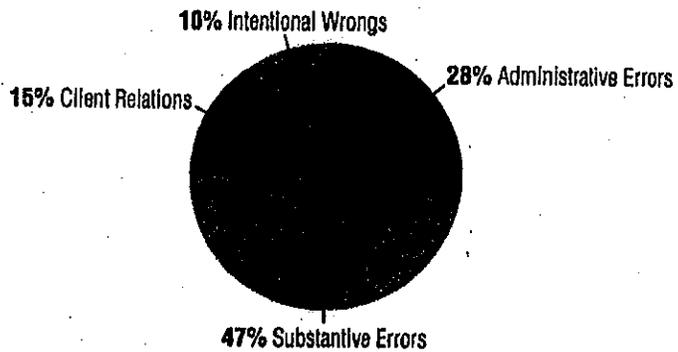
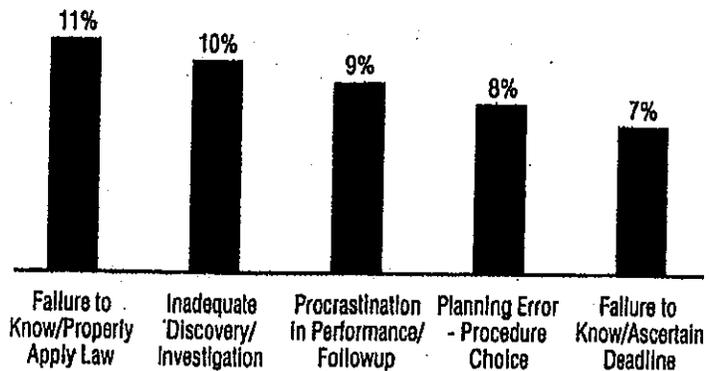


Figure 5b

The Most Common Alleged Errors in 2003 Study



Again, as noted in the discussion of Table 3, disregarding the results from the 1999 Study, the relative percentage distributions for each of the four error groups has remained virtually unchanged over the course of the almost twenty years of this study. The Administrative Error group has ranged within a relative percent range of two percent (28% in 2003 Study to 26% in 1985 Study). Likewise, the Substantive Error group has ranged within a relative percent range of three percent (47% in 2003 Study to 45% in 1985 Study). The Client Relations Error group has ranged within a relative percent range of three percent (17% in 1995 Study to 14% in 2003 Study). The Intentional Wrongs Error group has ranged within a relative percent range of two percent (12% in 1985 Study to 9% in 1995 Study). Introducing the 1999 Study results into the discussion expands the range of the relative percentages for the two major error categories of Administrative and Substantive Error by twelve percent each across the almost twenty years of the study. Introducing the 1999 Study

into the remaining two error categories of Client Relations and Intentional Wrong shows less variation with ranges of five percent for the Client Relations error groupings (19% in 1985 Study to 14% in 2003 Study) and four percent for the Intentional Wrong group (12% in 1985 Study to 8% in 1999 Study).

Consistent across almost twenty years has been the dominance of the Substantive Error group as the major source of errors, with the previous noted anomaly of the 1999 Study distinguishing itself in this instance by

