



Law Firms and Risk Control Litigation Claims Analysis

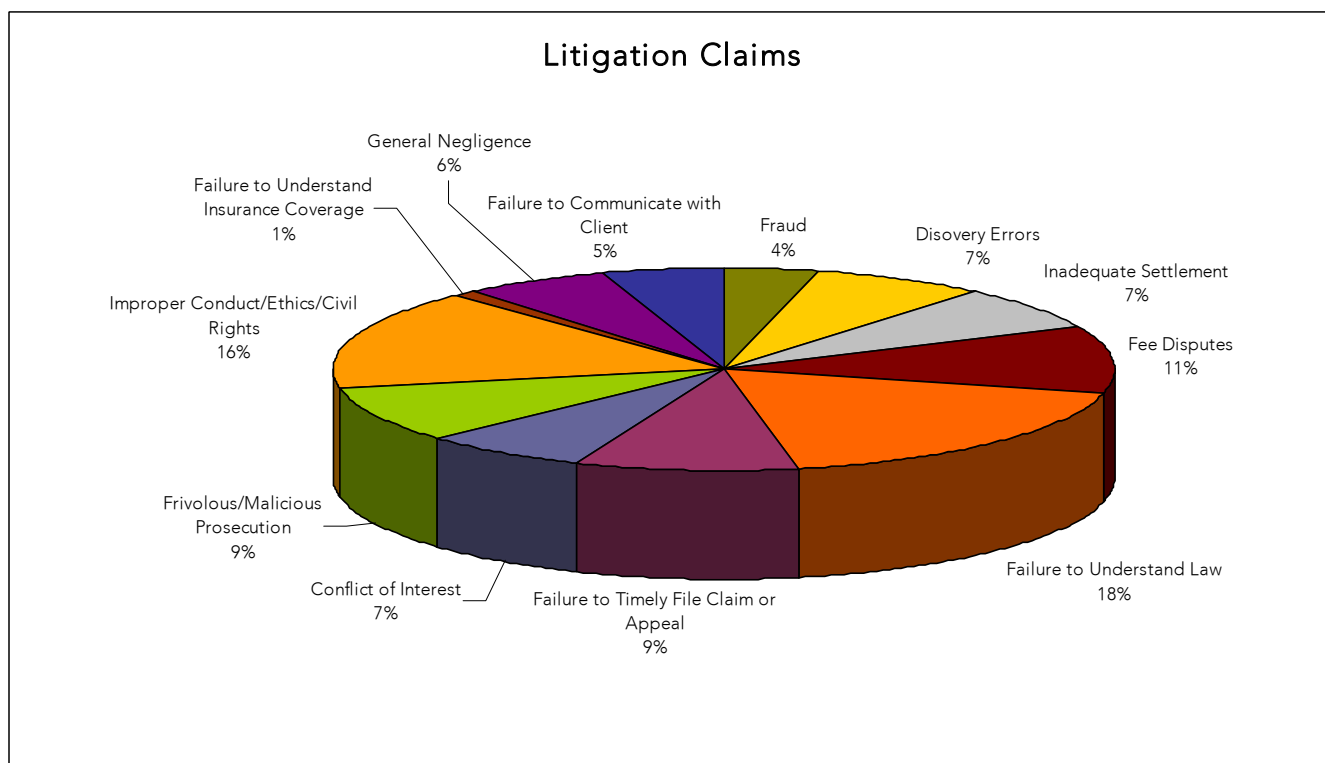
I. Introduction:

CNA's Large Law Firm team continues to be focused on providing high quality Risk Control advice to our clients. As part of our efforts to help law firms identify, understand and manage the risks relating to civil litigation, CNA conducted an analysis of claims, arising out of litigation, which were made against our large law firm clients over the past two years.

CNA analyzed litigation claims for the type of errors, issues and alleged causes of action against law firm policyholders. CNA then analyzed and identified risk control techniques to provide our clients with insight into Risk Control best practices.

