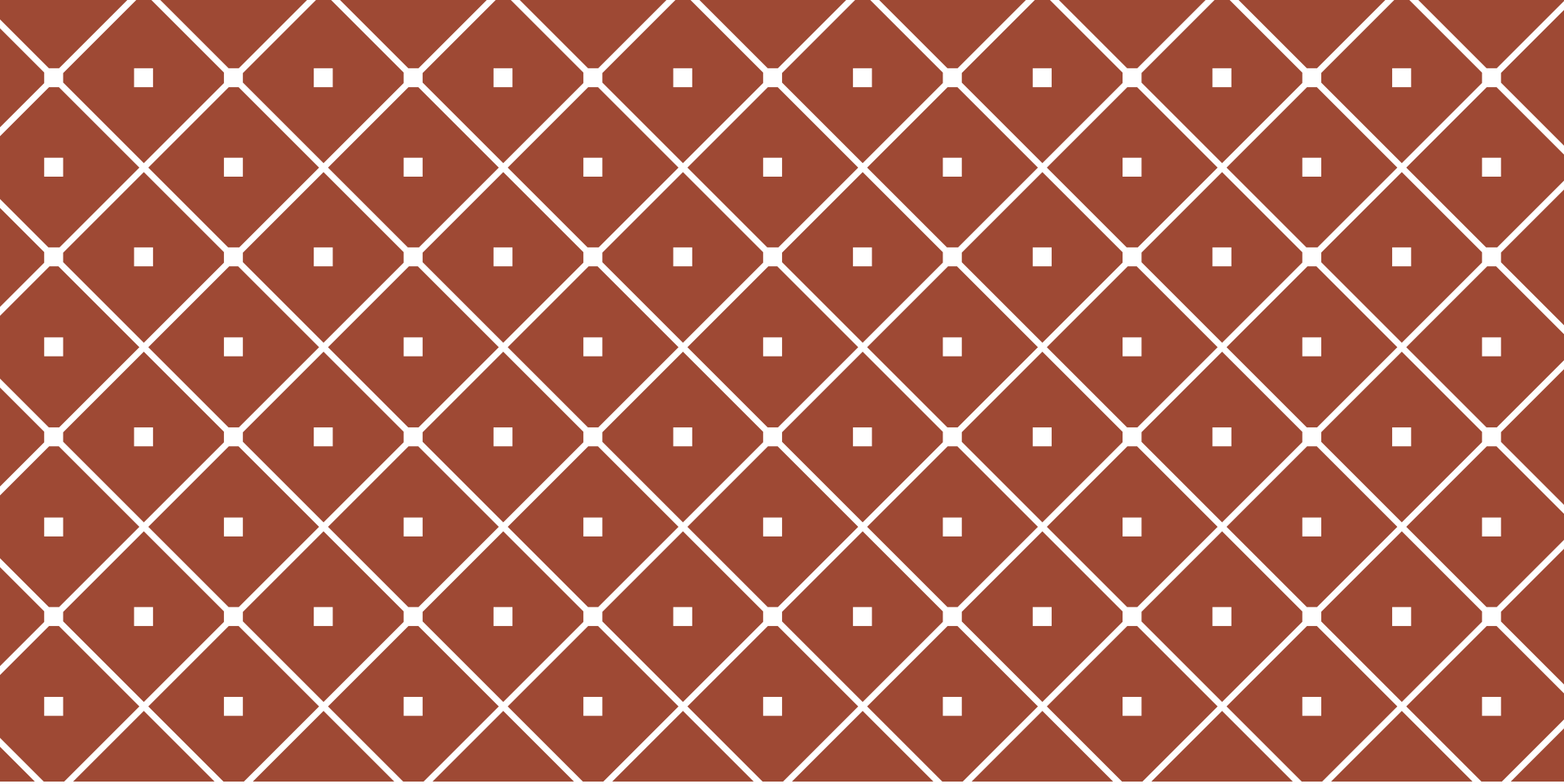


COMPETENCE | RULE 1.1

RULE 1.1 – COMPETENCE

A lawyer shall provide competent representation to a client.

Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

RULE 1.1 – COMPETENCE: COMMENT 1

In many instances, the required proficiency is that of a general practitioner.

Expertise in a particular field of law may be required in some circumstances.

RULE 1.1 – COMPETENCE: COMMENT 2

[2] A lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar.

A newly admitted lawyer can be as competent as a practitioner with long experience. Some important legal skills, such as the analysis of precedent, the evaluation of evidence and legal drafting, are required in all legal problems.

RULE 1.1 – COMPETENCE: COMMENT 2

[2] …A lawyer can provide adequate representation in a wholly novel field through necessary study.

