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# Liability Insurer Data as a Window on Lawyers' Professional Liability

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# Liability Insurer Data as a Window on Lawyers' Professional Liability

Tom Baker & Rick Swedloff\*

*Using the best publicly available data on lawyers' liability claims and insurance—from the largest insurer of large law firms in the United States, the American Bar Association's Standing Committee on Professional Liability, and a summary of large claims from a leading insurance broker—this Article reports the frequency of lawyers' liability claims, the distribution and cost of claims by type of practice, the disposition of claims, and lawyers' liability insurance premiums from the early 1980s to 2013. Notable findings include remarkable stability over thirty years in the distribution of claims by area of practice among both small and large firms, a large percentage of claims (64–70%) involving de minimis expenses (less than \$1000) in the small firm market, and in the large firm market a declining rate of “real claims” per one thousand lawyers, a declining rate of real average gross loss per claim, and stable real premiums per lawyer since the early 1990s. Because of data limitations, however, these results cannot be confidently generalized. Further advances in the understanding of lawyers' liability and insurance will require qualitative research.*

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#### INTRODUCTION

Lawyers' liability is a remarkably underexplored topic in tort and insurance law teaching and scholarship. Products liability, medical malpractice, environmental liability, and even the ubiquitous but hardly highbrow topics of auto liability and workers compensation fill the pages of tort and insurance law casebooks and law reviews.

Not so for lawyers' liability, the liability that arises out of a breach of lawyers' professional obligations to their clients. This is the liability risk that might be thought to be the most real, and the liability insurance most relevant, for the future lawyers who are our students. Yet law schools and legal scholarship scarcely touch on lawyers' liability, and they do so almost exclusively through the lens of professional responsibility teaching and scholarship, where it receives decidedly different treatment than it would in a torts and insurance context.<sup>1</sup> Among other differences, liability insurance is almost never mentioned in professional responsibility casebooks, and discussions of lawyers' liability typically appear only in a short section on lawyer competence.<sup>2</sup>

This situation may be about to change because law-and-society scholars have turned their attention to lawyers' liability.<sup>3</sup> In typical law-and-society fashion, this research will focus more on the law in action than the law on the books. Liability law in action almost always intersects with liability insurance, even when that intersection comes in the form of the absence of, or gaps in, liability insurance.<sup>4</sup> While there certainly are gaps, especially for solo practitioners and the smallest law

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1. See, e.g., STEPHEN GILLERS, REGULATION OF LAWYERS: PROBLEMS OF LAW AND ETHICS 701–47 (8th ed. 2009); THOMAS D. MORGAN & RONALD D. ROTUNDA, PROFESSIONAL RESPONSIBILITY: PROBLEMS AND MATERIALS 64–78 (10th ed. 2008); DEBORAH L. RHODE & DAVID LUBAN, LEGAL ETHICS 1007–20 (5th ed. 2009) (section on competence and malpractice). *But see* TOM BAKER & KYLE D. LOGUE, INSURANCE LAW AND POLICY: CASES AND MATERIALS 454–68 (3d ed. 2013) (using lawyer professional liability (LPL) insurance cases to teach about late notice problems in claims made policies); SUSAN SAAB FORTNEY & VINCENT R. JOHNSON, LEGAL MALPRACTICE LAW: PROBLEMS AND PREVENTION (2d ed. 2015).

2. One professional responsibility casebook that does contain a brief section on lawyers' liability insurance is GEOFFREY C. HAZARD, JR. ET AL., THE LAW AND ETHICS OF LAWYERING 881–84 (5th ed. 2010).

3. In addition to our project, we are aware of upcoming projects on lawyers' liability insurance by Bert Kritzer, Neal Vidmar, and Leslie Levin. Kritzer organized a significant gathering of law and society legal malpractice researchers that took place at the International Institute for the Sociology of Law in Onati, Spain in the summer of 2015.

4. See, e.g., KENNETH S. ABRAHAM, THE LIABILITY CENTURY 1 (2009) (“The tort system, not only as it exists on paper but also how it works in practice, is a product of the insurance system, just as the insurance system is a product of the tort system.”); Tom Baker, *Liability Insurance as Tort Regulation: Six Ways that Liability Insurance Shapes Tort Law in Action*, 12 CONN. INS. L.J. 1, 7 (2005) (“Exclusions in liability insurance policies create, in effect, remote islands of tort liability that lawyers and law professors know about, but almost no one goes to visit.”).

firms, firms with more than a few lawyers generally have liability insurance.<sup>5</sup> Thus, liability insurance data have the potential to provide a window on lawyers' liability, at least to the extent that the data are publicly available.

This Article contributes most significantly to this developing understanding of lawyer's liability by compiling and analyzing the data that are publicly available. Each of the three sources we examine is limited in significant ways, but taken together, they provide a window on claims brought against lawyers for breaches of their professional duties. These data also add a useful complement to, and highlight the need for, our ongoing qualitative research on lawyers' professional liability (LPL) insurance.

In this Article we present data compiled from the annual reports of the Attorneys' Liability Assurance Society insurer, commonly referred to as ALAS, which is the insurer with the largest market share in the medium- to large-firm LPL insurance market. Using the ALAS data, we are able to track LPL insurance pricing and claims for ALAS members from 1983 to the present.

The ALAS data are especially well suited for tracking insurance prices over time, because ALAS engages in unitary pricing, meaning that it charges the same per lawyer price for each of the policies that it offers, regardless of any differences among member firms.<sup>6</sup> All of the policies offered each year are identical in every respect except the limits of liability and the self-insured retention (SIR), which is the amount of money the firm must spend on a claim before ALAS begins to pay. While ALAS has changed the mix of policies that it has offered over time (for example, by offering policies with higher limits and SIRs in more recent years), there are a number of SIR/policy limit combinations that have been continuously offered, allowing us to track the price of LPL insurance in the medium- to large-firm market for over thirty years. What we find is that, although LPL insurance pricing reflects the liability insurance underwriting cycle,<sup>7</sup> meaning that substantial variations in prices over time are to be expected, LPL insurance premiums have declined in real terms since their peak in the early 1990s.

The ALAS annual reports also contain claim-related information in a manner that is sufficiently consistent to permit comparison over time. ALAS reports the total number of what it calls the "real claims" reported by members per calendar year (defined as "all claims other than those initially classified as without merit"),<sup>8</sup> the number of real claims reported per one thousand lawyers per year, the number

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5. HAZARD ET AL., *supra* note 2, at 881–82.

6. *See, e.g.*, ATTORNEYS' LIAB. ASSURANCE SOC'Y LTD., 2013 ANNUAL REPORT 23 (2013) [hereinafter 2013 ALAS ANNUAL REPORT] (showing the pricing matrix for any given retention and policy limit regardless of the firm risk). For some years ALAS charged California member firms a different price and for many years ALAS offered some policies with high self-insured retentions only to larger firms. *See, e.g.*, ATTORNEY'S LIAB. ASSURANCE SOC'Y LTD., 1989 ANNUAL REPORT 3, 16 (1990) (noting ALAS's hope to eliminate the twenty percent differential in California rates and the greater than 250-member policy).

7. *See* Tom Baker, *Medical Malpractice and the Insurance Underwriting Cycle*, 54 DEPAUL L. REV. 393 (2005).

8. *See, e.g.*, 2013 ALAS ANNUAL REPORT, *supra* note 6, at 11.

of claims reported per calendar year by area of practice, and the gross incurred loss per calendar year by area of practice. What we find is that the rate of real claims per one thousand lawyers has also declined since a peak in the 1990s. Among our other findings, the most notable may relate to the relationship between litigation and transactional practice area claims. Although the litigation practice area produces the largest number of claims (about 40% of the total), the bulk of the losses in dollar terms are attributable to transactional practice, most significantly general corporate work, followed by banking and securities.

While ALAS members are not representative of law firms generally, ALAS competes in the larger LPL market to retain and attract members, and law firms do join and leave ALAS over time. As a result, the prevailing belief among participants in the LPL insurance market is that ALAS's overall pricing and claims experience is sufficiently similar to that of the firms that are eligible for membership that the ALAS experience provides a reasonably good window on the experience of that larger group of firms.<sup>9</sup> We concur that the data are useful in relation to the experience of firms that are similar to those that are ALAS members, but that there are significant sectors of the bar that are under-represented, most significantly large law firms based in New York City, San Francisco, and Los Angeles and the very large, truly international firms.

Although small law firms are entirely absent from the ALAS data, that absence is of less concern because the American Bar Association's Standing Committee on Professional Liability has conducted a series of studies using claims data from liability insurers that sell primarily to solo and small firms. We conduct new analyses of these data and present them in some new ways as a complement to our analyses of the previously unreported ALAS data.

Like the ALAS data, the ABA Standing Committee data have serious limitations. For present purposes, the most significant is that data drawn from liability insurance records can only reflect the experience of lawyers who buy professional liability insurance. Many lawyers, especially solo practitioners, do not. With that understood, the Standing Committee data allow us to track the LPL claims experience over time along a variety of useful dimensions: the kinds of errors that produce claims, the distribution of claims by practice area, and the disposition of claims. What the Standing Committee data reveal is remarkable stability over nearly thirty years of liability insurance claims, from 1983 to 2011. Although the Standing Committee reports do not contain data on premiums, long term stability in claims activity is likely to be associated with long-term stability in premiums, recognizing that there can be very large short-term changes in premiums over the course of the underwriting cycle.

We present our results as follows. We begin with a brief note on method that explains how we obtained the qualitative information that we use to supplement the quantitative data. We then provide a basic description of the LPL insurance market that informs our discussion of the generalizability of what can be learned

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9. See *infra* Section III.B.

from the Standing Committee and ALAS data. We then present those data and findings. We conclude with discussion of a report prepared by Aon, the insurance brokerage firm with the largest LPL market share, regarding the nature of the errors that are alleged to have produced the largest publicly reported LPL settlements and judgments.

### I. A NOTE ON METHOD

In addition to reporting results from the data from ALAS and the ABA Standing Committee, this Article draws on our ongoing qualitative research on the lawyers' liability and insurance field. This qualitative research uses methods that have become familiar to liability and insurance scholars from the work of the sociologists H. Laurence Ross, Richard Ericson, and Carol Heimer as well as prior work by Baker and coauthors.<sup>10</sup> Whenever possible we provide citations to trade literature and other public source material, but much of our information comes from confidential, semistructured interviews with LPL market participants, along with follow-up e-mail and phone conversations and participant observation at lawyers' liability and insurance conferences and programs.

To date, the interviews have focused primarily on LPL insurance structure, pricing, and underwriting. We have interviewed fifty-one market participants: ten from insurance brokers; seventeen from LPL insurers (two actuaries, ten underwriters, three C-suite executives, one claims executive, and one loss prevention specialist); fifteen from large law firms (twelve general counsels, one chair of an insurance committee, one chair of a risk management committee, and one chief financial officer); four reinsurance underwriters; two law firm lawyers who are paid by LPL insurers to provide risk management advice to other law firms; and three lawyers from outside law firms who serve as "monitoring counsel" for LPL insurers, coordinating claims management and insurance coverage communications between policyholders and insurers.

Because we promised confidentiality to our participants, we will not provide information that would make them or their companies identifiable. When we do mention specific organizations, we use either public sources or statements from participants who have never worked in those organizations.

### II. THE LPL INSURANCE MARKET

In this Part we provide an introduction to the LPL insurance market that will inform our discussion of the generalizability of our analyses of the ABA Standing Committee and ALAS data. In summary, the ABA Standing Committee data appear to be based upon a sufficiently large proportion of the solo and small firm

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10. See, e.g., TOM BAKER & SEAN J. GRIFFITH, ENSURING CORPORATE MISCONDUCT (2010); RICHARD V. ERICSON & AARON DOYLE, UNCERTAIN BUSINESS: RISK, INSURANCE, AND THE LIMITS OF KNOWLEDGE (2004); H. LAURENCE ROSS, SETTLED OUT OF COURT (1970); Tom Baker & Thomas O. Farrish, *Liability Insurance and the Regulation of Firearms*, in SUING THE GUN INDUSTRY 292 (Timothy D. Lytton ed., 2005); Tom Baker, *Blood Money, New Money, and the Moral Economy of Tort Law in Action*, 35 LAW & SOC'Y REV. 275 (2001).

market that the results of our analysis should be generalizable to insured solo and small firm lawyers. The ALAS data are likely to be similarly generalizable to the medium to large firms that are eligible for membership in ALAS, but not to important segments of the large firm market that are not well represented in ALAS: firms based in New York City, San Francisco, and Los Angeles, and the truly international firms with a significant U.S. presence.<sup>11</sup>

LPL insurers primarily segment the law firm market according to size and geography. While there are differences among insurers in where they draw lines between categories, the law firm size categories we identified are: solo practitioners, very small firms (five or fewer lawyers), small firms (five to thirty-five lawyers), mid-sized firms (thirty-five to two hundred lawyers), large firms (two hundred or more lawyers), and mega international firms.<sup>12</sup> For present purposes we draw our main line at thirty-five lawyers, the minimum size for becoming a member of ALAS. There are important subcategories on both sides of that line. We draw the line there, because when selling to a firm with fewer than thirty-five lawyers insurers sell LPL policies without significant, if any, individuation between insureds beyond the insureds' areas of practice. As one Executive told us, below thirty-five lawyers "you have to underwrite by class in practice areas. There can't really be any insight into an individual firm. You just

11. ALAS insures only one of the eight firms described as "international" in the AmLaw 100 (Mayer Brown), as compared to six of the twenty-two firms with more than a thousand lawyers (Jones Day, K&L Gates, Kirkland & Ellis, Mayer Brown, Morgan Lewis & Bockius, and Ropes & Gray). Compare Special Report, *The AmLaw 100 2013*, AM. LAW., May 2013, with 2013 ALAS ANNUAL REPORT, *supra* note 6, at 79–83. Eighteen of the AmLaw 100 are firms that are based in New York City. See Special Report, *supra*, at 141. Five of the AmLaw 100 are firms that are based in Palo Alto or Los Angeles. *Id.*

12. See e.g., Telephone Interview with Broker 3 (Sept. 28, 2013); Telephone Interview with Broker 4 (Oct. 16, 2013).

Broker 3:

A lot of Bar Association programs or other insurers offering insurance to smaller law firms are typically in the solo attorney up to twenty-, twenty-five-, thirty-attorney range . . . . You talk to six people you'll get, I don't know, twelve to eighteen answers in terms of what middle market is. Middle market generally is 25 to 100, 25 to 150 attorneys. Some people would say it's twenty-five to seventy-five attorneys . . . . Certainly those folks look to add attorneys, but they're much different than when you get to the 175, 250-attorney firm on up. Then when you get to that next size there's a large firm and then there's the mega-firm or the international firm. In the middle of that some people will talk about regional firms where you'll have some firms that are just gonna focus on the Southeast. They're not too worried about Chicago or L.A. or wherever else. I don't know if that's helpful, but there's not really one clear-cut way of anybody really defining firms. Even if you walk up and down our hallway and talk to people, some people would say, "Well midsized firms are 100 to 250 attorneys." Other people would say, "Well no it's 25 to 100." No real right or wrong answer when it comes to that.

Telephone Interview with Broker 3, *supra*.

Broker 4:

I guess mostly the industry looks at firms on a size basis. Firms are still very much judged on the number of attorneys that they have. Everybody you speak to will have a different cut off as to what they consider a small firm, what they consider a mid-size firm, and what they consider a large firm. I guess from my perspective, I would consider a firm with less than fifty attorneys to be a small firm. With 50 attorneys to 200 attorneys, 250 attorneys, I would consider mid-size. Above 200, I think I would consider large.

Telephone Interview with Broker 4, *supra*.

don't have the time and you can't afford it."<sup>13</sup> As a result, providing LPL insurance to firms that are larger than thirty-five lawyers is a significantly different business than providing LPL insurance to smaller firms.

#### A. *The Solo and Small-Firm LPL Market*

Close to three-quarters of lawyers in private practice in the United States work in firms that employ fewer than twenty attorneys and nearly half of those work in solo practice.<sup>14</sup> The solo and small firm LPL insurance market is segmented by geography, primarily as a result of the state-based nature of insurance regulation and law practice. Each state bar association has its own bar-approved program, and insurers active in the small firm market evaluate on a state-by-state basis whether to enter into the competition to be the bar-approved program, or whether to compete against that program in the market. Insurers file rates and report their results on a state-by-state basis, which further encourages them to conceptualize LPL markets on that basis.