II. Litigation Claims:

This analysis encompasses a review of approximately 400 litigation claims. Often, a litigation claim involves multiple allegations and causes of action asserted against a law firm. This analysis identifies the main allegations, which are detailed in the graph below:



III. Main Causes of Action in Litigation Claims:

The above categories are discussed further in descending order below:

A. Failure to Understand Law or Prepare

- 18% of the claims arise out of the following allegations:
 - Failure to understand the law
 - Inadequate preparation for trial or mediation and improperly drawn documents
 - Failure to understand law regarding obtaining judgment/enforcing judgment
 - Failure to investigate adversary
 - Failure to understand law – Fair Debt Collections Practices Act
 - Failure to prepare for trial
 - Bad advice regarding responding and preparing affidavits
 - Failure to properly draft jury instructions (includes a failure to understand the court rules and requirements)
 - Failure to understand law concerning claim deadlines, notices of claim, and statute of limitations
 - Failure to know statutory requirements for filing of claim
 - Failure to understand and properly name parties to litigation
 - Lack of investigation

The 18% of claims in this area cover a wide variety of alleged errors varying from those that are fairly objective to establish and those that may be more subjective such as questioning an attorney's or law firm's judgment.

Allegations such as the failure to investigate an adversary, failure to prepare for trial, bad advice regarding affidavits, and lack of investigation are ones that may be subject to interpretation. For example, how much investigation needs to be conducted? These types of allegations may be related to a downturn in the economy where the client attempts to assert a claim against the law firm simply based upon a bad result. This can be frustrating to a law firm and attorneys in that their decision-making and expertise is second guessed. These allegations also can be related to a client that, for cost reasons, limited the amount of work performed by the law firm.

These types of subjective allegations demonstrate the need for continuous and effective communication with the client and documentation. Any strategic decisions, such as how much investigation to conduct, must be discussed with the client and the agreed upon plan must be documented.

If the allegation involves the failure to know or react to a deadline such as a statute of limitation, naming an improper party or failing to name a proper party or simply being unaware of a statute or legal requirement, the claims tend to be more substantive. The defense of such claims may involve a concession as to the missed a deadline, for instance, but a defense assertion that such failure was not the proximate cause of the client's damages.

To avoid these types of claims, law firms should exercise robust supervision over associates and paralegals that may not be as experienced. Careful calendaring and reacting to the calendar and deadlines are also important risk management techniques.

B. Ethical or Improper Conduct

- 16% of the claims arise out of allegations of improper conduct or ethics or civil rights violations (both clients and third-party claims):
 - Invasion of privacy
 - Acting without client or supervising attorney's authority
 - Improper conduct in obtaining documents for discovery
 - Alleged improper communication with opposing party
 - Violation of privilege
 - Conspiracy with adversary
 - Civil Rights violations

Claims by a client for ethical or improper conduct typically involve the attorney acting without the client's authority, such as agreeing to settlement demands or offers without consulting with the client. Claims involving a conspiracy with adversary involve an allegation that the client believes that the attorney is not acting in the client's best interest. Claims alleging a failure to communicate with the client are typically one of the top ethical grievances made against attorneys for failure to return telephone calls and emails.

Claims involving unethical or improper conduct in some situations can involve third-parties other than the law firm's client. These types of third-party claims can involve invasion of privacy of an opponent, improper conduct in obtaining documents for discovery from the opponent, improper communication with a legally represented opposing party, privilege issues and civil rights violations.

“Pretexting” is a common claim in today’s social media environment. In attempting to obtain negative information on an opponent or other party, the attorney or someone at the attorney’s direction attempts to “friend” or otherwise obtain access to a privately protected social media account. This is typically not allowed in most jurisdictions. While it can be risky to inadvertently disclose meta data in documents, some of the claims arise from the access to that meta data to gain an advantage in a litigated matter. Heated discovery disputes between attorneys can often lead to motions for sanctions in court and/or grievances made against attorneys or law firms.

C. Fee Disputes

- 11% of the claims rise out of a dispute over fees (allegations of excessive billings both with or without the insured commencing a fee action):¹
 - Failure to manage client’s expectation of costs – lack of budget
 - Improperly accepting fees
 - Failure to pay expert fees
 - Preference Payments – Bankruptcy Trustee- Payments accepted within 90 days of filing for bankruptcy

Fee dispute allegations have always been common, but never more so than in a downturned economy. Attorneys must have discussions with clients up front about anticipated costs of litigation. While it would be difficult to predict the exact outcome and costs of a matter, attorneys and law firms can put together anticipated budgets subject to unexpected developments in the litigation.

Disputes with vendors such as experts can lead to claims against attorneys. It is crucial in the engagement agreement to outline who is responsible for the choice and payment of experts and other vendors throughout the course of the litigation.