Competent representation can also be provided through the association of a lawyer of established competence in the field in question.

RULE 1.1 – COMPETENCE: COMMENT 3

[3] In an emergency a lawyer may give advice or assistance in a matter in which the lawyer does not have the skill ordinarily required where referral to or consultation or association with another lawyer would be impractical.

Even in an emergency, however, assistance should be limited to that reasonably necessary in the circumstances, for ill-considered action under emergency conditions can jeopardize the client's interest.

RULE 1.1 – COMPETENCE: COMMENT 5

Thoroughness and Preparation

[5] Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes **adequate preparation.**

RULE 1.1 – COMPETENCE: COMMENT 5
Thoroughness and Preparation

[5] **…An agreement between the lawyer and the client regarding the scope of the representation may limit the matters for which the lawyer is responsible.**

RULE 1.1 – COMPETENCE: COMMENT 6

Retaining or Contracting With Other Lawyers

[6] Before a lawyer retains or contracts with other lawyers outside the lawyer's own firm to provide or assist in the provision of legal services to a client, the lawyer should ordinarily obtain informed consent from the client and must reasonably believe that the other lawyers' services will contribute to the competent and ethical representation of the client.

RULE 1.1 – COMPETENCE: COMMENT 6

Retaining or Contracting With Other Lawyers

[6] …The reasonableness of the decision to retain or contract with other lawyers outside the lawyer's own firm will depend upon the circumstances, including the education, experience and reputation of the nonfirm lawyers; the nature of the services assigned to the nonfirm lawyers; and the legal protections, professional conduct rules, and ethical environments of the jurisdictions in which the services will be performed, particularly relating to confidential information.

RULE 1.1 – COMPETENCE: COMMENT 8

Maintaining Competence

[8] To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.

DILIGENCE | RULE 1.3

RULE 1.3: DILIGENCE

A lawyer shall act with reasonable **diligence** and **promptness** in representing a client.

RULE 1.3: DILIGENCE – COMMENT 1

[1] A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take **whatever lawful and ethical measures are required** to vindicate a client's cause or endeavor.

A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf.

RULE 1.3: DILIGENCE – COMMENT 1

[1] …A lawyer is **not** bound, however, to press for every advantage that **might** be realized for a client.

For example, a lawyer may have authority to exercise professional discretion in determining the means by which a matter should be pursued.

RULE 1.3: DILIGENCE – COMMENT 1

[1] …The lawyer's duty to act with reasonable diligence **does not require** the use of **offensive** tactics or preclude the treating of all persons involved in the legal process with courtesy and respect.

RULE 1.3: DILIGENCE – COMMENT 2

[2] A lawyer's work load must be controlled so that each matter can be handled competently.

RULE 1.3: DILIGENCE – COMMENT 3

[3] Perhaps no professional shortcoming is more widely resented than **procrastination**. A client's interests often can be adversely affected by the passage of time or the change of conditions; in extreme instances, as when a lawyer overlooks a statute of limitations, the client's **legal position may be destroyed**.

Even when the client's interests are not affected in substance, however, unreasonable delay can cause a client needless anxiety and **undermine confidence** in the lawyer's trustworthiness.

RULE 1.3: DILIGENCE – COMMENT 3

[3] …A lawyer's duty to act with reasonable promptness, however, does **not** preclude the lawyer from agreeing to a reasonable request for a postponement that will not prejudice the lawyer's client.

RULE 1.3: DILIGENCE – COMMENT 4

[4] Unless the relationship is terminated as provided in Rule 1.16, a lawyer should carry through to conclusion all matters undertaken for a client.

If a lawyer's employment is limited to a specific matter, the relationship **terminates** when the matter **has been resolved**.

RULE 1.3: DILIGENCE – COMMENT 4

[4]…If a lawyer has served a client over a substantial period in a variety of matters, the client sometimes may assume that the lawyer will continue to serve on a continuing basis unless the lawyer gives notice of withdrawal.