Lawyers in the small firm market appear to purchase policies with fairly low coverage limits. One insurer reported that its "average limit is somewhere in the \$1.5 or \$2 million range."<sup>15</sup> Another reported that most of its small firm insureds were in the "\$1 million, \$3 million, \$5 million" range.<sup>16</sup>

Even with low limits and correspondingly low prices, insurance may not be an integral part of every small firm and solo firm practice.<sup>17</sup> While liability

13. Telephone Interview with Executive 1 (Aug. 16, 2013). The full quote from Executive 1 in context is below:

You'll hear different formulations, but quite simply, the sort of thirty-five and up is still a—and that I believe is still ALAS's level. Below thirty-five . . . you have to underwrite by class in practice areas. There can't really be any insight into an individual firm. You just don't have the time and you can't afford it. I would say that there's probably tranches within that world, and the most significant, interestingly, is probably between 35 and 200 lawyers. You're really thinking about what most people would still call a midsized law firm. They're typically going to be—they might be in multiple locations, but they're not going to be huge and international. There are, by the way, going to be exceptions, like Wachtell Lipton to this, but I'll leave them aside, but most firms, until they crack 200, don't have some of the problems that you would equate with a Davis Polk or a White & Case or a Covington & Burling. At 200 and up is a class unto itself. Then there's a point at which—and the number of attorneys becomes less important—then you get up till then you get to a point where you start talking about international mega firms. Increasingly, they are now combinations of UK and US firms, or they just built up their own international practices to the extent that it's hard to tell where the center of gravity is.

*Id.*

14. Based on the most recent data obtained by the ABA, 75% of lawyers work in private practice. *See* CLARA N. CARSON & JEEYOON PARK, THE LAWYER STATISTICAL REPORT: THE U.S. LEGAL PROFESSION IN 2005 (Am. Bar Found. 2005) tbl.II.B, at 9, tbl.II.C., at 10. Of those, 73.9% work in firms employing fewer than 20 lawyers—48.6% work in solo firms, 13.5% work in firms with two to five lawyers, 6.3% work in firms with six to ten lawyers, and 5.5% work in firms with eleven to twenty lawyers. *See id.* tbl.II.C, at 10. Given recent trends in large firm hiring, these numbers may, in fact, understate the number of lawyers working in small firms.

15. Telephone Interview with CEO 1 (Nov. 16, 2013).

16. Telephone Interview with Underwriter 2 (Oct. 15, 2013).

17. *See* HAZARD ET AL., *supra* note 2, at 881–82 (“[I]t is estimated that at least fifty percent of solo and small-firm lawyers have no liability insurance.”).

insurance is a de facto cost of business for large firms, solo attorneys and very small firms have to make difficult choices about coverage in a marketplace with thin margins.<sup>18</sup> Even with fairly low rates for coverage, some firms may choose to go bare. As one insurance executive explained:

[W]hen confronted with the prospect of just having to pay an additional \$250.00 [for \$200,000 of coverage per claim,] a lot of lawyers won't do it . . . . [T]hat's how thin their margins are from an operating standpoint. Yeah, you can get it very inexpensively and again, depending upon the economic times and what's going on in the industry, even that can be too much. We don't lose those insureds to a competitor. We lose them to going bare.<sup>19</sup>

In other words, insurers selling insurance to solo practitioners and very small firms face price-sensitive clients who want to pay low premiums or none at all. Among other consequences, the large numbers of uninsured solo and very small firm lawyers means that statistics drawn from LPL insurers present an incomplete, and almost certainly biased, picture of lawyers professional liability. Lawyers and firms that choose to forego LPL insurance likely differ from other lawyers and firms in other ways as well. It is not difficult to imagine ways that those differences might affect the liability risks faced by these lawyers and firms.

There are two main types of insurers active in the small firm LPL market: the NABRICO (National Association of Bar Related Insurance Companies) companies and commercial insurance companies like CNA and Travelers (in addition to the reinsurers that support both types of companies). The commercial insurers operate their small-firm business as part of what they call “program” business. These programs are fairly described as “cookie cutter,” with “the same wording for every firm,” the “same basic rate [plan],” and much smaller limits than large firms.<sup>20</sup> NABRICO is a network of mutual insurers and risk-retention groups dating to the mid 1970's liability insurance crisis that also spawned the “bedpan mutuals” active in the medical liability insurance market.<sup>21</sup> As a result of the price-sensitive clients and cookie-cutter policies, it is not surprising to find that these insurance relationships look more like auto insurance relationships than like the relationships between large-firm LPL insurers and their clients.<sup>22</sup> Lawyers buy a policy off-the-shelf and hope the insurer pays if a claim arises. Insurers do little in terms of underwriting, contract negotiation, tailoring loss prevention advice, or pricing based on particular risk management practices.

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18. Although one state requires all lawyers to carry malpractice insurance and other states require it for those who practice as part of limited liability organizations, most states do not require coverage. See Tom Baker & Rick Swedloff, *Regulation by Liability Insurance: From Auto to Lawyers Professional Liability*, 60 UCLA L. REV. 1412, 1438 (2013).

19. Telephone Interview with CEO 1, *supra* note 15; see also Telephone Interview with Reinsurer 1 (Oct. 26, 2013) (calling the decision to go bare “arrogant” and explaining, “You’ve got a personal asset base that—I don’t know, at the time was probably a million bucks—and you’re exposing it to one mistake that you can easily hedge your bet against by spending \$3,000”).

20. Telephone Interview with Underwriter 4 (Oct. 30, 2013).

21. ABRAHAM, *supra* note 4, at 127.

22. See Baker & Swedloff, *supra* note 18, at 1446.

Most of the NABRICO companies have contributed data to all of the ABA Standing Committee studies, and many of the commercial insurance companies active in the small firm market have contributed data to one or more of the ABA Standing Committee studies.<sup>23</sup> Thus, in light of the relative stability of the results of the Standing Committee studies that we will present, we conclude that those studies provide a reasonably good window on the claims experience of insured lawyers in solo and small firm practice over the last thirty years, with the recognition that a few of the insurers that participate in the Standing Committee studies—most significantly CNA—also sell insurance to large law firms. The Standing Committee studies do not indicate whether CNA and the other participating insurers that sell to both small and large firms included their large firm results in the data that they provided. Because of the predominance of solo- and small-firm lawyers in this pool, the inclusion of some large law firms is unlikely to affect most of the results that we present. We will indicate those results for which the potential inclusion of claims against large firms may make a difference.

#### B. *The Medium- to Large-Firm LPL Market*

There are three distinct types of insurance arrangements in the medium- to large-law-firm LPL insurance market, each with significantly different approaches to program structure and pricing: (1) ALAS, (2) three other medium- to large-law-firm mutual insurance arrangements, and (3) the commercial insurance market. All three differ significantly from the small firm market in both insurance program structure and pricing. Larger law firms purchase much higher insurance limits than small firms, working closely with brokers (unless they are purchasing insurance exclusively from ALAS), and including more insurers on the risk.

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23. The report of the initial 1985 ABA study reports that all of the NABRICO companies participated and that of the commercial carriers active in the market, only three companies failed to contribute meaningful data. WILLIAM H. GATES & SHEREE L. SWETIN, AM. BAR. ASS'N, CHARACTERISTICS OF LEGAL MALPRACTICE: REPORT OF THE NATIONAL LEGAL MALPRACTICE DATA CENTER, at vii–viii (1989) (identifying the three companies as American Home, The Home Insurance Company, and Shand Morahan). The ABA studies from 1996 forward specifically list the contributing insurers. A comparison of those lists with the membership list on the NABRICO website reveals that only the Texas Lawyers Insurance Company has never contributed data to the follow-up studies. The Florida Lawyers Mutual Insurance Company missed one study (2003); the Illinois State Bar Association Mutual Insurance Company contributed only to the 2007 and 2011 studies; the Lawyers Mutual Insurance Company (California) missed the 1999 and 2003 studies; the Lawyers Mutual Insurance Company of Kentucky and the Lawyers Mutual Insurance Company of North Carolina each missed only the 2011 study; the Ohio Bar Liability Insurance Company missed the 1999 study; and the Oklahoma Attorneys Mutual Insurance Company missed the 2007 study. The other NABRICO members contributed data to all of the follow-up studies. There is much more variation in the commercial insurers contributing to the follow up studies. CNA is the only company that contributed to all the studies. Zurich contributed to all except the 1999 study. St. Paul (subsequently acquired by Travelers) contributed to all except the 1996 study. The other commercial insurers participating are a changing mix. Interestingly, ALAS contributed data to the 1996 study but to none of the other studies.

### 1. *The Commercial Market*

The commercial market is dominated by a relatively small number of carriers, each of which is typically willing at the time of this writing to provide no more than \$10 million of aggregate coverage to any given law firm in any given year.<sup>24</sup> Large law firms typically purchase limits vastly beyond what a single carrier wants to (or can) provide. The largest firms may seek insurance programs with total limits of up to \$300 or even \$400 million; mid-sized firms typically do not purchase as much insurance, but still may request limits beyond what any single carrier will offer.<sup>25</sup>

Commercial large law firm insurance arrangements typically consist of layers of “quota share” insurance policies, collectively referred to as a “syndicate.”<sup>26</sup> In a quota share, a lead insurer and two or more additional insurers provide up to \$50 million coverage (currently composed of no more than \$10 million from any single insurer). Under this arrangement, each insurer in the syndicate is responsible for paying any losses according to a preset percentage. For example, if there are

24. Telephone Interview with Broker 2 (Sept. 24, 2013):

Most insurers will only—on large law firms or at any law firm, they’ll write \$10 million part of a larger program. There’s a few insurers—there’s a few global insurers that will write \$20 to \$35 million. Rarely do they do that, but they have the ability to do that.

25. *See* Telephone Interview with Underwriter 1 (Sept. 27, 2013) (“There are quite a few firms who have \$200–300 millions in limits, but most of them a hundred or under.”). One insurance executive claimed that the top of the AmLaw 250 “buy 300 million in limits,” but “except for the very top handful, everyone [else in the AmLaw 250] is under 100 million.” Telephone Interview with Executive 2 (Oct. 31, 2013).

26. Telephone Interview with Broker 6 (Dec. 6, 2013):

R: Larger firms, sophisticated firms, prefer the syndicated placement, meaning you take capacity from various insurers and you put them together. You’re basically stretching the capacity so that, when you’ve got a claim, you’ve got the ability to have a comfortable primary. The people you’re dealing with when you pay the loss experience are the same people you’re dealing with when you’re paying the defense cost. They would rather have the capacity stretched a little bit differently. If somebody has a business plan that changes, they move off risk, and you just replace them. It’s not like you’re changing, wholesale changing a relationship. These insurers that I mentioned, some of them will write pure, discreet blocks of capacity, say ten million, or they’ll offer it on a syndicated basis.

Q: Is syndicated the same as quota share?

R: Yeah, exactly, quota share.

Telephone Interview with Executive 2, *supra* note 25:

Almost all our policies are quota share. There are carriers out there . . . [who] would write a primary ten million-dollar policy. If we offered you a ten million-dollar policy, we would take fifty percent of it, five million, and then we would quota share with another carrier. We are more comfortable with very large firms, and large firms take twenty-five, fifty million in limits for their primary limits. Then we take a piece of those limits. The most we’ll put on any primary is ten million. That’s not the first ten, that’s ten part of twenty-five, or ten part of thirty-five. That’s how we quota share our business.

Telephone Interview with Underwriter 1, *supra* note 25:

[Towers are] built either in primary fifties or primary thirties, and they’re all quota share.

Q: Oh, that’s interesting, so the primary layer is quota share?

R: The whole program is often quota share. Most of those large programs will have a starting primary limit that’s relatively large that will be shared by three, four, five carriers. Then the first excess layer will be frequently another layer of—you may have a [primary of] fifty and excess fifty, again, shared by five, six, seven, eight carriers. What that’s allowed people to do is, aside from there all the excess players, it allows me to do—if I really like the firm, I’ll put up my whole ten on the primary, but I can also put five up on the primary and five up on the excess.

five insurers who have each contributed \$10 million of coverage in a \$50 million quota share and the insured suffers a \$25 million loss, each insurer would pay \$5 million.<sup>27</sup> This stands in contrast to a tower with layers of coverage sold by individual insurance companies, each of which pays only once the underlying insurance is exhausted. The lead insurer in the syndicate is responsible for setting the price, agreeing on the policy form, and managing the claim.<sup>28</sup> To get to \$300 million or so of coverage, law firms must assemble multiple layers of insurers sharing a quota share risk in each layer. Typical of the large commercial insurance market more broadly, premiums for large law firm commercial insurance arrangements are individually negotiated and explicitly risk rated.<sup>29</sup>

Assembling the tower can be difficult and time consuming. Thus, brokers are key actors in the large-firm commercial LPL insurance market, assembling a number of carriers to meet the needs of the insured. Even for firms with relatively small towers, the LPL business requires specialized expertise and long-term relationships.<sup>30</sup> Brokers have traditionally had a comparative advantage in building and maintaining those relationships.

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27. Telephone Interview with Broker 4, *supra* note 12:

Generally speaking, if you quota share you spread your risk in a more favorable way. Here's the simplistic model. If a firm is buying ten million dollars, and that ten million dollars is provided by one insurer, if that firm has a three million-dollar claim, that insurer pays all those three million dollars. If that ten million is provided on a quota share basis by three different carriers, which equal shares of the ten million, and there's a three-million dollar loss, they only pay a million. They pay a third of the three.

28. Telephone Interview with Executive 3 (Dec. 20, 2013):

Q: So do carriers set their rates for being a part of that quota share independently, or do they all sort of get together and decide, or one person decides and they all follow?

R: Yeah, one person decides, so the broker will determine upfront. They'll approach somebody and ask for a lead indication, and say, "What would you, how much capacity would you put out, and what would your quote be, and what would the terms be for this policy?" If they get a quote back from a person that they want to have the lead, and if they think that that's acceptable to them and acceptable to their client, and then sellable to the rest of the market, something that they can get supported, they'll take those terms and then they'll come to the rest of the market. They'll say, "Okay, here's what CNA's terms are on this firm, can you support those, and we're looking for you to put up seven and a half million dollars of capacity or five or ten million," whatever they're looking for from us. At that point, my thing is either yes or no. Now, if they've placed forty million dollars and they need just ten million dollars plugged, my answer is basically yes or no because they can probably plug the last ten if they've got eighty percent of it placed already. If they come to me second, like, CNA put out a quote, here's what the quote is, can you support that. If I come back and say, "Yeah, I'm sorry, I just can't. I can't get to that price." If I'm just the second guy they've come to, they'll likely come back to me and say, "Okay, what could you support?" All right, look, I can't do it for a million one. I'm really at a million two fifty, and here's why I think it needs to be at that rate blah, blah, blah, blah, blah. Or, I don't like the retention treatment; I think the retention needs to move higher. Then, they'll normally try to go back to the lead, and say, "Look, here's where we need this to be. This is what we think we can get supported," so they'll bump the rates up, and then they'll go to the third guy and the fourth guy.

29. *See id.*

30. Telephone Interview with Reinsurer 1, *supra* note 19:

If [a law firm is] building up a tower of primary or first layer insurance and excess insurance, a broker is helpful because one, he has access to the markets. Secondly, it's a whole lot of work for a law firm risk manager or someone to be doing themselves. They're better off renting that through the commissions they pay to a broker.

As one underwriter explained,

[A] broker can help or hurt considerably in the sense of helping the law firm prepare the

## 2. ALAS

ALAS differs from commercial insurers in four key ways. First, ALAS offers its member firms per-claim and aggregate LPL limits up to \$75 and \$150 million,<sup>31</sup> substantially more than the \$10 million aggregate LPL limit that any commercial insurer will provide to a single law firm as of 2014. This means that ALAS members need to go to the commercial liability insurance market only for the kind of high-level excess insurance policies that very rarely are called upon to pay claims. As reported in more detail below, there are only sixty-four publicly known LPL verdicts and settlements in excess of \$20 million. Of those, only twenty-eight are \$35 million or more.<sup>32</sup> Assuming, very conservatively, that defense costs are equal to settlement or verdict amounts even for very large claims (more likely, defense costs gradually become a smaller percentage of the total loss as the settlement amount rises), that means that only twenty-eight known LPL claims would have exceeded the LPL limits that ALAS makes available to its members.