Also, legal malpractice claims pursued by bankruptcy trustees are on the rise. This is most likely related to the economic downturn where a corporation goes into bankruptcy. The trustee, who is likely paid by a percentage of money obtained for creditors, assigns to another law firm to view the corporation’s law firm or law firms for any potential claims. This can be frustrating as the legal malpractice claim must be held in bankruptcy court rather than in state court.

¹ See CNA PROfessional Counsel article entitled, “How to Manage Risks of Fee Disputes in a Tough Economy”, June 2009. (Discussion of the risks of counterclaims for legal malpractice in response to lawsuits for unpaid legal fees).

A well drafted engagement agreement outlining the amount that will be charged to the client and how and when bills are issued is crucial. Well drafted billing entries can help avoid disputes with clients. Also, it is important to outline in an engagement agreement, what occurs in the case of non-payment of fees. Some consideration can be given to a fee dispute arbiter to avoid a legal malpractice claim.

D. Failure to Timely File Pleadings

- 9% of the claims arise out of a failure to timely file a claim or appeal (or documents within discovery schedule):
 - Failure to timely file Notice of Appeal
 - Failure to timely perfect an appeal
 - Failure to timely file claim within Statute of Limitations
 - Failure to timely respond to Summons
 - Failure to timely file injunction
 - Failure to timely respond to Notice to Admit

Typically, calendaring issues are the cause of most allegations involving the failure to know or react to a deadline such as a failure to timely file a notice of appeal, or perfect an appeal, failure to timely file within a statute of limitation, failure to respond to a summons, failure to file an injunction or notice to admit facts or documents. Careful calendaring and reacting to the calendar are crucial risk management techniques. Law firms should have dual calendars and more than one person responsible for checking that due dates have been properly calendared and reacted to. Law firms can accomplish this through assigning more than one attorney per file and the use of assistants and paralegals.

E. Frivolous or Malicious Prosecution

- 9% of the claims arise out of allegations of malicious or frivolous prosecution (by third party):
 - Improper seizure of property
 - Suing improper party
 - Improper foreclosure/detainer Actions

Typically, these claims are filed by third-parties to the litigation (as opposed to the client) who allege that the opposing attorney in the litigation is pursuing a malicious or frivolous prosecution. The claims often involve either a mistake by the law firm as to a proper party or a possibly an allegedly over-aggressive litigation strategy. Law firms need to make sure that they have done the proper pre-suit investigation and can document why a particular

course of action was pursued or party was named. Sometimes these allegations can arise from improper information provided to the attorney by the client. Pre-suit investigation is an important risk management tool to ensure that the client has provided correct information.

F. Discovery Errors

- 7% of the claims arise out of allegations of errors in discovery:
 - Failure to preserve documents- spoliation
 - Disclosing confidential information
 - Withholding discovery/failing to comply with discovery order
 - Failure to prepare expert witnesses/retain witness/disclose witness timely
 - Missed discovery deadlines

The spoliation allegations are becoming fairly common as more and more discovery sought is electronic data. Law firms have to be extremely vigilant to avoid any destruction or alteration of electronic data. Even turning on a computer can sometimes result in corruption or destruction of electronic data. Also, litigation holds place many requirements and duties on law firms to communicate to their clients to discontinue any document destruction policies. Law firms need to work with IT professionals at the outset of litigation.

The disclosing of confidential information can be related to the inadvertent disclosure of metadata that may contain confidential information from other clients that was cut and pasted into another document. The deadline issues related to discovery also involve the importance to law firms to diary deadlines and react to deadlines. Multiple assigned attorneys on a file and the use of assistants and paralegals can help manage this risk.

G. Settlement Issues

- 7% of the claims arise out of an alleged inadequate settlement (and allegations that the insured failed to properly disburse the funds):
 - Failure to properly document settlement- improperly drafted agreement
 - Failure to disburse funds
 - Bad advice regarding accepting settlement
 - Failure to participate in settlement conference
 - Failure to communicate settlement offer to client
 - Improper disclosure of settlement terms (when confidential)

The “settle and sue” legal malpractice cases have been on the rise. This may be due to the downturn in the economy and the desire to second guess an attorney’s or law firm’s judgment. Thorough communication with the client during all stages of the litigation is paramount and documentation of those communications.

The allegations concerning failure to disburse funds and improper disclosure of confidential settlement terms are potential ethical violations as well. The timeframe of disbursement of settlement funds can lead to disputes with the clients. Due to the check cashing scams where attorneys release funds “as available” rather than after the check clears, prudent attorneys and law firms institute very strict procedures and time frames for disbursing settlement funds.