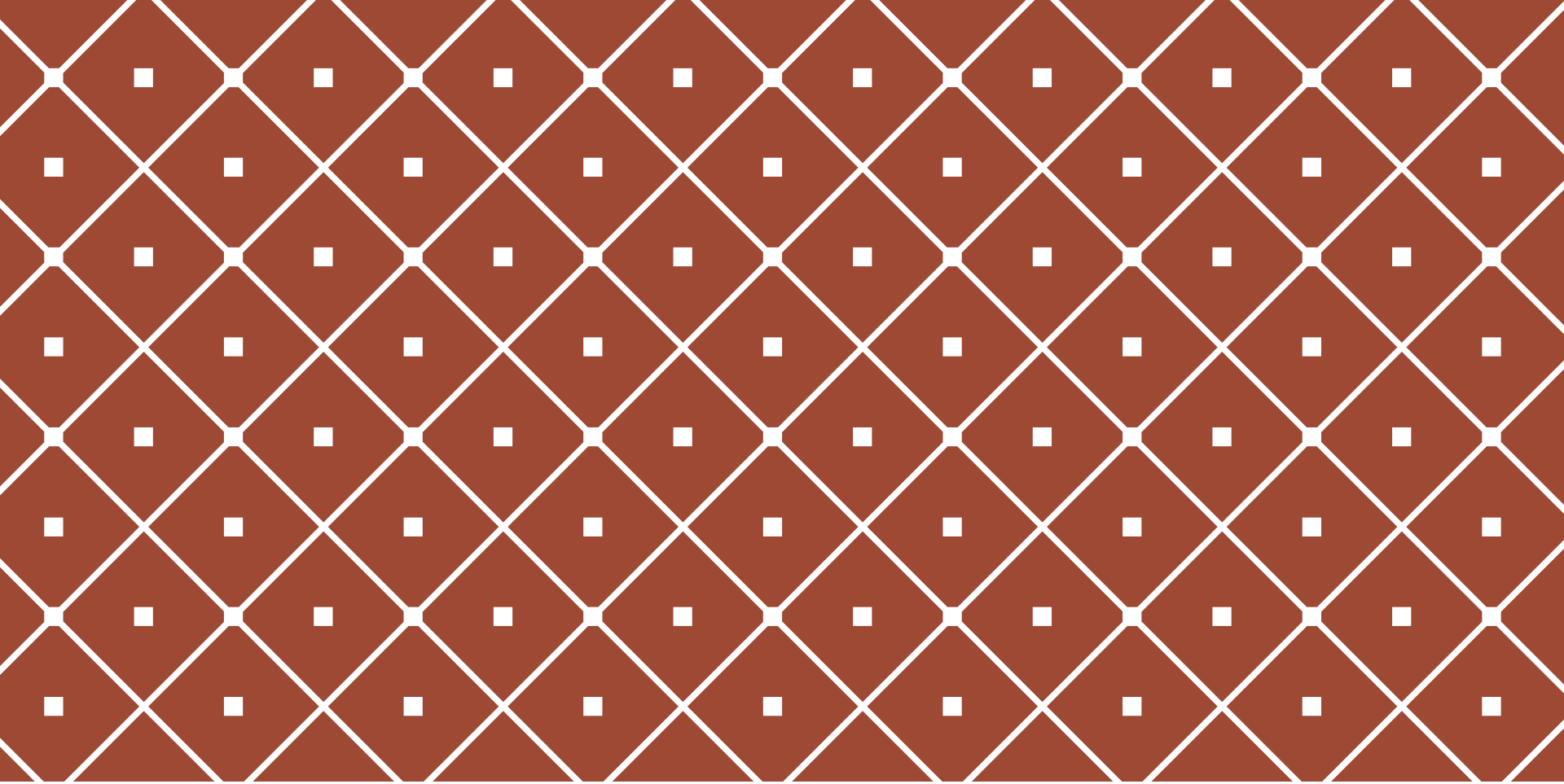
Doubt about whether a client-lawyer relationship still exists should be clarified by the lawyer, preferably in writing, so that the client will not mistakenly suppose the lawyer is looking after the client's affairs when the lawyer has ceased to do so.

RULE 1.3: DILIGENCE – COMMENT 4

[4]…**For example,** if a lawyer has handled a judicial or administrative proceeding that produced a result adverse to the client and the lawyer and the client have not agreed that the lawyer will handle the matter on appeal, the lawyer **must** consult with the client about the **possibility of appeal** before relinquishing responsibility for the matter.

RULE 1.3: DILIGENCE – COMMENT 5

[5] To prevent neglect of client matters in the event of a sole practitioner's death or disability, the duty of diligence **may require** that each **sole practitioner** prepare a **plan,** in conformity with applicable rules, that designates **another competent lawyer** to review client files, notify each client of the lawyer's **death or disability,** and determine whether there is a need for immediate protective action.



MALPRACTICE | RULE 1.8

RULE 1.8(H) - REVIEW

(h) A lawyer shall **not:**

(1) make an agreement **prospectively limiting the lawyer's liability** to a client for malpractice unless the client is independently represented in making the agreement; or

(2) **settle** a claim or potential claim for such liability with an **unrepresented client** or former client unless that person is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel in connection therewith.

MALPRACTICE

"Legal Malpractice" refers to the attorney's civil liability to a client or other injured person for professional misconduct or negligence.