Table 5

Number of Claims by Type of Alleged Error: 1985 Study - 2003 Study

Error Grouping	Alleged Error	2003 STUDY		1999 STUDY		Change 1999 to 2003	1995 STUDY		Change 1995 to 1999	1985 STUDY		Change 1985 to 1995
		Number	Percent	Number	Percent		Number	Percent		Number	Percent	
ADMINISTRATIVE ERRORS												
Procrastination in Performance/Followup		1,284	9.43	1,551	4.95	4.47	981	8.68	(3.73)	1,409	4.96	3.72
Failure to Calendar Properly		707	5.19	2,201	7.03	-1.84	763	6.75	0.28	3,256	11.46	(4.71)
Clerical Error		645	4.74	390	1.25	3.49	242	2.14	(0.90)	425	1.50	0.65
Failure to React to Calendar		593	4.35	398	1.27	3.08	717	6.35	(5.07)	1,016	3.58	2.77
Failure to File Document - No Deadline		583	4.28	481	1.54	2.74	304	2.69	(1.15)	1,230	4.33	(1.64)
Lost File, Document Evidence		50	0.37	125	0.40	-0.03	64	0.57	(0.17)	193	0.68	(0.11)
Subtotal		3,862	28.35	5,146	16.43	11.92	3,071	27.18	(10.75)	7,529	26.51	0.68
SUBSTANTIVE ERRORS												
Failure to Know/Properly Apply Law		1,495	10.98	6,858	21.90	-10.92	1,248	11.05	10.85	2,768	9.74	1.31
Inadequate Discovery/Investigation		1,413	10.37	1,921	6.13	4.24	1,157	10.24	(4.11)	2,618	9.21	1.03
Planning Error - Procedure Choice		1,052	7.72	1,004	3.21	4.52	1,228	10.67	(7.66)	2,238	7.88	2.99
Failure to Know/Ascertain Deadline		966	7.09	4,772	15.24	-8.15	788	6.97	8.26	1,997	7.03	(0.06)
Conflict of Interest		855	6.28	1,602	5.12	1.16	428	3.79	1.33	980	3.45	0.34
Error in Public Record Search		346	2.54	829	2.65	-0.11	140	1.24	1.41	1,382	4.86	(3.62)
Failure to Understand/Anticipate Tax		172	1.26	491	1.57	-0.31	221	1.96	(0.39)	537	1.89	0.07
Error Mathematical Calculation		141	1.04	150	0.48	0.56	50	0.44	0.04	221	0.78	(0.34)
Subtotal		6,440	47.28	17,627	56.29	-9.01	5,260	46.55	9.74	12,741	44.84	1.72
CLIENT RELATIONS												
Failure to Follow Clients Instruction		916	6.72	1,231	3.93	2.79	572	5.06	(1.13)	1,633	5.75	(0.69)
Failure to Obtain Consent/ Inform Client		783	5.75	3,724	11.89	-6.14	1,104	9.77	2.12	2,687	9.46	0.31
Improper Withdrawal of Representation		286	2.10	916	2.93	-0.83	242	2.14	0.78	435	1.53	0.61
Subtotal		1,985	14.57	5,871	18.75	-4.18	1,918	16.97	1.77	4,755	16.74	0.23
INTENTIONAL WRONGS												
Malicious Prosecution, Abuse of Process		489	3.59	1,282	4.09	-0.50	418	3.70	0.39	1,226	4.32	(0.82)
Fraud		456	3.35	661	2.11	1.24	361	3.19	(1.08)	1,217	4.28	(1.09)
Libel or Slander		217	1.59	368	1.18	0.42	125	1.11	0.07	438	1.54	(0.43)
Violation of Civil Rights		172	1.26	360	1.15	0.11	146	1.29	(0.14)	506	1.78	(0.49)
Subtotal		1,334	9.79	2,671	8.53	1.26	1,050	9.29	(0.76)	3,387	11.92	(2.63)
GRAND TOTAL		13,621	100.00	31,315	100.00	0.00	11,299	100.00	0.00	28,412	100.00	0.00

increasing this dominance to the highest relative percentage of fifty-six percent. The Substantive Error group contains four of the five single largest relative percentages for claims; Failure to Know/Properly Apply Law (11%), Inadequate Discovery/Investigation (10%), Planning Error- Procedure Choice (8%), Failure to Know/Ascertain Deadline (7%). This relative percentage ranking is consistent across the almost twenty years of the study. The third single largest relative percentage of errors is Procrastination in Performance/Follow-up (9%) in the Administrative Error group.

RANGE OF REMEDIES AVAILABLE FOR CALIFORNIA CLIENT PROTECTION

1. **State Bar of California Discipline System.** The State Bar Board of Governors, through the Office of Enforcement, investigates and prosecutes before the State Bar Court, which serves as the administrative arm of the California Supreme Court and recommends discipline to the Supreme Court.

Type of Conduct Covered: "Willful" breach of Rules of Professional Conduct, Rules of Court or State Bar Act (Bus. & Prof. Code, §6000, *et seq.*).