Second, ALAS historically refused to allow law firms in New York City to join, and it was reluctant to include law firms based in California.<sup>33</sup> As a result, firms in New York City and California formed their own mutual insurance organizations, described next. While ALAS appears to have significantly relaxed these restrictions, the law firms participating in these other mutual insurance arrangements have largely stayed put. As a result, the ALAS experience may not reflect that of the large New York and California firms.

Third, ALAS requires its members to engage in a variety of risk management activities and allow ALAS to manage all claims.<sup>34</sup> Some commercial insurers encourage firms to engage in risk management activities, including in some cases by subsidizing the associated costs, but the activities are not a requirement.<sup>35</sup>

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submission—the presentation to us, in terms of the application. They can also help in the sense of the meeting to organize in such event that would help show the law firms advantages and prepare them, if there's any weak spots, to know how to respond.

Telephone Interview with Underwriter 4, *supra* note 20.

31. 2013 ALAS ANNUAL REPORT, *supra* note 6.

32. See *infra* note 101 and accompanying text.

33. See ATTORNEYS' LIAB. ASSURANCE SOC'Y LTD., 2000 ANNUAL REPORT 6 (2001) (noting that ALAS bylaws were changed that year to remove geographic restrictions that had previously existed).

34. See, e.g., 2013 ALAS ANNUAL REPORT, *supra* note 6, at 17–20 (detailing ALAS's loss prevention services and claim management requirements).

35. One executive described the process for providing risk management advise to insureds: [W]hen we're the lead carrier, we set up a budget. Probably, for a big firm that's paying a million and a half or two million-dollars in premium, we'll set up a twenty-five or thirty-five or forty thousand-dollar risk management budget. Then what we'll do is, we'll talk to the firm periodically throughout the year. We'll ask them different things about, are there issues that concern you? Do you feel comfortable with your conflicts? How do you feel about client intake? Have you gone through and done a review or audit of all your engagement letters? We'll work with them to find out if they feel that this is something we really need more on. Cyber risk. I wonder if we're really protected the way we should be from a cyber risk issue? Then we'll go out, because there are plenty of vendors out there, and we will go out and we will hire somebody, or we'll set up an engagement where someone will come in. A lot of times it'll provide CLE, continuing legal education credit, so that helps the attorneys in the firm. We'll give a presentation.

Commercial, large-law-firm LPL policies also almost always permit the law firm to select the defense lawyer, and they give the law firm significant control over the defense.<sup>36</sup>

Fourth, ALAS charges unitary per-lawyer premiums that differ only according to the limit and retention of the policy.<sup>37</sup> In other words, all ALAS member firms are eligible to purchase any combination of retention and limit for the same per-lawyer price regardless of the firms' particular features or claims history.<sup>38</sup> This means that ALAS members with the very best claims records are the firms that are most likely to realize lower premiums from leaving ALAS and entering the commercial market.

It is important to note that ALAS member firms that wish to purchase additional insurance do so in the commercial market, using commercial insurance

Telephone Interview with Executive 2, *supra* note 25. This is typical. Most insurers provide some risk management advice. One reinsurer told us that he did not give carriers a lower price for providing risk management services because he expected all carriers to do some level of risk management. "Everybody has a hotline; everybody probably offers various ancillary-type services and things even embedded into the policy, like you want mutual choice counsel, those types of things." Telephone Interview with Reinsurer 2 (May 3, 2014).

36. See Telephone Interview with Broker 6, *supra* note 26:

Most of the large firms will be on a surplus lines basis, and they'll also be on an indemnity form basis. What they mean by indemnity is that, the duty to defend the firm does not rest with the insurer, but it rests with the insured. There's more latitude in the way a case is defended in an indemnity form.

As one broker stated:

The smaller firms don't tend to get the same breadth of coverage as the larger firms, and some of that is how claims are handled. The large firms in the U.S. have big self-insured retentions, and want to have a certain amount of autonomy as to how they handle their claims, and don't want an insurer telling them how to do it. The smaller firms have much smaller self-insured retentions, and the insurers, as a result, insist on being much more heavily involved in the handling of the claim. You have policy wordings to reflect those two different types of way you do your business.

Telephone Interview with Broker 9 (June 12, 2014).

37. See 2013 ALAS ANNUAL REPORT, *supra* note 6 (showing an example of the per-lawyer premium rates table ALAS charges).

38. In the commercial market, for example, carriers commonly rate prices based on firm size, geography, practice area, and certainly claims history, among other things. See Telephone Interview with Executive 2, *supra* note 25 (listing "head counts, location, business split," "practice area," and "loss history" as the primary tools for building a premium price); see also Telephone Interview with Broker 3, *supra* note 12:

Q: When you're thinking about the rates for these firms what are the primary things you're looking at?

R: Head count. Lawyer's professional liability is typically written on a head-count basis. A 100-person firm is gonna pay a much different total premium than a 500-attorney firm. . . . There's a lot of other pieces. The claims history is certainly important. The firm's risk management policies and procedures. Geography sometimes plays a role. Certain jurisdictions insurers don't like as much, so they'll charge more. The areas of practice. Patent prosecution for example is a dangerous area cuz if somebody misses the filing of a patent at a certain date that could cause their client quite a bit of harm. Insurers would end up and have ended up paying quite a bit of money as compared to insurance defense work that usually comes at a lower risk. The areas of practice certainly are important.

None of this, however, plays into ALAS's pricing structure. While ALAS reserves the right to stop insuring its members with bad claims history, it does not do so frequently. See, e.g., 2013 ALAS ANNUAL REPORT, *supra* note 6, at 24 (noting that since 1992, ALAS has declined to renew only twenty-one firms, including one in the fall of 2013).

brokers. These brokers can and do tell ALAS members what they would be charged for all of their LPL insurance if they left ALAS and went into the commercial market.<sup>39</sup> This process brings the largest ALAS members into close contact with the commercial market at every renewal and, thus, tempers the degree to which ALAS pricing and other terms can be less favorable to law firms than those offered in the commercial market.<sup>40</sup> Our senior broker respondents claimed that the savings could be as high as 30% for many of the ALAS member firms, though it is important to keep in mind that commercial insurers underwrite firms individually, and such predicted savings may prove to be exaggerated if a firm's claims history or other factors suggest to underwriters that it is not as good a risk as a broker believes.<sup>41</sup>

The regular contact between ALAS members and the commercial market reinforces our conclusion that it is reasonable to generalize the ALAS experience to much of the medium- to large-law-firm market, keeping in mind (1) the law firm sectors that are significantly underrepresented in ALAS and (2) the possibility that ALAS members have better claims records because of selection effects and ALAS loss prevention and claims management.

### 3. *Other Large-Firm Mutuals*

The third large law firm segment consists of three geographically based mutual insurance organizations about which very little is publicly known: Bar Assurance and Reinsurance, Ltd. (BAR), MPC Insurance, Ltd., and Attorneys Insurance Mutual Risk Retention Group (AIM). BAR serves very large New York City Firms. MPC members are primarily San Francisco-based very large law firms.<sup>42</sup> AIM serves a broader based group of California law firms with more than

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39. When asked about whether his firm would consider leaving ALAS, one General Counsel of an ALAS firm joked, "that's a frequently asked question . . . every commercial insurer in the western hemisphere—or actually more than the western hemisphere—is asking that question every year." Telephone Interview with Law Firm General Counsel 3 (May 8, 2014). He later stated, "We are frequently approached by commercial carriers who would love to replace them if they could. It's a common question; it's a question that we're asked and we consider every year." *Id.*

40. As a General Counsel of an ALAS law firm stated:  
We're very satisfied with ALAS and I think it does a terrific job not only with respect to clients but with respect with loss prevention programs and so forth. We get approached from time to time by insurers or brokers who make pitches and so forth. We're very comfortable with where we are and like I said it's not that we don't have significant interaction with the commercial markets outside of ALAS, because we have a substantial excess program and deal with and meet with those folks regularly.  
Telephone Interview with Law Firm General Counsel 5 (May 29, 2014).

41. See, e.g., E-mail from Broker 8 to coauthor Tom Baker (Jan. 4, 2015, 3:09 PM) (on file with coauthor Tom Baker).

42. Brian McDonogh, *Jed Hurley, 30-Year McCutchen Attorney*, 76, LEGALPAD (July 9, 2009), [http://legalpad.typepad.com/my\\_weblog/2009/07/jed-hurley-30year-mccutchen-attorney-76.html](http://legalpad.typepad.com/my_weblog/2009/07/jed-hurley-30year-mccutchen-attorney-76.html) [<https://perma.cc/E8Z4-6L7J>] (providing the obituary of Jed Hurley, thirty-year McCutchen Attorney, and identifying him as one of the founders of "MPC Insurance Ltd., a company that provided professional liability insurance to many of San Francisco's largest law firms"); see *Thomas J. Igoe, Jr.*, REED SMITH, [http://www.reedsmith.com/thomas\\_igoe](http://www.reedsmith.com/thomas_igoe) [<https://perma.cc/RSV6-N8RZ>] (last visited Feb. 8, 2016) (identifying Mr. Igoe as of counsel to Reed Smith and President and Chairman of MPC Insurance, Ltd., and reporting that MPC is "a Vermont captive insurance company

forty-five attorneys.<sup>43</sup> While there are substantial differences in the details of these three organizations, all three largely function as insurance buying groups and are managed by leading insurance brokers.<sup>44</sup> More detailed description awaits future work. For present purposes it is useful to think of them as mutual/commercial hybrids that provide LPL insurance primarily for law firms that historically did not have access to ALAS.

### III. INSURER DATA ON LAWYERS' PROFESSIONAL LIABILITY

The lawyers' liability that we are investigating and that is the subject of LPL insurance is legal malpractice liability: liability that arises out of a breach of the lawyers' professional obligations to their clients. Lawyers can be sued for many other kinds of wrongs—from automobile accidents to employment discrimination—but those other kinds of liabilities are covered by other kinds of insurance, such as auto liability insurance, employment-practices liability insurance, and general liability insurance.

In this Part we report at a high level what can be known about the frequency and extent of LPL claims based on the LPL insurer data that we have assembled. We have three sources: (1) a series of studies conducted by the American Bar Association Standing Committee on Lawyers' Liability and previously published by the ABA; (2) the annual reports of the largest insurer of medium to large law firms, the Attorney's Liability Assurance Society, which contain much useful data that has never been publicly collected and analyzed and (3) a collection and analysis of the largest publicly reported LPL settlements and verdicts compiled by Aon, the insurance brokerage company with the largest market share in the lawyers professional liability insurance market. All of these sources have significant limitations. Nevertheless, taken together they provide an informative complement to what can be learned from qualitative research.

#### A. *The Standing Committee Studies*

The most significant prior empirical research on lawyers' liability comes from the ABA Standing Committee on Lawyers' Liability. The Standing Committee launched its first systematic study of lawyers' liability in response to the mid 1970's liability insurance crisis (the same crisis that initiated the more

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owned by 9 national and international law firms that provides professional liability insurance coverage for more than 7,000 attorneys practicing in the United States and in many foreign jurisdictions").

43. See *California Lawyer's Annual Professional Liability Insurance Report*, CAL. L., Feb. 2010, at 28, 28–29.

44. The Business Insurance directory of alternative risk financing facilities identifies Marsh as the manager for MPC. *BI Directory of Alternative Risk Financing Facilities*, BUS. INS. (Nov. 12, 2000, 12:01 AM), <http://www.businessinsurance.com/article/20001112/ISSUE01/10001657> [<https://perma.cc/UX2J-5RAN>]. The California Lawyer listing of malpractice insurers identifies AIM as an "Aon affiliate." *Malpractice Insurance Report*, CAL. L., Feb. 2006, at 32, 32–33. Aon also serves as a broker and manager for BAR. See E-mail from Executive 1 to both coauthors (Jan. 5, 2015) (on file with coauthors) (confirming that Aon's role managing BAR is widely known among LPL insurance professionals).

widely known empirical research on medical malpractice).<sup>45</sup> Working closely with the members of NABRICO, the Standing Committee persuaded most of the insurers operating in the LPL market at the time to fill out individual reports on each claim opened or closed during a study period of 1980 to 1985, of which the 29,227 claims reported during the period January 1983 through September 1985 were deemed worthy of analysis.<sup>46</sup>

Unfortunately, the study made no systematic effort to determine how representative this convenience sample was of lawyers and law firms, either by comparing the lawyers insured by these organizations to lawyers who did not purchase liability insurance at all or by comparing them to lawyers who are insured by organizations that did not participate.<sup>47</sup> To the latter point, the nonparticipating insurance organizations include ALAS, other large law firm mutual insurance organizations, and a number of commercial carriers that insure medium and large firms. As a result, the data are skewed toward the solo- and small-firm market and are unlikely to be representative of claim practices in the medium- and large-firm market.

Nonetheless, the first Standing Committee study had an impact on the LPL market. Imperfect as it was, it was the first effort to gather systematic evidence on lawyers' liability and changed underwriting practices. A senior reinsurance underwriter who has been involved in the LPL market for more than thirty years described the study as producing "a paradigm shift in the thinking of the industry, from an earlier view of how to underwrite, to a more evidence-based type."<sup>48</sup>

Starting in 1996, the Standing Committee has updated this research in ten- and five-year increments, with the most recent study covering the years 2008 through 2011.<sup>49</sup> Unfortunately, the updates use a different research method than

45. TOM BAKER, *THE MEDICAL MALPRACTICE MYTH* 65 (2005) (describing the relationship between the liability insurance underwriting cycle and empirical research on medical malpractice).

46. AM. BAR ASS'N STANDING COMM. ON LAWYERS' PROF'L LIAB., *PROFILE OF LEGAL MALPRACTICE: A STATISTICAL STUDY OF DETERMINATIVE CHARACTERISTICS OF CLAIMS ASSERTED AGAINST ATTORNEYS* 3 (1986) [hereinafter ABA STANDING COMM., 1986 STATISTICAL STUDY]; GATES & SWETTIN, *supra* note 23, at vii.

47. A statistical study released prior to the 1989 publication reported that the Committee undertook the following validation exercise:

Additionally, the major findings of this study were validated by examining claims from Oregon, with legal malpractice insurance mandatory for practice in a substantive proportion of all areas of law. [sic] Therefore, because the claims reported in Oregon come from a substantial group of the entire population of lawyers, the analysis of those claims should be generalizable to the lawyer population of Oregon. If the findings in this study hold true for Oregon, then they can be generalized more defensibly to the entire population of U.S. lawyers, even to those non-insured lawyers not included in this study.

ABA STANDING COMM., 1986 STATISTICAL STUDY, *supra* note 46, at 5. This kind of statement does not appear in the 1989 report or in any of the follow up studies. *See, e.g.*, GATES & SWETTIN, *supra* note 23.

48. Telephone Interview with Reinsurer 1, *supra* note 19.

49. AM. BAR ASS'N STANDING COMM. ON LAWYERS' PROF'L LIAB., *LEGAL MALPRACTICE CLAIMS IN THE 1990S* (1996) [hereinafter ABA STANDING COMM., 1990S PROFILE]; AM. BAR ASS'N STANDING COMM. ON LAWYERS' PROF'L LIAB., *PROFILE OF LEGAL MALPRACTICE CLAIMS 1996-1999* (2000) [hereinafter ABA STANDING COMM., 1996-1999 PROFILE]; AM. BAR ASS'N STANDING COMM. ON LAWYERS' PROF'L LIAB., *PROFILE OF LEGAL MALPRACTICE*

the original study.<sup>50</sup> The updates are based on calendar-year summary reporting by the participating insurers, based on their own internal records, rather than individual claim forms. To the extent that an insurer's internal reporting does not match closely with the Standing Committee's requested categorization, the reliability of the insurer's reports is at issue.<sup>51</sup> Moreover, because the LPL insurers providing the claims data have not remained consistent over the years, the results from the studies are not directly comparable. Lastly, just as in the original study, the participating insurers disproportionately represent solo and small firms.