H. Conflict of Interest

- 7% of the claims arise out of allegations of a conflict of interest:
 - Failure to disclose conflict
 - Collusion²

Conflict of interest allegations have always been a common claim in legal malpractice claims. However, with mergers and acquisitions in recent years, it has become more and more difficult for law firms to avoid all potential conflicts of interest. A recent study placed conflict of interest allegations the largest cause of legal malpractice actions.³

While attorneys are aware of the differences between potential conflicts and actual conflicts and that there are differences in severity, jurors often see conflict situations as much more black and white and often serious in all instances. Attorneys and law firms should either designate an individual in the firm to conduct conflict analyses, hire conflicts counsel or work with outside counsel. The consequences for the failure to analyze conflicts in a meaningful manner can be severe in the legal malpractice field.

Another sound risk management technique is to send “closure letters” to clients as soon as the work on the file is completed. The conflict analysis for a former client is often less strict than that for a current client.

² Attorneys should review all of the terms of their Lawyers Professional Liability Policy for any coverage exclusions as to intentional and fraudulent acts and consult with their agent as to any coverage questions.

³ Ames & Gough, “*Lawyers’ Professional Liability Claims Trends: 2011*”, July 2011.

I. General Negligence

- 6% of the claims arise out of allegations of general negligence:
 - Negligent withdrawal
 - Negligent trial handling

Law firms must be careful to not prejudice the client when they attempt to withdraw from a matter. Any statements in the motion to withdraw or statements before the tribunal must be circumspect and not inadvertently reveal any privileged information. Well drafted engagement agreements can help provide a more effective contractual mechanism for withdrawal.

Negligent trial handling allegations can fall into the category of subjective claims questioning an attorney's or law firm's judgment. These types of allegations may be driven by the economic downturn. Best practices are constant communication with the client at all stages of the litigation (not just at trial) and documentation of those communications.

J. Failure to Communicate

- 5% of the claims arise out of an alleged failure to communicate properly with client or adversary:
 - Failure to communicate with client regarding settlement
 - Failure to communicate with correct client regarding authority
 - Failure to communicate with client regarding expert retention
 - Failure to advise client to retain document-discovery hold
 - Failure to communicate regarding E-Discovery

Failure to communicate with the client is typically the number one ethical grievance against attorneys in most jurisdictions. Communication with the client is a basic and sound risk management technique to avoid many of the issues related to legal malpractice claims. Since in today's legal environment, attorneys can email their clients as often as calling and drafting formal letters, communication with the client has never been easier or more accessible.

The electronic discovery allegations are likely related to the failure of the attorney to effectively communicate litigation holds to their clients.

K. Fraud⁴

- 4 % of the claims arise out of allegations of fraud:
 - Misrepresenting facts to the court
 - Conspiracy to defraud client
 - Fraud- Forum Shopping
 - Assignment of assets to avoid seizure of property after Judgment
 - Aiding and abetting tort on behalf of client

Attorneys have always had to be concerned about their own ethical conduct before a tribunal and in legal proceedings. In addition, there is much more information available to corroborate whether a statement made by an attorney in court is truthful – e.g., the reason why the attorney requested a continuance of the trial.

However, the tort of aiding and abetting on behalf of a client is a troubling trend in many jurisdictions. Attorneys need to be especially wary of clients that they believe may be engaging in fraud or attempting fraud. Attorneys need to review their applicable ethical obligations as to remonstrating with a client to stop the fraudulent activity and possibly notifying the court and withdrawing from a matter. The tort of aiding and abetting a client's fraud has also appeared in bankruptcy matters, especially any advice to that could be considered hiding of assets.

Law firms must recognize that their duties of truthfulness to a tribunal and to others are significant any deviation can result in actions including the attorney or law firm for their client's fraud.