How: The client files a discipline complaint with the State Bar Office of Intake against the attorney, alleging attorney misconduct; there is no cost to the client to file a complaint.

Usage: In 2004, the Office of Intake received 89,823 telephone calls to its toll free line, including 12,383 inquiries regarding possible misconduct by an attorney; 4,278 inquiries/reportable actions were advanced to the complaint status stage (sent to Investigations.) Almost 400 Notices of Disciplinary Charges were filed in the State Bar Court in 2004. In that year, 103 attorneys received private (i.e., non-public) disciplinary sanctions and a total of 444 attorneys received public disciplinary sanctions ranging from disbarment (52), resignation with charges pending (77), a term of actual suspension (243), interim suspension (for risk of harm or for criminal conviction) (80), public reprimands (60), probation (198), and transfers to disability-inactive status (10).

Range of Sanctions: Admonition; private or public reproof, with or without conditions; probation with stayed suspension and conditions that may include restitution or satisfaction of a judgment (e.g., malpractice, civil fraud, confirmation of fee arbitration award); probation with actual suspension for a set period of time and compliance with conditions that may include restitution or satisfaction of judgment; or disbarment. To avoid sanctions, a member who is the subject of a disciplinary investigation or disciplinary charges may resign with disciplinary charges pending. To return to active status, the member must petition the State Bar Court for reinstatement, and no petition may be filed within five years after the date of resignation.

Potential Limitation: The imposition of professional discipline does not guarantee compliance with a restitution order or satisfaction of a judgment against the attorney, especially when a member is disbarred or resigns with charges pending. It remains an open question whether a disciplinary requirement to pay restitution may be discharged in bankruptcy proceedings filed by the attorney.

2. **State Bar of California Client Security Fund.** Established by legislation in 1972 to relieve or mitigate pecuniary losses caused by the dishonest conduct of California lawyers arising from or connected with the practice of law.

Types of Conduct Covered: The Fund reimburses clients who have lost money or property due to theft or an equivalent dishonest act committed by a California attorney acting in a professional capacity.

How: The client files application for reimbursement; no filing fee is charged. The Fund Commission, appointed by the Board of Governors, decides whether to grant the application.

Usage: In 2004, the Fund paid out \$5,681,455 on 746 awards. The largest number of applications paid was in the “unearned fees” category (74%).

Potential Limitation: In order for a client to be eligible for reimbursement, the attorney must have been disciplined, voluntarily resigned, died, have been found mentally incompetent, or adjudged guilty of a crime that involved the loss. The Fund will not reimburse a loss if it was covered by insurance, a bond or another fund, caused by negligence or malpractice, or was a “bad business” loss such as a failed investment. Reimbursement does not cover interest or incidental or consequential losses incurred by the client, such as fees paid to another lawyer or damages caused by malpractice, negligence, or incompetence. Supported by lawyers' annual dues, the Fund reimburses eligible applicants up to a limit of \$50,000 per individual applicant.

3. **State Bar Mandatory Fee Arbitration Program.** Established by legislation in 1978 to provide an informal, low-cost forum for resolving fee disputes between lawyers and their clients as an alternative to litigation.

Type of Conduct Covered: Fee and cost disputes between clients and California attorneys or attorneys licensed in another jurisdiction who perform legal services in California.

How: Prior to or at time of filing a lawsuit against a client to collect attorney's fees, the attorney must notify the client of the right to fee arbitration. Fee arbitration is mandatory for the lawyer if the client requests it. The client may request fee arbitration or waive the right to mandatory fee arbitration and proceed with litigation or private arbitration. The petitioner, typically the client, pays a filing fee to the program to initiate fee arbitration.

Usage: In 2004, approximately 2,000 fee arbitration requests were filed with approved local bar and State Bar mandatory fee arbitration programs (125 filed with State Bar program). In State Bar enforcement-of-unpaid-award proceedings to place an award debtor on inactive status for nonpayment, clients filed 63 requests with the State Bar for enforcement of unpaid awards requiring a refund of attorney's fees. The State Bar filed 15 motions for administrative inactive enrollment based on unpaid awards requiring the attorney to refund attorney's fees to the client.