Despite these limitations, the Standing Committee studies are informative. First, they are a window into what information LPL insurers and the Standing Committee expected to be important and reliably obtained. For each claim the insurers recorded the number of lawyers insured by the policy (a reasonable proxy for firm size),<sup>52</sup> the number of years the defendant had been practicing, whether the claim arose out of an attempt to collect a fee, whether the claim arose out of an area of law "normal to the insured's practice" or "not normal," the area of law in which the defendant was retained by the client, the major activity in which the defendant was engaged at the time of the alleged error, "the one alleged error or misconduct which is the most significant to the cause of the claim being made," the disposition of the claim (e.g., no payment, settlement, judgment), the amount of loss expense and any claim payment, along with a few other less noteworthy topics. With only two exceptions,<sup>53</sup> the updates have maintained the same categories, allowing for comparison across time subject to the data limitations already noted.

The results of the studies are also informative. Most significantly, according to one senior reinsurance underwriter:

Prior to that study, underwriters were, in my estimation, unduly focused on area of practice. They would ... come to conclusions like this: "Oh. This law firm has three attorneys. They're focused in providing legal

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CLAIMS 2000–2003 (2005) [hereinafter ABA STANDING COMM., 2000–2003 PROFILE]; AM. BAR ASS'N STANDING COMM. ON LAWYERS' PROF'L LIAB., PROFILE OF LEGAL MALPRACTICE CLAIMS 2004–2007 (2008) [hereinafter ABA STANDING COMM., 2004–2007 PROFILE]; AM. BAR ASS'N STANDING COMM. ON LAWYERS' PROF'L LIAB., PROFILE OF LEGAL MALPRACTICE CLAIMS 2008–2011 (2012) [hereinafter ABA STANDING COMM., 2008–2011 PROFILE].

50. See ABA STANDING COMM., 2008–2011 PROFILE, *supra* note 49, at 3.

51. All of the updates contain cautionary language similar to the following:

This claim-by-claim reporting system proved to be cumbersome and was abandoned after the [initial] study. The 1995 through 2011 studies are based on calendar-year summary report forms completed by participating companies based on their own internal data. We asked insurers to do their best in assigning their data to the established 1985 categories. While the recent studies use the same general data categories as the 1985 study, the categories do not always correspond to those used by participating insurers. In some instances, the Committee had to eliminate incompatible insurer data.

*See, e.g., id.* As a result, the number of observations differs considerably across the Standing Committee Studies' data fields, with no way to assess how the missing data affect the generalizability of the results other than to provide significant grounds for caution.

52. Of note, the categories for number of lawyers were: one, two to five, six to thirty, and over thirty. GATES & SWETIN, *supra* note 23, at 508–09 (providing a copy of the reporting form).

53. The normal/not normal and the years of practice coding are not included in later studies.

services connected with the issuance of municipal bonds. Municipal bonds have gone into bankruptcy. Lawyers have been held responsible, in part, for that. Therefore, I'm not gonna write areas of practice in which law firms or areas—or law firms with heavy areas of practice in providing legal services for municipal bonds.”

It became this idea of, if you could only steer around certain areas of practice, you could underwrite safely. What this study showed, on a number of levels, was that the majority of lawyers professional liability claims had as their origin, not a failure of substantive knowledge. Meaning the practitioner, if he spent any considerable time in a particular area, pretty well knew what to do, mechanically, in the practice of law.

What he may not have done well was an administrative issue. He may not have issued an engagement letter, issued a disengagement letter, run a conflict of interest clearance, had a docket control system, had a backup on a docket control system. It was all these administrative things where the majority of claims, when you traced it back to the origins, not all of them, but the majority of them, tended to lend itself to the idea that wow, these practitioners are missing some administrative management issue, as opposed to failing in some substantive area of law.

. . . Likewise, underwriters, as they began underwriting these law firms . . . began incorporating some of the ideas, in that study, into their applications, into their questionnaires, into just the casual questions they'd ask a broker or directly to the law firm about how do you do what you do, and focus predominately on administrative issues.

The reason was that study.<sup>54</sup>

In fact, and contrary to the recollection of this underwriter, the study found that alleged substantive errors were just as frequent as the sum of what the Standing Committee referred to as “administrative”<sup>55</sup> and “client relations” errors<sup>56</sup> (both of which were likely subsumed in what the underwriter referred to as “administrative issues”). Nevertheless, the fact that this senior underwriter remembered that the study found that administrative issues were more frequent than substantive errors only serves to emphasize how influential the administrative error finding was. Administrative and client-relations errors occurred across the entire spectrum of practice areas and in firms of all sizes (though more frequently, relative to other alleged errors, in the smaller firms).<sup>57</sup> And, perhaps,

54. Telephone Interview with Reinsurer 1, *supra* note 19.

55. The leading “administrative errors” are: “failure to calendar properly,” “failure to react to calendar,” “failure to file documents where no deadline is involved,” and “procrastination in performance of service or lack of follow up.” See *infra* Table 2; *infra* note 68.

56. The “client relations” errors are: “failure to follow client’s instructions,” “failure to obtain client’s consent or to inform client,” “improper withdrawal from representation.” Many of these claims would seem to fit within the reinsurance underwriter’s definition of “administrative issues.” See *infra* Table 2; *infra* note 68.

57. See ABA STANDING COMM., 1986 STATISTICAL STUDY, *supra* note 46, at 21 (administrative plus client-related errors account for 44% of alleged errors in solo firms, 42% in two-to-five-lawyer firms, 42% in six-to-thirty-lawyer firms, and only 28% in thirty-or-more-lawyer firms). See also Telephone Interview with Actuary 1 (Dec. 7, 2013):

administrative and client-relations errors could be controlled, an important point that led the bar and LPL insurers to begin to focus more on loss prevention.

The ABA Standing Committee study also confirmed that, as LPL insurers already suspected, the number of claims and the size of the resulting losses differed by practice area as well as geography. The two practice areas with the most claims in the Standing Committee data have consistently been plaintiffs' personal injury and real estate.<sup>58</sup> Numbers three and four have generally been family law and "estate, trust and probate."<sup>59</sup> These practice areas are all among the most common, especially among lawyers in solo practice or small firms, so it is not necessarily the case that these practice areas have higher rates of claims, though insurance pricing practices suggest that they do.<sup>60</sup> These basic elements—practice area and geography—along with the number of lawyers and past claim experience, remain the fundamental building blocks of solo- and small-law-firm LPL insurance pricing today.<sup>61</sup>

In contrast to the closed-claim studies of medical malpractice claims

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On the size of firm, it kind of became a little bit self-evident. When I looked at the loss information when you side the loss information with the underwriting information. Basically, when I matched up the size of firm with their loss data, you saw definite breaks in the data. You saw solos—astronomical frequencies. Their frequencies were tenfold every other law firm. Two and third man law firms, their frequency wasn't nearly as high as a solo, but it was pretty high. Then you got down to five to ten, and there were actually natural breaking points in the data based upon the claim frequency, so I started there. I didn't see it quite as much on the severity side on the size of firm. Where I saw the more natural breaking points for severity for the average cost of the claim, came on the area of practice.

58. See *infra* Table 1.

59. *Id.*

60. Insurers have charged somewhat higher prices for these practice areas in the small firm LPL market. See Telephone Interview with Underwriter 2, *supra* note 16 (noting that "real estate, which is a much maligned area of practice these days within the LPL business."). One reinsurer explained that price when rating practice area, his firm considered whether the firm did "heavy plaintiff work or is it real basic estate work?" Telephone Interview with Reinsurer 2, *supra* note 35. In addition, his firm rated "corporate M&A, securities work, [and] intellectual property" as more risky. One CEO also explained that practice area was a very important factor for pricing, but suggested that the practice areas that were high risk were different than the ones identified in the ABA Standing Committee study:

[O]ur view of the claim environment is now much more focused on area practice. Is the law firm working in a high hazard area or not? The groupings are pretty consistent—securities, IT, IP, entertainment—are all on the high hazard end of the equation. Things like criminal law, insurance defense, legal aid, arbitration mediation—family law probably—are on the less hazard end of the spectrum.

CEO1. Presumably, they know the number of lawyers practicing in these areas relative to the size of the bar as a whole.

61. See Telephone Interview with Underwriter 3 (Oct. 22, 2013):

I think you asked a good question there and really there's kind of three main things that I think most carriers—and again, this is the part that our company gets nervous on when I talk about what most carriers do. There's three main things that most carriers would look at when they think about underwriting law firms and those are size, services and location. How big is it, what are the particular areas of practice that they and almost every carrier has an area of practice grid that law firms have to fill out explaining what percentage of either their revenues or billings come from each individual area of practice. Ours is pretty extensive. It has sixty different classifications.

conducted at about the same time,<sup>62</sup> the Standing Committee study did not attempt to evaluate the merits of the claims. Instead, the study simply reported the outcome of the closed claims—67% were closed with no payment. Of the claims closed with payment, only 38% (12% of all claims) followed commencement of a suit, indicating that most paid claims were paid outside of the formal civil justice process. Only about 4% of paid claims (1% of all claims) involved a judgment for the plaintiff.

Figure 1 below shows the disposition of claims reported in all of the ABA Standing Committee Studies.<sup>63</sup> Across the thirty-year time period covered in the studies, about 50% to 60% of claims are abandoned without payment (except for an outlier of 33% in the 1995 study) and another 10% to 20% are adjudicated in favor of the defendant, with the rest resulting in a payment. Of the claims resolved with a payment, most are paid without suit and less than 10% (usually much less) after a trial. The large percentage of paid claims settled presuit, and the lack of any attempt on the part of the Study participants to challenge the merits of paid claims, suggests that the Study participants thought that paid claims were reasonably meritorious.<sup>64</sup> This is, of course, also the conclusion of all of the well-designed closed-claim medical malpractice studies.<sup>65</sup>

Because of the changing composition of the participating insurers, the nature of the sample, and the change in the method of collecting the data, the Standing Committee's updates do not provide statistically reliable information about the overall rate of claiming. There are progressively more claims per year in the studies over time, which is to be expected given two things: the growth in the number of lawyers,<sup>66</sup> and greater participation by insurers in providing data, especially in the most recent study. Accordingly, the only sensible way to use the Standing Committee data is to compare the distribution of claims and disposition in percentage terms, rather than absolute numbers, over time. As is clear from Figure

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62. See BAKER, *supra* note 45, at 77–83 (2005) (summarizing medical malpractice closed-claim studies).

63. ABA STANDING COMM., 1990S PROFILE, *supra* note 49, at 12; ABA STANDING COMM., 1986 STATISTICAL STUDY, *supra* note 46, at 64; ABA STANDING COMM., 1996–1999 PROFILE, *supra* note 49, at 10; ABA STANDING COMM., 2000–2003 PROFILE, *supra* note 49, at 8; ABA STANDING COMM., 2004–2007 PROFILE, *supra* note 49, at 9; ABA STANDING COMM., 2008–2011 PROFILE, *supra* note 49, at 10.

64. The choice not to make an attempt to evaluate the merits of the claims may simply be a question of resources. Closed-claim studies are expensive and time consuming. It is also possible that the organized Bar is more prepared than organized Medicine to believe that the legal system does a decent job of weeding out nonmeritorious claims and calibrating claim payments to reflect the strength of the plaintiffs' case.

65. BAKER, *supra* note 45, at 77–83; see also Tom Baker, *Reconsidering the Harvard Medical Practice Study Conclusions About the Validity of Medical Malpractice Claims*, 33 J.L. MED. & ETHICS 501 (2005) (describing the flaws in the only closed-claim study to reach a contrary conclusion).

66. According to the U.S. Statistical Abstract, the number of employed lawyers and judges in the U.S. grew from 547,000 in 1980 to 1.10 million in 2010. See U.S. CENSUS BUREAU, U.S. STATISTICAL ABSTRACT: LABOR FORCE, EMPLOYMENT, AND EARNINGS 402 tbl.675 (1981); U.S. CENSUS BUREAU, U.S. STATISTICAL ABSTRACT: LABOR FORCE, EMPLOYMENT, AND EARNINGS 394 tbl.615 (2011). The number of lawyers and judges was not reported separately for 1980. For 2010, the number of employed lawyers was 1.04 million and the number of employed judges was 71,000.

1, the distribution of the disposition of claims has been relatively stable over time.

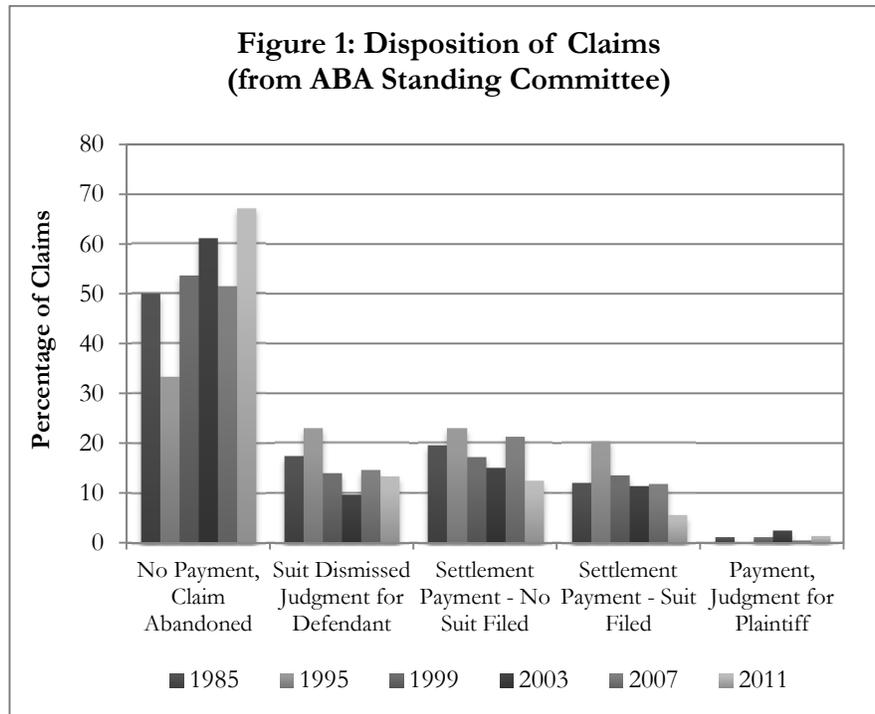
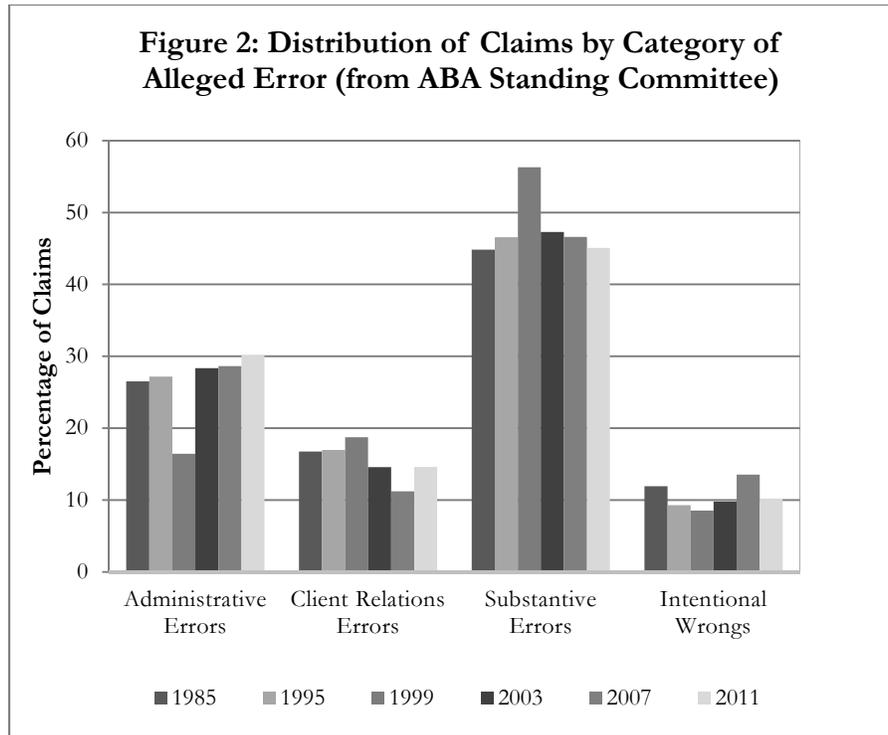


Table 1 and Figure 2 show the mix of claims by practice area and type of alleged error over time.<sup>67</sup> Both show stability among the share of claims attributable to different practice areas and to general categories of errors. Although Table 1 shows change in the distribution of claims attributable to different practice areas, real estate, personal injury, family law, and trusts and estates have consistently maintained the top four spots.