L. Coverage issues

- 1% of the claims arise out of allegations of a failure to understand insurance coverage and/or make proper tender of coverage:
 - Failure to note coverage
 - Failure to advise regarding coverage for settlement
 - Failure to tender

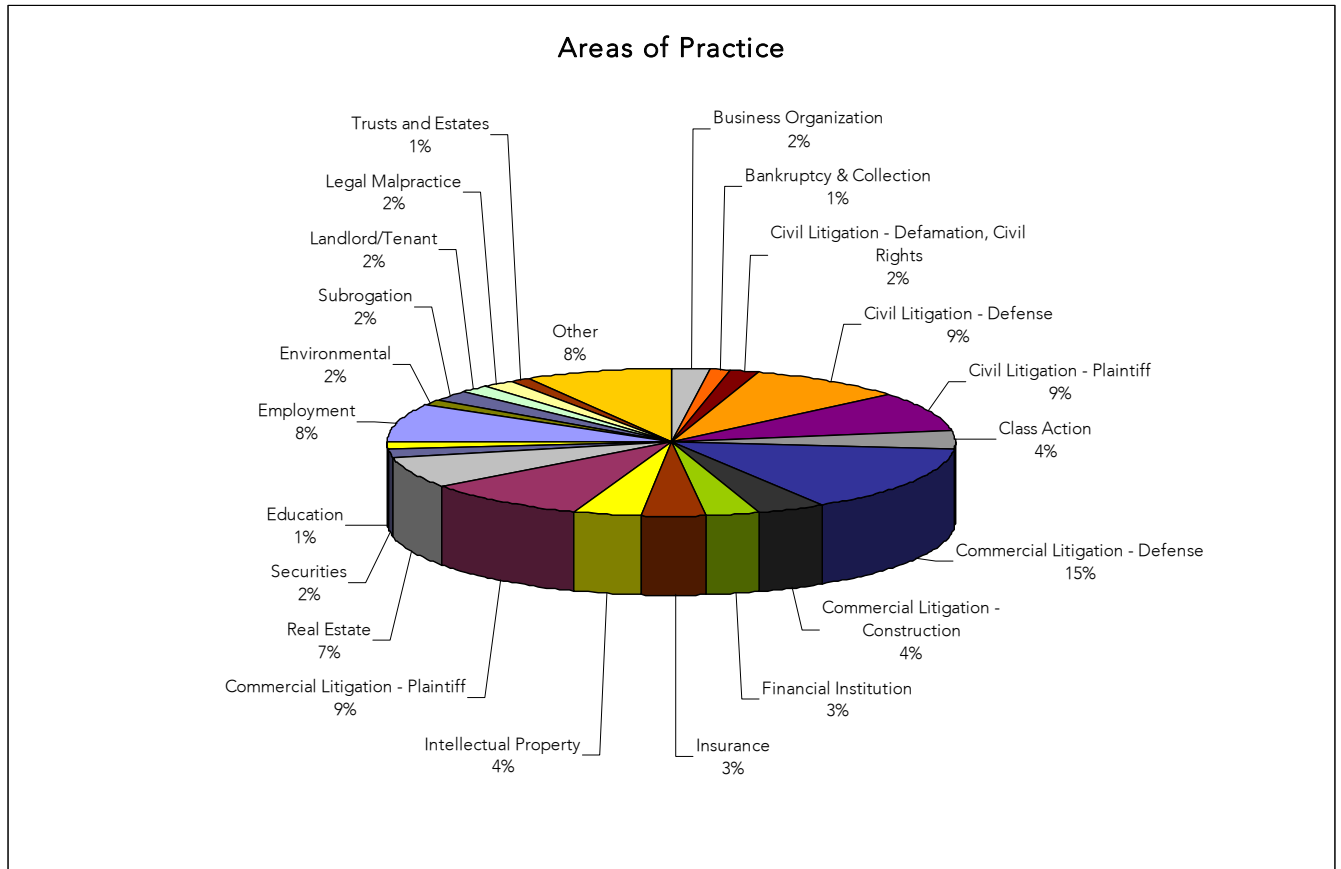
Law firms should be careful to utilize either coverage attorneys in their own law firm or outside coverage counsel, especially where there is any question as to coverage. A failure to

⁴ Id.

recognize additional avenues for recovery can often lead to substantial claims made against attorneys. Discovery requests should be designed to elicit this type of information.

IV. Underlying Litigation Areas of Practice:

CNA also categorized the recent litigation claims by areas of practice and the type of litigation that led to a legal malpractice claim.



Other includes: local government, fraud, property damage, and pro bono work.

Real Estate includes: foreclosures, developer litigation, condominium litigation, fair housing litigation, and zoning

Class Action – both plaintiff and defense (includes securities class actions).

As one can view on the above pie chart, there are a wide variety of practice areas that lead to civil litigation claims. Sound risk management techniques can be employed in all areas of practice to help avoid claims and the severity of claims.

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