Potential Limitation: A fee arbitration award may not include damages for malpractice or attorney misconduct. Because arbitrations are non-binding unless the parties agree to binding arbitration after the fee dispute arises, fee arbitration awards are subject to post-arbitration litigation (trial de novo if the award is non-binding). The client's enforcement of the award may be impractical if the attorney is subsequently disbarred or resigns. Debts based upon arbitration awards are subject to discharge in bankruptcy proceedings filed by the attorney. In State Bar enforcement-of-award proceedings, enforcement of the award is subject to a claim that the attorney is financially unable to pay.

4. **Professional Liability Insurance Carriers.** Provide private insurance coverage.

Type of Conduct Covered: Professional negligence or malpractice committed by an attorney licensed to practice law.

How: The client files a claim for monetary damages based upon the attorney's rendering of, or failure to render, professional services. As a practical matter in most cases, the client must hire an attorney to prosecute a professional malpractice claim.

Usage: It is estimated that in any given year, a minimum of five to six insured lawyers out of every 100 in private practice will experience a malpractice claim. In a 2001 Cal Bar Journal survey, 18% of active members in private practice lacked professional liability insurance.

Potential Limitation: The lawyer may have no or insufficient coverage. If a lawyer has no coverage at all, it may discourage the filing of otherwise meritorious malpractice claims, leaving the client without a remedy. Coverage does not extend to intentional acts of misconduct. Availability of coverage is subject to significant market swings, and underwriting criteria may exclude many high risk lawyers or make the cost of coverage prohibitively high.

RANGE OF REMEDIES AVAILABLE FOR CALIFORNIA CLIENT PROTECTION

		Attorney Conduct Covered	Manner of Initiation	Potential Limitation
1.	State Bar Discipline System	“Willful” breach of Rules of Professional Conduct, Rules of Court, or State Bar Act	Client files discipline complaint; no charge	No guarantee of restitution or satisfaction of judgment; may exclude acts of mere negligence
2.	State Bar Client Security Fund	Theft or equivalent dishonest act in professional capacity	Client files application for reimbursement; no charge	Attorney must have been disciplined, died, found mentally incompetent or guilty of crime; excludes loss covered by insurance or caused by malpractice; \$50K cap per applicant.
3.	State Bar Mandatory Fee Arbitration Program	Covers attorney’s fees and costs disputes only	Client requests arbitration; pays filing fee	Excludes damages for malpractice; subject to post-arbitration litigation; remedy of involuntary inactive enrollment is not effective if member is already disbarred, resigns, or on inactive status.
4.	Private professional liability insurance carriers	Professional negligence or malpractice	Client files claim; may need to pay attorney’s fees to initiate action	High cost; insufficient or no coverage; availability of coverage subject to market swings/refusal to cover high-risk lawyers.

State Bar of California

Non-Disciplinary Inactive Enrollment Proceedings

Reason for Suspension		Authority	Due Process Protection	Mechanism	Reinstatement Process
1.	Failure to satisfy MCLE requirements	B & P §6070	Notice	Board authorizes administrative inactive enrollment	Compliance with MCLE; pay non-compliance fee \$200 and late penalties fees; State Bar reinstates
2.	Failure to pay bar dues	B & P §6143	Notice	Board recommends; California Supreme Court issues order	Payment of dues; California Supreme Court issues order
3.	Failure to comply with judgment or order for child support	B & P §6143.5; Rule of Court 962	Notice	State Bar notifies California Supreme Court; Court issues order	Family support agency issues release; California Supreme Court issues order
4.	Claim of insanity or mental incompetence	B & P §6007(b)(1)	Notice and Order to Show Cause	State Bar Court issues order	Petition to State Bar Court
5.	Assumption by court over law practice	B & P §6007(b)(2)	By motion; notice or hearing not required	State Bar Court issues order	Petition to State Bar Court
6.	Mental infirmity, illness or habitual use of intoxicants	B & P §6007(b)(3)	Notice to Show Cause; hearing on merits	State Bar Court issues order	Petition to State Bar Court
7.	Threat of harm to clients or public	B & P §6007(c)(1)-(c)(4)	Notice and expedited hearing; parties may stipulate to order	State Bar Court issues order	Petition to State Bar Court
8.	Entry of default in disciplinary proceeding	B & P §6007(e)	Notice; no hearing	State Bar Court issues order	Motion to State Bar Court
9.	Failure to pay fee arbitration award	B & P §6203(d)	Notice; expedited hearing available	State Bar Court issues order	Motion to State Bar Court with proof of payment of award
10.	Condition requiring entry into Attorney Diversion and Assistance Program	B & P §6233	Parties may stipulate to order	State Bar Court issues order	Motion to State Bar Court