67. ABA STANDING COMM., 1986 STATISTICAL STUDY, *supra* note 46, at 6, 8; ABA STANDING COMM., 1990S PROFILE, *supra* note 49, at 7, 14; ABA STANDING COMM., 1996–1999 PROFILE, *supra* note 49, at 5, 12; ABA STANDING COMM., 2000–2003 PROFILE, *supra* note 49, at 4, 9; ABA STANDING COMM., 2004–2007 PROFILE, *supra* note 49, at 4, 7; ABA STANDING COMM., 2008–2011 PROFILE, *supra* note 49, at 5, 9.

	<b>2011</b>	<b>2007</b>	<b>2003</b>	<b>1999</b>	<b>1995</b>	<b>1985</b>
<b>AREA OF LAW</b>	%	%	%	%	%	%
Real Estate	20.3	20.1	16.5	17.0	14.4	23.3
Personal Injury - Plaintiff	15.6	21.6	20.0	24.6	21.7	25.1
Family Law	12.1	10.3	9.6	10.1	9.1	7.9
Estate, Trust and Probate	10.7	9.7	8.6	8.7	7.6	7.0
Collection and Bankruptcy	9.2	7.3	7.9	8.0	7.9	10.5
Corporate/Business Org.	6.8	4.9	6.4	8.6	8.9	5.3
<b>Subtotal</b>	<b>74.7</b>	<b>73.8</b>	<b>68.9</b>	<b>76.9</b>	<b>69.5</b>	<b>79.0</b>
Criminal	5.7	5.1	4.2	4.2	3.8	3.3
Business Trans. Commercial	4.1	4.7	3.2	3.6	10.7	3.0
Personal Injury - Defense	3.3	2.9	10.0	4.1	3.3	3.2
Labor Law	2.2	1.4	1.6	2.2	1.4	0.7
Worker's Compensation	1.9	2.0	2.3	1.9	3.3	2.1
Patent, Trademark, Copyright	1.8	1.7	1.8	1.0	0.9	0.6
Taxation	1.2	1.4	1.4	1.1	1.6	1.6
Civil Rights Discrimination	0.8	1.1	1.7	1.1	0.6	1.1
Immigration/ Naturalization	0.8	0.5	0.4	0.5	0.2	0.1
Construction (Building Contracts)	0.7	0.5	0.3	0.3	0.7	0.8
Local Government	0.7	1.0	0.6	0.4	0.7	0.7
Government Contracts/Claims	0.7	0.3	0.4	0.2	0.2	0.4
Securities (S.E.C.)	0.6	0.9	1.8	1.5	1.9	2.0
Consumer Claims	0.4	0.3	1.2	0.4	0.3	0.7
Natural Resources	0.2	0.1	0.1	0.2	0.3	0.2
Environment Law	0.1	0.1	0.1	0.3	0.2	0.1
Admiralty	0.1	0.1	0.1	0.2	0.2	0.3
Antitrust	0.1	0.0	0.0	0.0	0.1	0.2
International Law	0.0	2.1	0.0	0.0	0.1	0.0
<b>TOTAL</b>	<b>100.0</b>	<b>100.0</b>	<b>100.0</b>	<b>100.0</b>	<b>100.0</b>	<b>100.0</b>

As shown in Figure 2, the rate of administrative and client-relations errors, combined, is consistently about the same as that of substantive errors, with the exception of the 1999 update, which found a higher substantive to administrative error ratio.



This long-term stability in the distribution of errors by type and practice area helps to explain the recent shift away from a focus on risk management in LPL pricing in the small law firm market.<sup>68</sup> Historically, the NABRICO firms (and some commercial firms) priced, in significant part, on risk management. When commercial insurers were pulling out of the market in the late 1970s and early 1980s, the first NABRICO companies took a different approach to providing insurance. Rather than follow exactly in the footsteps of the withdrawing commercial insurers, which had until that time been focused more on area of practice and geography,<sup>69</sup> these NABRICO companies decided to investigate the “original cause” of the claims, determining whether the claim was “fortuitous, or was there a cause of events that could have been prevented, and if so, what are the practices that need to be laid in place to prevent that sort of claim from happening in the future.”<sup>70</sup> This instinct to investigate was part of what led to the initial ABA

68. The data from Figure 2 are reproduced below in Table 2 with additional granularity—the major categories of errors and wrongs are broken into smaller units of analysis. The one notable area of long-term decline is calendaring errors, which have declined from 11% of claims in the 1985 study to 4% in the 2011 study. Conversely, one area of increase in the most recent study is lost files, documents, or evidence, growing to over 7% from less than 1% in all of the previous studies.

69. Telephone Interview with Reinsurer 1, *supra* note 19 (“Prior to that study, underwriters were, in my estimation, unduly focused on area practice.”).

70. *Id.*; see also Telephone Interview with CEO 1, *supra* note 15, explaining why he avoided solo practitioners:

Standing Committee study discussed above.

	2011	2007	2003	1999	1995	1985
TYPE OF ACTIVITY	%	%	%	%	%	%
<b>ADMINISTRATIVE ERRORS</b>						
Procrastination in Performance/ Follow-up	9.68	4.24	9.43	4.95	8.68	4.96
Lost File, Document Evidence	7.05	0.60	0.37	0.40	0.57	0.68
Failure to Calendar Properly	4.34	7.44	5.19	7.03	6.75	11.46
Clerical Error	3.54	2.04	4.74	1.25	2.14	1.50
Failure to File Document - No Deadline	3.17	10.73	4.28	1.54	2.69	4.33
Failure to React to Calendar	2.34	3.57	4.35	1.27	6.35	3.58
<b>Subtotal</b>	<b>30.13</b>	<b>28.63</b>	<b>28.35</b>	<b>16.43</b>	<b>27.18</b>	<b>26.50</b>
<b>CLIENT RELATIONS ERRORS</b>						
Failure to Obtain Consent/ Inform Client	7.02	5.31	5.75	11.89	9.77	9.46
Failure to Follow Client's Instruction	5.71	3.22	6.72	3.93	5.06	5.75
Improper Withdrawal of Representation	1.87	2.70	2.10	2.93	2.14	1.53
<b>Subtotal</b>	<b>14.61</b>	<b>11.22</b>	<b>14.57</b>	<b>18.75</b>	<b>16.97</b>	<b>16.74</b>
<b>Admin. + Client Errors Subtotal</b>	<b>44.74</b>	<b>39.85</b>	<b>42.92</b>	<b>35.18</b>	<b>44.15</b>	<b>43.24</b>
<b>SUBSTANTIVE ERRORS</b>						
Failure to Know/Properly Apply Law	13.57	11.51	10.98	21.90	11.05	9.74
Inadequate Discovery/Investigation	7.82	8.10	10.37	6.13	10.24	9.21
Planning Error - Procedure Choice	7.39	9.44	7.72	3.21	10.87	7.88
Failure to Know/Ascertain Deadline	6.91	6.38	7.09	15.24	6.97	7.03
Conflict of Interest	4.28	4.79	6.28	5.12	3.79	3.45
Error in Public Record Search	3.03	4.02	2.54	2.65	1.24	4.86
Failure Understand/Anticipate Tax	1.37	1.73	1.26	1.57	1.96	1.89
Error Mathematical Calculation	0.69	0.64	1.04	0.48	0.44	0.78
<b>Subtotal</b>	<b>45.07</b>	<b>46.61</b>	<b>47.28</b>	<b>56.29</b>	<b>46.55</b>	<b>44.84</b>
<b>INTENTIONAL WRONGS</b>						
Fraud	4.53	5.82	3.35	2.11	3.19	4.28
Malicious Prosecution, Abuse of Process	3.43	3.88	3.59	4.09	3.70	4.32
Violation of Civil Rights	1.27	1.87	1.26	1.15	1.29	1.78
Libel or Slander	0.96	1.96	1.59	1.18	1.11	1.54
<b>Subtotal</b>	<b>10.19</b>	<b>13.53</b>	<b>9.79</b>	<b>8.53</b>	<b>9.29</b>	<b>11.92</b>
<b>GRAND TOTAL</b>	<b>100.00</b>	<b>100.00</b>	<b>100.0</b>	<b>100.00</b>	<b>100.00</b>	<b>100.00</b>

Today, pricing in the small firm market is formula driven with less emphasis on risk management.<sup>71</sup> Although different companies place emphases on different

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Solo practitioners didn't have the wherewithal to really manage, from a risk management standpoint, a business in the kind of way that would be safe from claim activity. They didn't have the money. They would have insufficient calendaring systems. They would have insufficient or inadequate conflict systems. They would have—they wouldn't use form letters with regard to engagement or disengagement. Small firms or sole practitioners simply wouldn't have the time, quite frankly, to focus on that type of thing and still trying to eke out a living.

71. Telephone Interview with CEO 1, *supra* note 15:

Just a few years ago our pricing was based on kind of a test. Our application in essence was a screening test to determine just how tight and how well-run your office was. We asked questions about things like your docket control, your conflict system, your calendaring system, your intake procedures, your engagement letters and depending upon how you answered those, then we would score you. Depending upon what that score was, it equated to a rate. We had like basically three different rating levels—good, bad and average, if you

factors, there is a clear focus on the traditional factors of area of practice, geography, and number of lawyers. That is not to say that risk management is completely unimportant in pricing, it is just weighted less on pricing scales than it may have once been. Although we do not have information to corroborate this point, it may be that insurers believe that technological advances have made administrative tasks such as calendaring and conflicts checking easier. Alternatively, the relatively consistent distribution of claims by practice area and type of error from 1980 to 2011 reflected in Table 1 and Figure 2 may have convinced insurers that the adoption of easily observable risk management practices by small law firms does not change their risk profiles very much.

Figures 3, 4, and 5 show the distribution of claims according to the amount of the payment to the claimant and the amount of money spent on “expense” (i.e. defense), respectively.<sup>72</sup> As with the figures above, Figures 3, 4, and 5 show each category of claim as a percentage of overall claims because the participating insurers, the sample, and the methods of collecting data have changed over time such that the data do not allow for a direct comparison of claims themselves. Figures 3 and 4 are further complicated because the Standing Committee changed the categories in which it reported claims by payment to claimants over time. Until 2007 the Committee reported \$0 payment claims together with claims paid in amounts up to \$10,000 in a single category, thereby not permitting the separation of paid and \$0 payment claims. Thus, in order to make the results of the studies comparable while retaining this important distinction, Figure 3 reports the 2007 and 2011 results with the \$0 payment claims separate from and combined with the \$1 to \$10,000 paid claims. In the 1985 study the category of “over \$100,000” was the largest category. Accordingly, Figure 3 reports the “over \$100,000” category

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will. We rated accordingly and then what we filed with the states reflected those scores and that kind of philosophy. Today it's much more driven by area practice and we typically say—we ask questions now more tailored to, “How much do you do in a specific area of law?” Based on the percentages that the applicant sends back, our rating model basically does the math.

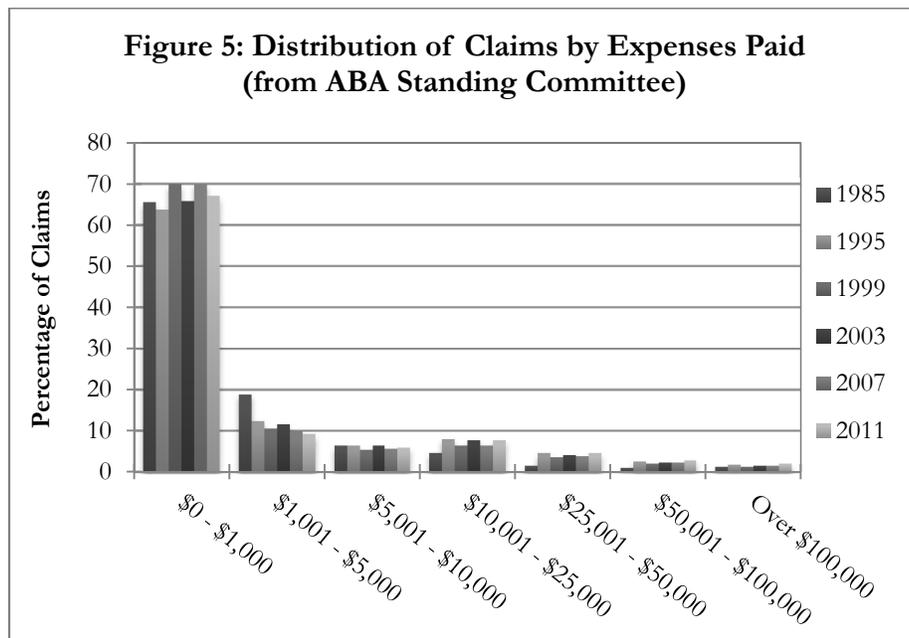
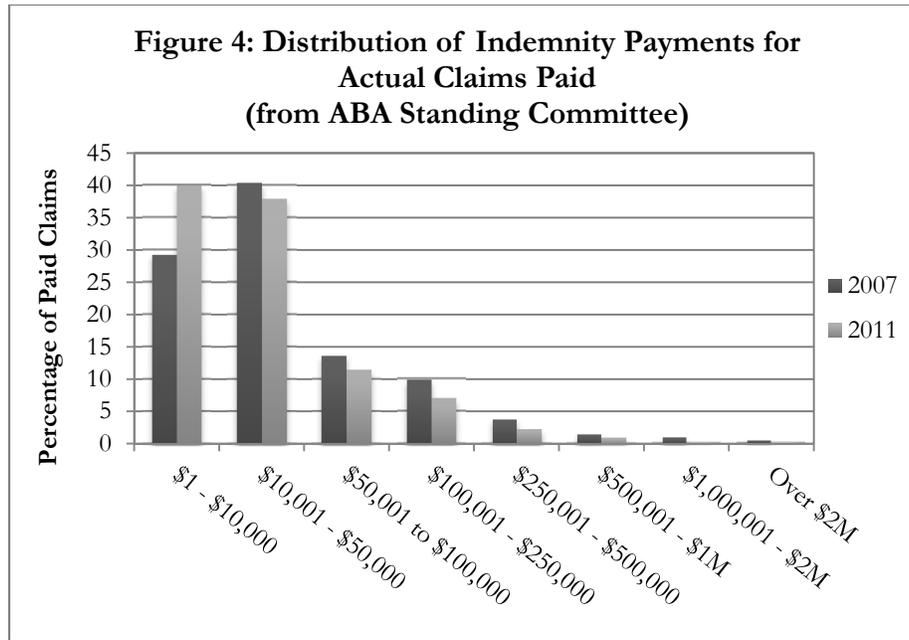
This change was corroborated by several other interviews. As one reinsurer stated:

We're invisible in the whole process; at least we should be. The better the application, the fewer questions we have to ask and that's a good thing. Then the way we rate it and so forth is pretty much similar to how everybody else does: number of attorneys; modification for good claims or bad claims; modification for what they do from a risk management perspective; reputational respect, those types of things. Modification for where they're operating: Those types of things, and then just their practice factor, so is it all heavy plaintiff work or is it real basic estate work? Those types of things.

Telephone Interview with Reinsurer 2 (May 3, 2014). Similarly, an actuary we interviewed explained that the top three items that make up the price are the number of attorneys, the state where the firm practices, and the practice areas of the insureds. *See* Telephone Interview with Actuary 2 (Nov. 1, 2013); *see also* Telephone Interview with Underwriter 2, *supra* note 16 (explaining the entire rating structure for credits and debits based, *inter alia*, on geography, area of practice, number of lawyers, and loss).

72. ABA STANDING COMM., 1986 STATISTICAL STUDY, *supra* note 46, at 65; ABA STANDING COMM., 1990S PROFILE, *supra* note 49, at 15; ABA STANDING COMM., 1996–1999 PROFILE, *supra* note 49, at 16; ABA STANDING COMM., 2000–2003 PROFILE, *supra* note 49, at 13; ABA STANDING COMM., 2004–2007 PROFILE, *supra* note 49, at 13; ABA STANDING COMM., 2008–2011 PROFILE, *supra* note 49, at 14.





