

LEGAL MALPRACTICE IN KENTUCKY - HOW ARE WE DOING?

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One of the reasons for founding Lawyers Mutual was to get a handle on the scope and characteristics of malpractice claims in Kentucky. The idea was that Kentucky lawyers should pay premiums for insurance based on what is happening in Kentucky, not in other jurisdictions. Lawyers Mutual now has nearly 10 years of claims experience and a new national study of legal malpractice was recently published. Accordingly, this seems like a good time to provide you with a short status report on legal malpractice in Kentucky and how we stack up.

Background

In 1986 the ABA issued a comprehensive study of legal malpractice that was the definitive source on legal malpractice in the US until the 1996 ABA-NABRICO National Legal Malpractice Data Study. The National Association of Bar-Related Insurance Companies and the ABA joined forces to produce the 1996 study designed to build on the 1986 study. Lawyers Mutual, as a member of NABRICO, participated in this study. In this newsletter we share with you highlights of the '96 study and provide analysis for your own evaluation of where we are in Kentucky. In reviewing this information consider the following factors which necessitate that a certain amount of Kentucky windage be applied before drawing conclusions:

- The '96 study is based primarily on bar-related insurance company data. Bar-related companies typically do not insure large firms. This study is most relevant to solo practitioners and small firms as is Lawyers Mutual's data.
- Differences in data collection methodology and regional differences make comparisons useful only on a broad gauge basis. National studies are primarily helpful in spotting malpractice trends and reviewing your practice's risk management program. While significant differences between Kentucky data and national data require examination for the reasons why, these differences may have benign causes.
- Study results are based on claims reported to insurance companies by insured lawyers. They do not capture malpractice not reported or that of uninsured lawyers (estimated to be more than 30% of all lawyers in the '96 study). Neither do these claims reports provide the information needed to determine what percentage of lawyer time is spent on each practice area. For this reason an active practice area with a high percentage of total malpractice claims may appear more risky than it actually is.

Top Ten Malpractice Claims by Area of Practice

- Real Estate practice remains a high risk area in second place in all three studies. It is disappointing to see Kentucky at a higher percentage than the '96 study. The primary cause for real estate claims remains the same - missed encumbrances.

- Collection and Bankruptcy has been visible as a growing source of malpractice claims in Kentucky for some time. This trend developed in Kentucky during a time when national statistics show improvement. What's going on here?
- Workers' Compensation claims have been increasing in Kentucky for some time and are conspicuously higher than either the '86 or '96 study. Maybe the recent overhaul of Kentucky's workers compensation law will reverse this trend.
- Family Law is a growing source of malpractice claims. While Kentucky's percentage compares favorably with the '96 study, it is a practice area of increasing risk. Divorce and elder law matters appear to be the hot spots. It has been estimated that lawyers with less than five years experience account for about 30% of these claims.
- Business Transactions practice showed a dramatic increase in malpractice claims in the '96 study. Much of this is probably attributable to the economic situation of the early '90's. Nonetheless, this is an area to watch. New laws and regulations continue to make already complex business transactions even more complicated. You must keep up.

Top Ten Malpractice Claims by Area of Practice			
	ABA'86	NABRICO'96	KY'97
Personal Injury-Plaintiff	25.08%	21.65%	19%
Real Estate	23.29%	14.35%	17%
Business Transactions	3.04%	10.66%	*
Family Law	7.88%	9.13%	8%
Corp./Bus. Organization	5.32%	8.87%	* 5%
Collection & Bankruptcy	10.49%	7.91%	10%
Estate, Tax and Probate	6.97%	7.59%	7%
Criminal	3.34%	3.82%	5%
Workers' Compensation	2.14%	3.30%	8%
Personal Injury-Defense	3.22%	3.27%	3%
* Lawyers Mutual merges these two categories			

Significant Observations From the NABRICO '96 Study

- Settlement/Negotiation claims increased in '96 to 11.4% from 8.1% in '86.

Comment: We see settlement/negotiations as a growing risk in Kentucky because of increased client settlement remorse and an overall quicker trigger on malpractice claims against lawyers.

- Failure to Calendar Properly claims decreased in '96 to 6.8% from 11.5%; but Procrastination in Performance/Follow Up claims increased to 8.7% from 5% in '86.

Comment: It appears that more firms are automating their work and docket control systems which improves sensitivity to time limits; but if you drop the ball after getting it in play, you haven't accomplished much.

- Conflict of Interest claims rose slightly. This warrants concern because conflict claims with little merit or connection to an alleged loss are often given great weight by juries.

Comment: Our sense of it is that too many Kentucky lawyers are relying on memory and Rolodex for conflict review and are not installing automated systems readily and inexpensively available.

- Debt Collection claims have significantly increased as a result of the Federal Fair Debt Collection Practices Act.

Comment: Kentucky lawyers are having their share of problems with this law - it's important to know what you are doing or expect to pay about \$5,000 for a hard lesson.

- Non-client claims continue to increase with many coming from family law and divorce matters. Comment: This is major risk in business transactions and real estate matters as well.

- Claims involving lawyer business transactions with clients are apparently in decline.

- New Lawyers and Solo Practitioners: As the lawyer employment market tightens more new lawyers are going into practice as solo practitioners. Some insurers are concerned that without supervision and mentoring these lawyers are exposed to extraordinary risk.

Comment: This appears to be Kentucky's experience.

- The affirmative defense of the malpractice statute of limitations is less effective in defending claims.

Comment: This is particularly true in Kentucky. There have been a series of Supreme Court cases in the '90's that effectively increase the time available to file a legal malpractice claim.

- There is a correlation between how well the economy is doing and the number of legal malpractice claims. There are fewer in good times and more in hard times.

- Overall insurers experienced only modest and incremental increases in the number of claims and their value over the last ten years. The surge in legal malpractice claims appears to be diminishing.

Comment: We think the Kentucky situation is stable and expect this trend to persist. We, however, do not see a decrease in frequency of legal malpractice claims. The wave of the future is the splash of now.