Professional Conduct Requirements With A Client Disclosure Component

	Rule	Title	Manner of Disclosure
1.	RPC 1-311	Employment of Disbarred, Suspended, Resigned, or Involuntarily Inactive Member	Written notice to State Bar and client
2.	RPC 1-400	Advertising and Solicitation	Communication or solicitation
3.	RPC 2-200	Financial Arrangements Among Lawyers	Disclosure and client consent in writing
4.	RPC 2-300	Sale or Purchase of a Law Practice of a Member, Living or Deceased	Notice and client consent in writing
5.	RPC 3-300	Avoiding Interests Adverse to Client	Disclosure and client consent in writing
6.	RPC 3-100	Confidential Information of a Client	Must communicate with client before revealing confidential information to prevent a criminal act
7.	RPC 3-310	Avoiding the Representation of Adverse Interests	Informed written consent of client
8.	RPC 3-320	Relationship With Other Party's Lawyer	Must inform the client in writing
9.	RPC 3-400	Limiting Liability to Client	Written disclosure
10.	RPC 3-500	Communication	Keep client "reasonably informed"
11.	RPC 3-510; see also B & P § 6103.5	Communication of Settlement Offer	"Promptly communicate" to client
12.	RPC 3-700	Termination of Employment	"Due notice" to client
13.	RPC 4-100	Preserving Identity of Funds and Property of Client	"Promptly notify" client and "render appropriate accounts" to the client
14.	RPC 4-210	Payment of Personal or Business Expenses Incurred by or for a Client	Consent from client required before making certain payments

	Rule	Title	Manner of Disclosure
15.	RPC 5-210	Member as Witness	Informed written consent of the client is required, absent specified circumstances
16.	B & P § 6068(m)	Duties of Attorney	“Respond promptly” to client and keep client “reasonably informed”

**Standards for Attorney Sanctions
for Professional Misconduct Involving a
Client Disclosure Component**
(Title IV, Rules of Procedure of the State Bar of California)

Standard 2.3 Offenses involving moral turpitude, fraud, dishonesty or concealment

Culpability of a member of an act of moral turpitude, fraud, or intentional dishonesty toward a court, client or another person or of concealment of a material fact to a court, client or another person shall result in actual suspension or disbarment depending upon the extent to which the victim of the misconduct is harmed or misled and depending upon the magnitude of the act of misconduct and the degree to which it relates to the member's acts within the practice of law.

Standard 2.4 Offenses involving willful failure to communicate with the client or to perform services in the matter for which the member has been retained

- (a) Culpability of a member of a pattern of willfully failing to perform services demonstrating the member's abandonment of the causes in which he or she was retained shall result in disbarment.
- (b) Culpability of a member of willfully failing to perform services in an individual matter or matters not demonstrating a pattern of misconduct or culpability of a member of willfully failing to communicate with a client shall result in reproof or suspension depending upon the extent of the misconduct and the degree of harm to the client.

Standard 2.8 Offenses involving violation of rule 3-300, Rules of Professional Conduct re business transactions with a client)

Culpability of a member of a willful violation of rule 3-300, Rules of Professional Conduct, shall result in suspension unless the extent of the member's misconduct and the harm to the client are minimal, in which case, the degree of discipline shall be reproof.