The precise distribution reflected in Figures 3, 4, and 5 is less important than the remarkable stability that is demonstrated. Figures 3, 4, and 5 reflect the usual trend in liability claims generally, large numbers of small claims and increasingly fewer claims at higher levels of payment and defense expense. Consistent with the results shown in Figure 1 regarding disposition of claims, Figure 3 shows that

there is a very high percentage of \$0 claims in the two studies for which those claims were separately reported (2007 and 2011). Figure 5 shows that the percentage of claims with zero or de minimis expense payment (less than \$1000) is consistently high across all of the studies, strongly suggesting that a substantial majority of the claims reported to insurers never pose a realistic threat of liability.<sup>73</sup> Very few claims in the ABA studies result in payments of \$1 million or more, and a substantial number of those may well represent payments by CNA, Zurich, or other commercial insurers on behalf of larger law firms.

The ABA Standing Committee reports show significant stability over time in a number of areas. First, over time, and as found in most closed-claims studies, the majority of claims brought are either dismissed in favor of the defendants or abandoned. Second, over time, about 45% of all claims are brought as a result of either defendants' administrative errors or client-relationship errors. The remainder is the result of substantive legal errors. Third, the data show significant stability in the distribution of indemnity and overall claim payments.

That said, the conclusions to be drawn from these data might be quite limited. First, the Standing Committee studies do not provide much that is useful regarding medium to large law firms. This is not a criticism of the Standing Committee. Rather, it is the inevitable result of the fact that, with the exception of five years of data provided by ALAS for the 1995 study, none of the large law firm mutual insurers provided data to the Standing Committee, nor, with the significant exception of CNA and Zurich, did many of the commercial insurance companies that insure larger law firms. Further, in the solo- and small-firm market, a significant percentage of lawyers may be uninsured. As such, even if the sample is representative of insured lawyers practicing in small or solo firms, the findings may not be generalizable to all lawyers practicing in that market. Moreover, the data we present here are limited to the survey responses solicited and reported from insurers. We do not have detailed claims studies from which to draw more precise conclusions.

Despite these limitations, the Standing Committee reports are important in light of the sway they held in the formation of the LPL market.<sup>74</sup> Further, these are the best publicly available data and, as such, present, at least a reasonable window into claims and claiming against small and solo firms.

#### B. *ALAS Annual Reports as a Window on Larger Firm Liability*

As limited as the Standing Committee findings are, at least there has been some organized effort to collect data about the small and solo firms. There are no corresponding publicly available data that aggregate the claims records of the insurers of medium and large law firms. The large law firm mutual insurers are

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73. The high rate of nonserious claims likely results in part from the strict notice reporting requirements in LPL insurance policies, pursuant to which law firms that delay reporting claims face a substantial risk of losing coverage for the claim. See BAKER & LOGUE, *supra* note 1, at 454–69 (discussing insurance liability cases).

74. See *supra* notes 52–57 and accompanying text.

notoriously and understandably secretive, with the partial exception of ALAS, which insures a sufficiently large number of firms that it can release some data in a manner that does not expose its members. The Minet brokerage firm, acquired by Aon in 1997, has for many years represented a large percentage of the large law firm market, but it derives a competitive advantage from its resulting access to claims-related information that we expect that it would be reluctant to give up.

As a result, the only publicly available large law firm claims numbers are those contained in the annual reports of ALAS. Those reports have never been systematically collected and analyzed in a public forum. With considerable effort, we have obtained all of the ALAS Annual Reports, from the first report issued in 1981 through the most recent report issued in 2014. These reports contain information about premiums, limits, self-insured retentions, and claims in addition to financial information about ALAS and a complete listing of member law firms. Ours is the first published effort to compile and use the data from these reports as a window on large law firm liability.

ALAS has long been the single largest insurer of medium to large law firms in the United States. A more complete description of ALAS awaits future work. For present purposes what matters most are the ways in which ALAS members are, and are not, representative of U.S. law firms.

The first important difference is size. ALAS members are much larger than the vast majority of U.S. law firms. This first difference is part of what makes the ALAS data such a useful complement to the ABA Standing Committee studies. ALAS members are a sample—admittedly a convenience sample—of the population of law firms that is most underrepresented in the ABA Standing Committee data. A firm must have at least thirty-five lawyers to be eligible for membership in ALAS, and most ALAS member firms are considerably larger.<sup>75</sup> Of the 224 member firms listed in the 2013 ALAS annual report, seventy-seven are in the 2014 AmLaw 200, which is a listing prepared by American Law Media of the 200 largest law firms as determined by annual revenues.<sup>76</sup> Twenty-eight of the ALAS member firms are in the AmLaw 100.<sup>77</sup>

A second important difference is geography. For many years, ALAS did not permit firms based in New York City to join, and it placed significant restrictions on law firms based in California, thereby excluding an important segment of the medium- to large-law-firm population.<sup>78</sup> The current ALAS membership reflects

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75. See ATTORNEYS' LIAB. ASSURANCE SOC'Y LTD., 1999 ANNUAL REPORT 37 (2000) (noting that ALAS required firms to have thirty-five or more practicing attorneys).

76. Compare *Revenue Growth Strengthens*, AM. LAW.: THE HAVES AND HAVE-NOTS, June 2013, at 75, 75–76; and *A New Number One*, AM. LAW., *supra* note 11, at 137, 137, 139–42, with 2013 ALAS ANNUAL REPORT, *supra* note 6, at 79–83. We determined the number of ALAS members in the AmLaw 200 by comparing the list in this issue of the American Lawyer to the list of ALAS members in the 2013 Annual Report.

77. 2013 ALAS ANNUAL REPORT, *supra* note 6; *A New Number One*, AM. LAW., *supra* note 11, at 137, 137–38. We determined the number of ALAS members in the AmLaw 100 by comparing the list in this issue of the American Lawyer to the list of ALAS members in the 2013 Annual Report.

78. See *supra* note 33 and accompanying text (noting that ALAS originally excluded firms from

this historic practice. The ALAS member firms listed in the 2013 annual report do not include any truly large firms based in New York City, San Francisco, or Los Angeles, in marked contrast to firms based in Chicago, DC, Boston, and Philadelphia.<sup>79</sup> In part as a result of this historic practice, the large New York City firms and many of the large California firms formed their own mutual insurance arrangements, which we described above. This difference means that what can be learned from the ALAS convenience sample may not be generalizable to the large New York City and California law firm experience.

A third important difference relates to the ALAS commitment to loss prevention and claims management. ALAS requires its members to make a significant commitment to ALAS-mediated risk and claim management practices.<sup>80</sup> This requirement likely produces some selection bias: law firms that find this requirement congenial and law firms that find it unacceptable are likely to differ from one another in ways that may impact their LPL-claims profiles. The requirement may also result in different patterns of liability among ALAS member firms that are otherwise similar to nonmember firms. If this difference makes a difference, then the frequency and severity of claims within the ALAS convenience sample should be less than prevails outside that sample.

Despite these very significant limitations on the generalizability of what can be learned from ALAS data, there are good reasons to believe that the results of the analysis do provide useful information for the medium- to large-law-firm market generally. The LPL insurance market appears to be a competitive one. It appears that at least some commercial carriers look at the ALAS rates in setting their own.<sup>81</sup> Our law firm, broker, and commercial insurance company respondents also all reported that brokers and commercial LPL insurers regularly attempt to persuade ALAS members to leave ALAS and move to the commercial market.<sup>82</sup> Further, our respondents reported that ALAS is open to new members.<sup>83</sup> For these reasons we conclude that ALAS pricing (and, thus, by

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that had their principal office in New York City).

79. 2013 ALAS ANNUAL REPORT, *supra* note 6, at 79–83.

80. *See, e.g.*, 2013 ALAS ANNUAL REPORT, *supra* note 6, at 17–20, 25–26 (detailing ALAS’s loss-prevention services and policy of remedial actions for firms that do not meet its requirements).

81. *See* Telephone Interview with Executive 3, *supra* note 28:

I mean, again, we started out with the ALAS rates. It’s kind of like the beginning benchmark when we started underwriting, and saying, “Okay, look, if it’s an average firm across the board—and an average firm, of course, will have some claims because ALAS certainly does have claims—they’ll have some claims activity that’ll creep up above the retention sometimes, and we’ll take a look at that.”

82. *See, e.g.*, Telephone Interview with Broker 5 (Nov. 7, 2013) (“We would always do sort of a competitive analysis, not on financial security necessarily, but really on pricing volatility type issues, so that we could talk to members of ALAS about putting them into the commercial market or helping them understand the difference.”); Telephone Interview with Law Firm General Counsel 12 (July 13, 2014) (“I think there is—one of the arguments that commercial carriers make—we get solicited a fair amount—is, ‘If you come with us, you’re going to pay X dollars a lawyer, and that’s Y dollars less than what you’re paying at ALAS.’”).

83. *See, e.g.*, Telephone Interview with Law Firm General Counsel 4 (May 9, 2013) (“Q: Have you ever considered being part of ALAS? R: Yes, we were—we talked to ALAS a number of times and we actually were invited to join ALAS a couple years ago. I have very close relationships with the

operation of arithmetic, ALAS claims experience) cannot over the long term diverge too sharply from the commercial market. If ALAS long-term prices were much lower than the commercial market, then more law firms would be attempting to join. If ALAS long-term prices were much higher than the commercial market, then ALAS would be unable to maintain its membership. How much is “too much” is a subject for additional research. For present purposes the ALAS data that we report are sufficiently likely to be at least directionally informative about large law firm liability generally to justify the effort involved in compilation and analysis.

Unlike the Standing Committee studies, the ALAS data allow us to reach conclusions about lawyers professional liability and insurance within a population of firms over time—ALAS member firms. For all years since 1983 the ALAS annual reports contain the following claim related information in a manner that is sufficiently consistent to permit comparison over time: the cumulative number of “real claims” reported by members per calendar year (defined as “all claims other than those initially classified as without merit”),<sup>84</sup> the number of real claims reported per one thousand lawyers per year, the number of claims reported per calendar year by area of practice, and the cumulative gross incurred loss per calendar year by area of practice. Figures 6 through 9 on the following pages present some of the highlights of the ALAS claims data in simple chart form.

Figure 6 shows the number of real claims per one thousand lawyers reported to ALAS each year from 1983 to 2013. Apart from a sharp uptick in the first two years (which is likely to be the result of a transition in claims reporting as ALAS members shifted from reporting their claims to their prior insurers under older, occurrence-based coverage to ALAS, rather than a sharp increase in claims brought against ALAS members) and a peak in the very early 1990s, the long-term trend is a slow decline, from a peak of 11.4 real claims per one thousand lawyers in 1991 to 7.5 real claims per one thousand lawyers in 2013. To the extent that these numbers can be extrapolated to large law firms generally, this gradual decline suggests that the large growth in the number of lawyers practicing in large law firms in the United States since the early 1990s has not been accompanied by a corresponding growth in the number of LPL claims brought against lawyers practicing in large law firms.<sup>85</sup> Whether this reflects instantiation of norms of professional conduct, better risk management, the difficulty of bringing these claims, or something else is indiscernible from this data.

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people at ALAS.”).

84. See, e.g., 2013 ALAS ANNUAL REPORT, *supra* note 6, at 11.

85. See generally Aric Press, *Big Law's Reality Check*, AM. LAW., Nov. 2014, at 40, 43–44.

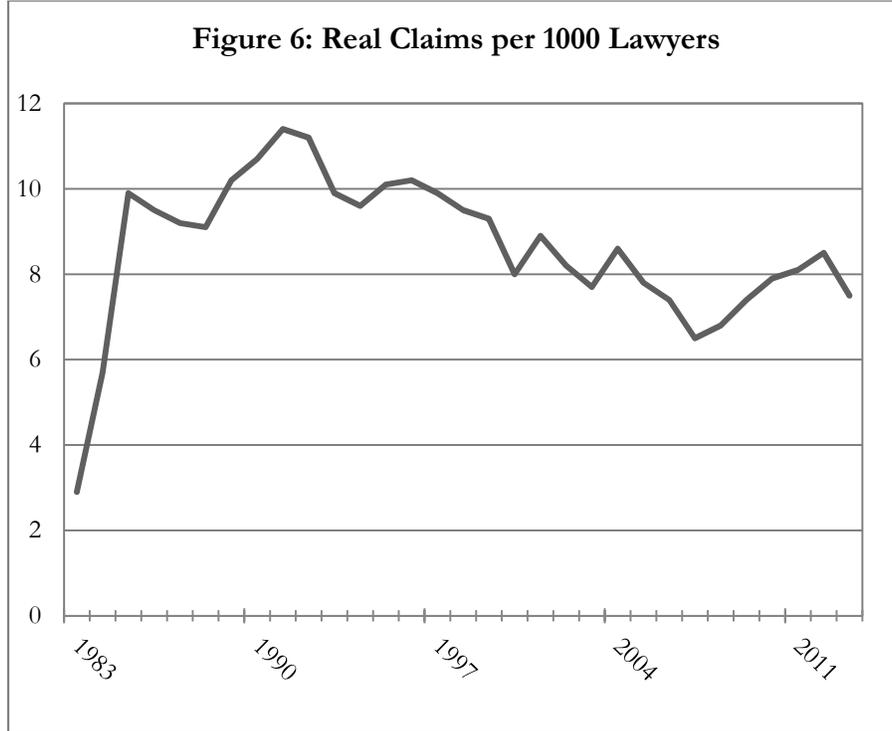


Figure 7 shows the distribution of total claims filed each year by practice area.<sup>86</sup> In this chart the gray scale areas that appear from bottom to top in the chart

86. ATTORNEYS' LIAB. ASSURANCE SOC'Y LTD., 1984 ANNUAL REPORT (1984); ATTORNEYS' LIAB. ASSURANCE SOC'Y LTD., 1985 ANNUAL REPORT (1985); ATTORNEYS' LIAB. ASSURANCE SOC'Y LTD., 1986 ANNUAL REPORT (1987); ATTORNEYS' LIAB. ASSURANCE SOC'Y LTD., 1988 ANNUAL REPORT (1989); ATTORNEYS' LIAB. ASSURANCE SOC'Y LTD., 1989 ANNUAL REPORT (1990); ATTORNEYS' LIAB. ASSURANCE SOC'Y LTD., 1990 ANNUAL REPORT (1991); ATTORNEYS' LIAB. ASSURANCE SOC'Y LTD., 1991 ANNUAL REPORT (1992); ATTORNEYS' LIAB. ASSURANCE SOC'Y LTD., 1992 ANNUAL REPORT (1993); ATTORNEYS' LIAB. ASSURANCE SOC'Y LTD., 1993 ANNUAL REPORT (1994); ATTORNEYS' LIAB. ASSURANCE SOC'Y LTD., 1995 ANNUAL REPORT (1996); ATTORNEYS' LIAB. ASSURANCE SOC'Y LTD., 1996 ANNUAL REPORT (1997); ATTORNEYS' LIAB. ASSURANCE SOC'Y LTD., 1997 ANNUAL REPORT (1998); ATTORNEYS' LIAB. ASSURANCE SOC'Y LTD., 1998 ANNUAL REPORT (1999); ATTORNEYS' LIAB. ASSURANCE SOC'Y LTD., 1999 ANNUAL REPORT (2000); ATTORNEYS' LIAB. ASSURANCE SOC'Y LTD., 2000 ANNUAL REPORT (2001); ATTORNEYS' LIAB. ASSURANCE SOC'Y LTD., 2001 ANNUAL REPORT (2002); ATTORNEYS' LIAB. ASSURANCE SOC'Y LTD., 2002 ANNUAL REPORT (2003); ATTORNEYS' LIAB. ASSURANCE SOC'Y LTD., 2003 ANNUAL REPORT (2004); ATTORNEYS' LIAB. ASSURANCE SOC'Y LTD., 2004 ANNUAL REPORT (2005); ATTORNEYS' LIAB. ASSURANCE SOC'Y LTD., 2005 ANNUAL REPORT (2006); ATTORNEYS' LIAB. ASSURANCE SOC'Y LTD., 2006 ANNUAL REPORT (2007); ATTORNEYS' LIAB. ASSURANCE SOC'Y LTD., 2007 ANNUAL REPORT (2008); ATTORNEYS' LIAB. ASSURANCE SOC'Y LTD., 2008 ANNUAL REPORT (2009); ATTORNEYS' LIAB. ASSURANCE SOC'Y LTD., 2009 ANNUAL REPORT (2010); ATTORNEYS' LIAB. ASSURANCE SOC'Y LTD., 2010 ANNUAL REPORT (2011); ATTORNEYS' LIAB. ASSURANCE SOC'Y LTD., 2011 ANNUAL REPORT (2012); ATTORNEYS' LIAB. ASSURANCE SOC'Y LTD., 2012 ANNUAL REPORT (2013); ATTORNEYS' LIAB. ASSURANCE SOC'Y LTD., 2013 ANNUAL REPORT (2014).

correspond to the gray scale legend at the bottom, running from left to right. For example, the bottom area of the chart shows the percent of claims in the corporate/banking practice area, and the top area of the chart shows the percent of claims in all practice areas other than those specifically listed.

There is one important caveat about the data shown in Figure 7. ALAS provides only cumulative data about the number of claims filed; ALAS does not provide the total number of claims per practice on an annual basis. That is, ALAS provides only the total number of claims per practice area from the beginning of ALAS to the current reporting period.<sup>87</sup> Our attempts to calculate marginal yearly data—by simply subtracting one year from the next—yielded odd results. For example, in several years, across several different practice areas, the annualized per claim numbers were negative. This may be because ALAS reclassified a claim from a real claim to a frivolous claim, reclassified a claim from one area of practice to another, or some other unknown reason. Because of these strange results, we present only the cumulative data. Further, because the number of lawyers insured affects the number of cumulative claims, we present only the distribution of the cumulative claims.

One problem with the cumulative—as opposed to annualized—data is that the chart is not very sensitive to yearly changes in the distribution of claims. Even if the number of litigation claims spiked over a couple of year period, the figure would not reflect that trend with a similar spike. In other words, the right hand side of the chart is not particularly sensitive to annual changes in the number of claims in a given practice area because the annual change is not likely enough to change the cumulative distribution of claims. Figure 7 might nonetheless be useful as a holistic picture of the market and of the way insurers might consider the risks presented.

Litigation is the practice area with the largest number of claims, with corporate/banking in second place, followed at some distance by trusts and estates, real estate, and securities. (Corporate and banking are lumped together because ALAS did not report them separately until 1991.) ALAS does not report the number of lawyers practicing in these areas, and we were unable to obtain historical practice area information for ALAS member firms, so we do not have a way to assess whether the rate of claims per lawyer varies across those practice groups. Our sense is that corporate and litigation practice groups are the largest practice groups in most large law firms, so the higher frequency of claims in those practice areas likely reflects the number of lawyers involved rather than a higher per lawyer frequency risk.

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87. In 1995, ALAS did not report cumulative claims. Rather ALAS reported the percentage of cumulative claims per practice area as we have done in Figure 7.

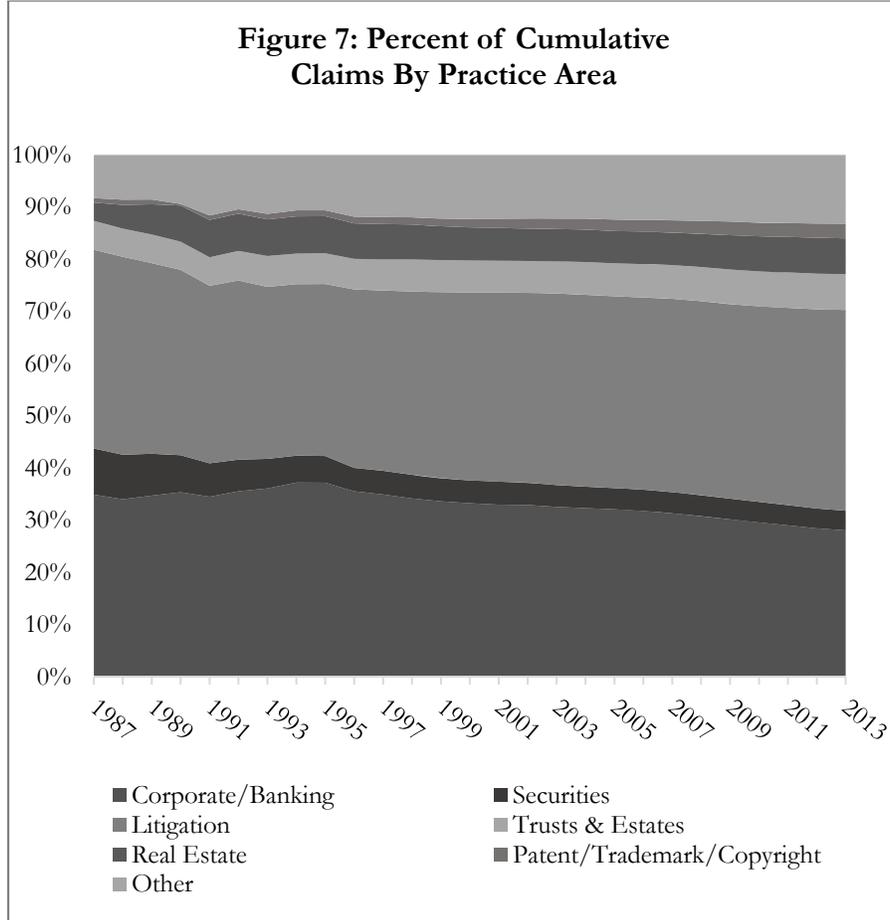


Figure 8 shows the distribution of cumulative gross loss for each year by the same practice areas,<sup>88</sup> and it should be read with the same caveat and in the same manner as Figure 7. Importantly, gross loss is not the same as claims paid data. Gross loss is a measure of the cost of claims to ALAS. That cost includes both actual claim-related payments as of the date of the reporting and the reserves ALAS put aside as an estimate of the future expenses for that claim.<sup>89</sup> Given that part of the cost of claims—the reserves—are an estimate, the actual cost of a given claim might change from year to year. For this reason, the data reported by ALAS on cumulative gross loss are also not amenable to modification to annualized losses. The result, again, is that the data for 2013, for instance, includes

88. See sources cited *supra* note 86.

89. 2013 ALAS ANNUAL REPORT, *supra* note 6, at 11 (“This metric comprises the expected ultimate cost of claims reported in the current underwriting period plus any change in projected ultimate claim costs related to prior underwriting periods, without taking reinsurance into account. It also includes ALAS’s internal expenses for claims management and loss prevention services.”).

all of the losses for each category from 1987 to 2013. Thus, the distribution across categories is less likely to change significantly on the right hand side of the chart. Even really big payouts in a given category may be a drop in the bucket compared to the cumulative effects of payments over twenty-five years.

That said, the data are again useful for seeing a holistic picture of the losses. The corporate/banking practice area consistently has the largest share—close to 50% in all years after 1989—followed by securities in the early years and litigation thereafter. As a comparison of Figures 7 and 8 reveals, litigation has always been responsible for a much larger percentage of total claims than total losses.

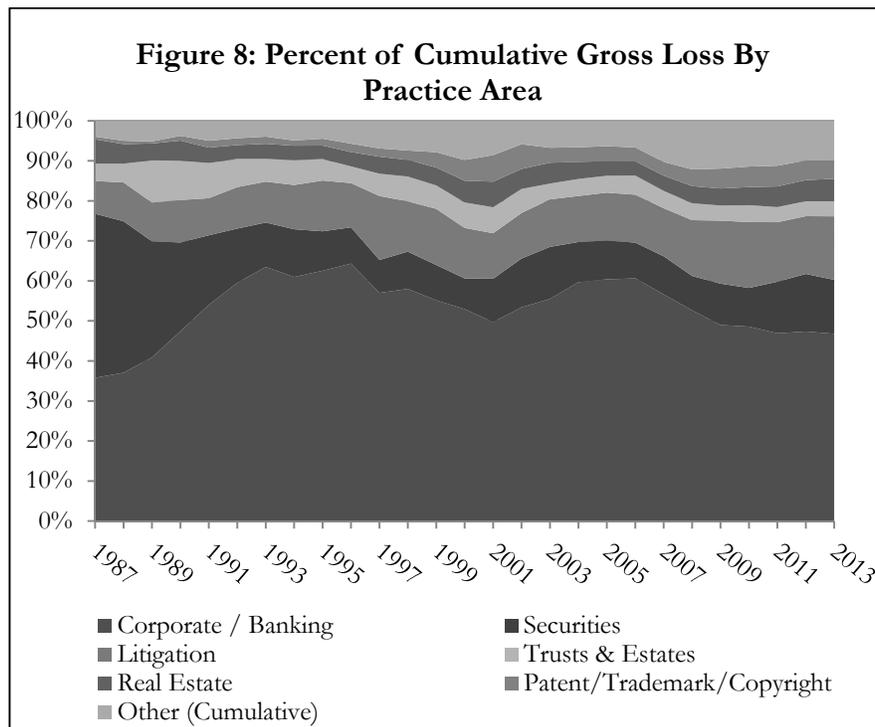


Table 3 presents the cumulative ALAS claims and loss data, confirming that litigation claims are much less expensive than corporate and banking claims.<sup>90</sup> The area of practice with the largest average per claim severity is securities (\$1.42M) followed by banking (\$1.12M). The lowest average per claim severity is for litigation claims at only \$165,300. All of these averages include defense costs,

90. 2013 ALAS ANNUAL REPORT, *supra* note 6, at 12. We consolidated certain practice areas for this table, including Administrative law, Bankruptcy, Divorce/Family Law, and Labor/Employment into the Other category. We display claims deriving from Tax/ERISA practice areas in Table 3, but not in Figures 7 and 8, because ALAS did not report data on those practice areas throughout the sample. Conversely, we broke out Corporate and Banking practice areas because ALAS has tracked those areas separately since 1991.

which count as part of the insured loss in the ALAS standard policy.<sup>91</sup> Importantly, these averages do not include payments by the law firms themselves to satisfy their retentions before ALAS makes payments, nor do they include payments by excess insurers for those (very few) claims that exceed the limit of the ALAS coverage. Thus, the total average loss per claim in each practice area is larger. How much larger is impossible to say without taking these retentions and excess insurer payments into account.

	Number of Claims	% of all ALAS Claims	Gross Loss (000s Omitted)	% of All ALAS Gross Loss	Mean Gross Loss per Claim (000s Omitted)
Securities	522	4%	\$747,800	13%	\$1,432.6
Banking	262	2%	\$294,600	5%	\$1,124.4
Patent/Trademark/ Copyright	386	3%	\$255,400	5%	\$661.7
Corporate	3627	26%	\$2,302,900	41%	\$634.9
Tax/ERISA	564	4%	\$303,300	5%	\$537.8
Real Estate	952	7%	\$312,100	6%	\$327.8
Trusts & Estates	949	7%	\$208,700	4%	\$219.9
Other	1254	9%	\$245,000	5%	\$195.4
Litigation	5334	39%	\$881,700	16%	\$165.3

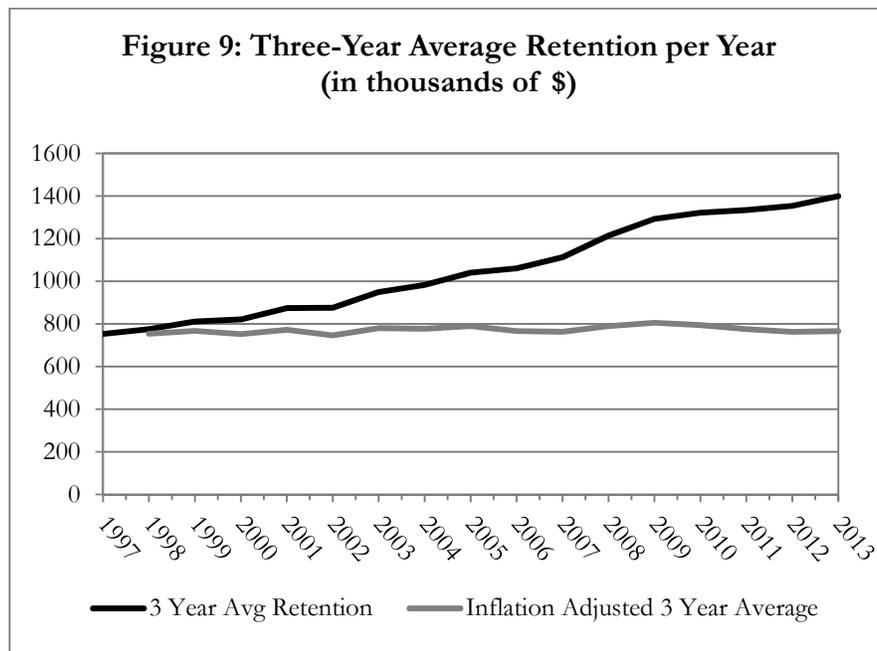
ALAS began reporting information about law firm retentions in 1998 in a manner that is informative but does not permit a straightforward calculation of the total loss associated with ALAS claims, either in the aggregate or on a practice area basis. Figure 9 shows the average per claim retention for lawyers in ALAS member law firms.<sup>92</sup> The dark line shows the average per claim retention in nominal dollars. The shaded line uses the Bureau of Labor Statistics Producer Pricing Index for legal services to control for inflation.<sup>93</sup> As Figure 9 shows, average per claim retentions were just under \$800,000 in 1997 and grew to \$1.4 million in 2013. In real terms the average per lawyer retention has remained constant over the entire period of the available data.

91. See ATTORNEYS' LIAB. ASSURANCE SOC'Y LTD., 2011 ANNUAL REPORT 9-10 (2012) (noting that gross claims expense is the expected ultimate costs of claims reported and includes actuarial predictions, reserves, and internal expenses); see also ATTORNEY'S LIAB. ASSURANCE SOC'Y LTD., 1991 ANNUAL REPORT 16 (1992) (noting that this number does not include expenses by member firms or within their retentions and giving an example of that amount for 1991).

92. We used a three-year trailing average because of an anomaly in the way that the data were reported for policies issued in 2000 and 2001.

93. The PPI numbers for legal services are tracked under number 5411 and provide an annual and monthly index from 1996 to the present. The data can be accessed using the industry number through the Bureau of Labor Statistics website.

If we make the reasonable assumption that larger law firms have higher retentions and more severe claims, it follows that it is not possible simply to add the average retention amount to ALAS's average gross incurred loss in order to arrive at the average total incurred loss. Moreover, there are no publicly available data regarding the frequency or amount of payments made in excess of ALAS limits. Thus, all that can be said about the average gross loss per claim numbers is that they understate, perhaps substantially, the total defense and indemnity payments on an average claim.



Figures 10 and 11 show ALAS per member LPL costs over time using two different metrics. The figures show the costs in nominal dollars in the dark black line and, for years beginning in 1997 (when the Bureau of Labor Statistics began tracking the producer price index for legal expenses) also in inflation-adjusted dollars in the thinner grey line.

Figure 10 shows the annual per lawyer change in cumulative gross loss.<sup>94</sup> This measure of per lawyer LPL cost is computed by dividing the total number of lawyers in ALAS member firms during each year into the change in cumulative gross loss from the prior year. This metric is much less stable because it is strongly affected by year-to-year changes in reserves, which are based upon judgments that can change rapidly and typically do so over the course of the underwriting cycle.<sup>95</sup> As shown in Figure 10, this LPL cost metric follows the pattern of the liability insurance underwriting cycle that is familiar from work on medical malpractice

94. See sources cited *supra* note 86.

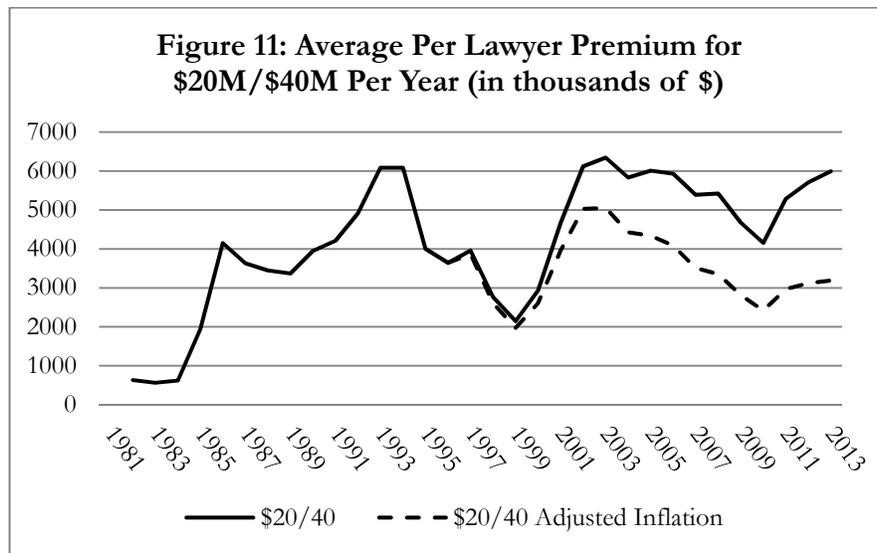
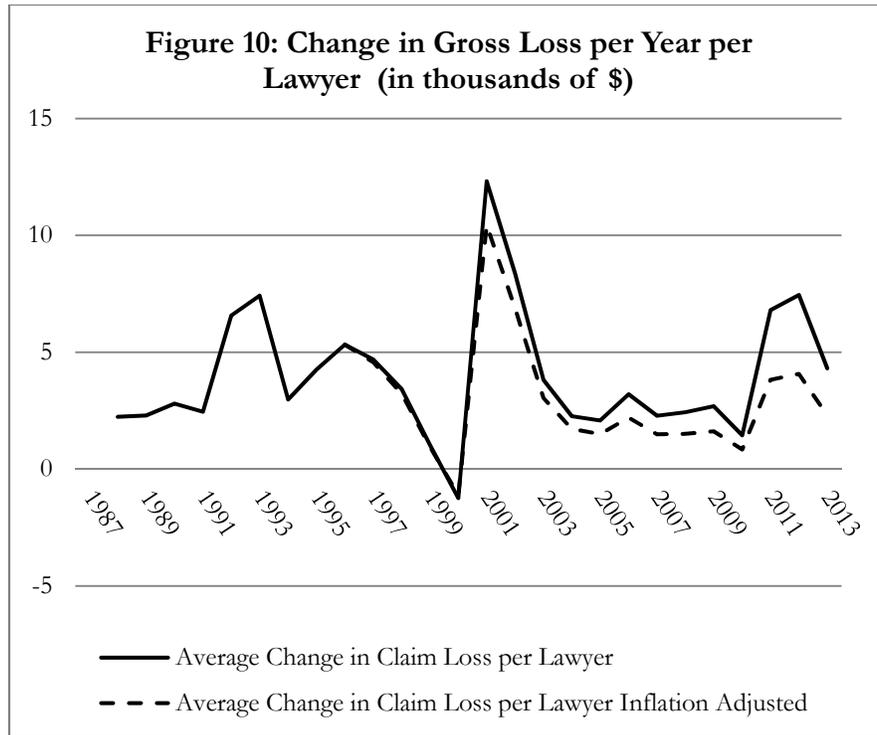
95. Baker, *supra* note 7, at 398–99.

liability insurance, with the difference that, in addition to the rapid increases in gross loss during the mid 1980s and early 2000s, there was also a rapid increase in gross loss in the early 1990s. This latter increase may be attributable to the early 1990s peak in real claims per one thousand lawyers shown in Figure 1 (which did not occur in medical liability)

Figure 11 shows the average per lawyer rate ALAS charges each year for an LPL insurance policy with a \$20 million per claim and a \$40 million annual aggregate limit, one of the kinds of insurance policies that ALAS has offered to its members every year since inception.<sup>96</sup> The per lawyer rate for these twenty/forty policies differs according to the SIR; policies with higher SIRs have lower premiums. We show the average rate for all of the twenty/forty SIR combinations that have been consistently offered by ALAS. This rate is computed by averaging the rates ALAS offered for the \$100,000, \$250,000, and \$500,000 retention levels at the \$20/\$40 million limit level from 1982 to 2013. In unreported work we have verified that the same general pattern of changes in rates over time holds true across all of the ALAS insurance policies. We present the average rate for the twenty/forty policies because a chart with a single line is easier to interpret than one with multiple lines. The figure follows the familiar pattern of the liability insurance underwriting cycle. For example, the rise in premiums in the early 1980's reflects one of the most significant hard markets in liability insurance. The one difference, once again, is that there was also a rapid increase in premiums in the early 1990s.

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96. See sources cited *supra* note 86.



ALAS does not report claims disposition rates in a manner that is similar to the Standing Committee reports, so it is not possible to determine how the disposition rates of claims reported by ALAS members compare to those reported in the Standing Committee studies. The only dispositions that ALAS reports are trial results. Since its inception in the late 1970s ALAS has litigated to trial just 218

claims. In those cases, ALAS reports that it received a defense verdict in 153 cases and a reversal of a plaintiff's verdict on appeal in another 17.<sup>97</sup> This is a defendant trial success rate of 72% (similar to that in medical malpractice cases) and an overall adjudicatory success rate of 81%, suggesting that ALAS is making good judgments about which cases to take to trial.<sup>98</sup>

ALAS does not report its claims according to the type of error or activity categories employed by the Standing Committee. Nevertheless some insights can be gleaned from the narratives in the claims management section of the annual reports. First, while ALAS does not publicly report claims by type of error or activity, it appears that, like other entities engaged in large law firm risk management, ALAS divides claims into three categories: "mistakes," "conflicts of interest," and "poor client quality."<sup>99</sup> Second, consistent with the findings of the Standing Committee, these "issues . . . cut across all practice areas and geographic locations . . ."<sup>100</sup> For insight into how those categories map on to major claims we turn next to summary data on large verdicts and settlements compiled by the leading LPL insurance brokerage firm.

### C. *The Aon Summary of Large Verdicts and Settlements*

Providing some insight into the breakdown between these categories of major claims, Aon loss prevention specialist and insurance law scholar Douglas Richmond has released a brief analysis of the largest publicly reported LPL verdicts and settlements since the mid 1980's, sixty-four of which exceed \$20 million and twenty-eight of which exceed \$35 million.<sup>101</sup> The top two are a \$108 million settlement in 2004 and a \$103 million verdict in 2010.<sup>102</sup> While there is no comprehensive database that would allow us to determine how many additional settlements there are that are greater than \$20 million and not included in his survey, our respondents suggest, "[t]hese sorts of debacles are hard to keep quiet," and, thus, Richmond likely has identified most of the very large claims payments.<sup>103</sup>

97. See 2013 ALAS ANNUAL REPORT, *supra* note 6, at 11.

98. BAKER, *supra* note 45, at 74 (reporting a defense trial success rate of 70%).

99. See, e.g., ATTORNEYS' LIAB. ASSURANCE SOC'Y LTD., 2008 ANNUAL REPORT 10 (2009) [hereinafter 2008 ALAS Annual Report]; 2013 ALAS ANNUAL REPORT, *supra* note 6, at 12.

100. 2008 ALAS ANNUAL REPORT, *supra* note 99, at 10; see also 2013 ALAS ANNUAL REPORT, *supra* note 6, at 12:

As noted in the Leadership Letter, our firms continue to confront challenging economic and financial pressures that can affect the behavior of lawyers in their practices, often leading to mistakes, conflicts of interest, the representation of unworthy clients, or other conduct that can cause serious claims. These issues have always been at the heart of our major claims, and they are not confined to particular types or sizes of firms or specific practice areas.

101. DOUGLAS R. RICHMOND, THE LAW FIRM LIABILITY TERRAIN: PUBLICLY REPORTED SETTLEMENTS AND VERDICTS (2014), <http://www.americanbar.org/content/dam/aba/administrative/tips/webinars/LawFirmLiabilityTerrainRichmond.authcheckdam.pdf> [https://perma.cc/WN97-XMZ5].

102. *Id.* at 1.

103. See, e.g., Telephone Interview with Broker 8 (Sept. 25, 2013) ("These sorts of debacles are hard to keep quiet.").

Richmond reports the following breakdown among these very large claims:

- Forty-one attributable to dishonest clients
- Eleven attributable to conflicts of interest
- Three attributable to mistakes
- Three attributable to a combination of a dishonest client and a conflict of interest
- Two attributable to malicious prosecution
- One attributable to a mistake coupled with a conflict of interest
- One attributable to a dishonest client and a mistake in an extended representation of a client
- One attributable to a firm's dishonesty (Milberg LLP's payment of secret fees to class action plaintiffs)
- One attributable to a lawyer's dishonesty (the O'Quinn Law Firm's settlement of allegations that it over-charged clients for expenses in a breast implant class action)<sup>104</sup>

In our judgment, Richmond's "dishonest client" category likely matches up reasonably well to ALAS's "poor client quality" category, with the recognition that "dishonest client" appears to be a deliberately provocative label for a category that likely also includes honest clients in financial trouble.

Richmond also tracks settlements and verdicts in the \$3 to \$20 million range, "with the \$3 million floor being significant because it exceeds all but the very largest law firms' self-insured retentions."<sup>105</sup> Perhaps because of the smaller size of the cases, there is less publicly available information about them (though certainly there is much nonpublic information available to Aon in light of its very substantial role in the LPL market). Richmond reports that such cases are "numerous," and categorizes an unspecified set of "recent cases" of this size as follows:

- Thirty-three attributable to mistakes
- Seventeen attributable to dishonest clients
- Thirteen attributable to conflicts of interest
- Three attributable to malicious prosecution
- One attributable to fraud<sup>106</sup>

He reports that "the \$3-20 million claims are believed to be representative of matters within the range" even though "they are not all-inclusive."<sup>107</sup>

Commenting on these cases, he observes:

What is perhaps most interesting about the settlements and verdicts in the \$3-20 million range is the prevalence of mistakes as the cause of loss, which distinguishes cases of this size from those exceeding \$20 million. There probably are two reasons for this. First, the cases in the \$3-20

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104. RICHMOND, *supra* note 101.

105. *Id.*

106. *Id.*

107. *Id.*

million range include a number of matters involving small law firms. Because lawyers in small firms often do not work in teams in the same way that their counterparts at large law firms do, there is a greater likelihood that mistakes will escape notice until they allegedly harm clients. Lawyers working in teams in large law firms tend to catch mistakes before work gets out the door. Second, dishonest client claims and conflict of interest allegations often put “heat” in cases, thus driving up settlement and verdict value, while simple negligence rarely is an aggravating factor. Thus, it is logical that most of the largest settlements and verdicts would be rooted in allegations of dishonesty and conflicts of interest.<sup>108</sup>

### CONCLUSION

This review of the available quantitative data on the past thirty years of experience in lawyers’ professional liability shows a pattern of relative stability and, if the ALAS experience can be generalized, a decline in the real cost of lawyers’ liability on a per lawyer basis. As discussed above, there are reasons to doubt the generalizability of the data. Both the ABA Standing Committee study and the ALAS data are a convenience sample that may not be representative of insured lawyers, let alone lawyers more generally. Nonetheless, these are the best data publicly available.

Unlike medical liability, researchers studying legal professional liability do not have other significant publicly available data. In the medical liability context, researchers have (1) the National Practitioner Data Bank (NPDB), tracking all payments made by or on behalf of physicians in the United States;<sup>109</sup> (2) The National Association of Insurance Commissioners (NAIC) financial database, which reports medical liability losses separately;<sup>110</sup> and (3) closed-claim records of medical liability in individual states like Texas, Florida, Missouri, and Illinois.<sup>111</sup>

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108. *Id.*

109. *See About Us*, NAT’L PRAC. DATA BANK, <http://www.npdb.hrsa.gov/topNavigation/aboutUs.jsp> [<https://web.archive.org/web/20150210035943/http://www.npdb.hrsa.gov/topNavigation/aboutUs.jsp>] (last visited Feb. 10, 2015) (“[NPDB] is a confidential information clearinghouse created by Congress with the primary goals of improving health care quality, protecting the public, and reducing health care fraud and abuse in the U.S.”). For an example of how these data have been used by medical liability researchers, see Myungho Paik et al., *The Receding Tide of Medical Malpractice Litigation: Part 1—National Trends*, 10 J. EMP. STUD. 612 (2013).

110. *See generally* Baker, *supra* note 7 (using NAIC’s separately reported medical liability financial data to study changing costs of medical liability over time). Legal liability losses are reported as part of the category of “other liability claims made,” which includes the much larger Directors and Officers Liability Insurance line as well as all other professional liability except medical liability.

111. *See, e.g.*, TEXAS DEP’T OF INS., THE 2012 TEXAS LIABILITY INSURANCE CLOSED CLAIM ANNUAL REPORT 2 (2014), <http://www.tdi.texas.gov/reports/pc/documents/taccar2012.pdf> [<https://perma.cc/A5J2-7KCU>] (indicating that the closed-claim reports are required to identify claims according to the following categories: “General Liability; Medical Professional Liability; Other Professional Liability; Commercial Automobile Liability; The Liability Portion of Commercial Multi-Peril Insurance”). For an example where these data have been used by medical liability researchers, see Bernard Black et al., *Stability, Not Crisis: Medical Malpractice Claim Outcomes in Texas, 1988–2002*, J. EMP. LEG. STUD. 207 (2005).

To be sure, each of these sources is flawed in its own right. For example, there are serious concerns that the exclusion of claims made by or on behalf of hospitals and other institutional medical providers means that the NPDB does not include all claims.<sup>112</sup> Further, there are serious concerns that the NAIC data under-count medical liability losses because of the large number of alternative risk transfer mechanisms, especially for hospitals and other large collections of medical providers.<sup>113</sup> And, there are concerns about the generalizability of conclusions based upon a single state.<sup>114</sup> But, especially when considered together, these sources provide a significant window into medical liability. With these data in hand researchers can make estimates and reach judgments about the overall population of medical liability claims that simply cannot be made about lawyers' liability.

Perhaps it is impossible to hope for such data in the LPL context. The NAIC data on medical liability, for example, is a reasonable sample because physicians have legal and other institutional requirements that obligate them in most cases to be insured,<sup>115</sup> a situation that we know does not correspond to lawyers, especially those in solo- and very small-firm practice. More importantly, there is likely little political will to create closed-claims records in the LPL context. All of the public sources of medical liability data are a side effect of the political struggle on the part of the medical profession to escape from medical liability. As part of this struggle, advocates for the medical profession made assertions about the extent and cost of medical liability in relation to the underlying rate of medical malpractice that researchers acting on behalf of the profession attempted to back up through empirical research.<sup>116</sup> The political struggle took the medical profession into legislatures, where advocates asked for relief from the usual tort law rules that governed all of the other professions. In that process, the legislatures passed laws that required medical liability insurers and others to provide data to the government about medical liability losses.<sup>117</sup>

That political struggle never took place for the legal profession. Perhaps because the legal profession regards lawyers' liability as just one more form of self-regulation by the profession, the organized bar has never mounted the kind of

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112. Tom Baker, *Transparency Through Insurance: Mandates Dominate Discretion*, in CONFIDENTIALITY, TRANSPARENCY, AND THE U.S. CIVIL JUSTICE SYSTEM 184, 191 (Joseph Doherty et al. eds., 2012).

113. *Id.* at 190.

114. See, e.g., Tom Baker et al., *Everything's Bigger in Texas Except the Medmal Settlements*, 21 CONN. INS. L.J. (forthcoming 2016) (questioning generalizability of some of the results using Texas Department of Insurance claims data).

115. MICHELLE M. MELLO, UNDERSTANDING MEDICAL MALPRACTICE INSURANCE: A PRIMER 1 (2006), [https://folio.iupui.edu/bitstream/handle/10244/517/no8\\_primer.pdf](https://folio.iupui.edu/bitstream/handle/10244/517/no8_primer.pdf) [<https://perma.cc/Z4FS-YVYU>] (“Nearly all states require that physicians have liability insurance. Even in states that don’t, physicians usually have to have insurance coverage in order to get privileges to see patients at a hospital.”).

116. BAKER, *supra* note 45, at 25–30 (describing origins of mid 1970s California and early 1980s New York hospital record studies).

117. Baker, *supra* note 112, at 197–98.

challenge to lawyers' liability that the medical profession mounted to challenge medical liability. Thus, there have been no legislative demands for legal liability reform that have led the way to the kind of mandatory reporting that exists for medical liability.

This makes the quantitative study of legal malpractice difficult, at best. There is little we can say conclusively from the data even about how many claims are brought and settled, let alone the merits of the claims and the impact of the claims on the practice of law. This means that, even more so than for medical liability, understanding the nature and extent of lawyers' liability requires going out into the field.