Malpractice actions differ from disciplinary actions

- Civil court, not disciplinary hearing
- Attorney's adversary = injured person, not a disciplinary authority
- Purpose = obtain compensation for injured, not punish attorney/protect public

MALPRACTICE

Legal Theories available to Plaintiff

- Intentional tort
  - Example: misuse of funds, abuse of process or misrepresentation.
- Breach of Fiduciary Duty
- Breach of Contract
  - Express or implied
- Unintentional tort – "ordinary negligence"
  - Most common theory
  - Requires proof of: duty of care, breach of that duty, causation and damages.

MALPRACTICE

Negligence: Duty of Care

Attorney owes a duty of care to client

"Client" may include a person that simply asks the attorney for legal help, if the attorney does not decline to give the help, and if the attorney knows or should know that the person will reasonably rely on the attorney to give the help.

Does an attorney owe a duty to a non-client?

- Prospective client
- Invited reliance
- Non-client, or Breach of fiduciary duty by client

MALPRACTICE - STANDARD OF CARE?

If the attorney is a **general practitioner,** then the standard of care is the skill and knowledge ordinarily possessed by attorneys under similar circumstances.

If the attorney purports to be a **specialist,** or acts in a specialized area of law, then the attorney must exercise the skill and knowledge possessed by attorneys who practice that specialty.

Relevant geographic area = jurisdiction (usually the state); Lawyers in rural areas are held to the same standard as lawyers in urban areas

MALPRACTICE - STANDARD OF CARE?

Breach of the Duty of Care

Lawyers are not liable for "mere errors in judgment." Lawyers will not be liable when acting in good faith and honest belief that his advice and acts are well-founded and in the best interest of his client

Applies to circumstances where an attorney fails to know the settled principles of law

MALPRACTICE - CAUSATION

Actual Cause

- "But for" : Proof that the injury would not have happened but for the defendant's negligent act; or
- "Substantial Factor" : where several acts unite to cause an injury and any one of them alone would have been sufficient to cause it.

Proximate Cause

- A plaintiff must also prove proximate cause –that it is fair to hold defendant liable for unexpected injuries or for expected injuries that happen in unexpected ways

MALPRACTICE - DAMAGES

Legal malpractice plaintiffs usually seek money for their injuries

Types of Damages

- Direct Damages
- Consequential damages
  - Loss that flows indirectly but foreseeably from the defendant's negligence.

MALPRACTICE - DEFENSES

The attorney reasonably believed that the action was required by law or a legal ethics rule.

Comparative or contributory negligence

Assumption of the risks and failure to mitigate

MALPRACTICE - DEFENSES

Statute of Limitations

- Does not run on a client's claim while the lawyer continues to represent client
- Does not start to run until the lawyer discloses the supposed malpractice to the client, or the client knows—or reasonably should know– that the malpractice occurred.
- Does not start to run until the alleged malpractice significantly injures the plaintiff.

MALPRACTICE – VICARIOUS LIABILITY

A law firm is civilly liable for injuries caused by an employee or principal of the firm who was acting in the ordinary course of the firm's business, or with actual or apparent authority

If the law firm is organized as a partnership without limited liability, each partner is liable jointly and severally with the firm. (Vicarious liability)

Limited liability firms - A limited liability firm remains vicariously liable for injuries caused by an employee or principal, but the principals of the firm are generally not personally liable for the negligence or misconduct in which they did not participate personally or as supervisors.

MALPRACTICE & LAW FIRM PRIVILEGE

Until recently, the majority view was that if a current outside client threatened its firm with a malpractice claim, the attorney-client **privilege did not apply** to the consultations between the firm members representing the client and in-house counsel responsible for issues such as ethics and risk management.

Thus, in any subsequent malpractice litigation, the former client could discover any written records of the internal consultations and depose firm members about related oral communications. NOTE: a few recent decisions have started a trend in the other direction.

MALPRACTICE – INSURANCE

The ABA Model Rules do **not** require lawyers to carry malpractice; however, a growing minority of states require lawyers to tell potential clients if they do or do not carry it.

- Approximately half of the states now require lawyers to disclose whether they carry malpractice insurance.

Different types of policies – high deductibles, caps on coverage, etc. You get what you pay for.

MALPRACTICE – INSURANCE

OCCURRENCE POLICIES (USED TO BE COMMON) – covered lawyers for **acts or omissions during the policy term,** regardless of when the claim was asserted.

"CLAIMS MADE" POLICIES (MODERN) – covers the lawyer for unforeseen **claims made during the policy period,** no matter when the incident occurred. If the lawyer has changed jobs or insurers, she may need supplemental "prior acts" coverage to prevent gaps in policy applicability.

Introduction & Overview

Law firms can typically expect a surge in malpractice suits when their own clients experience a drop in revenue or reduced earnings. Thus, in past recessions, there had been a noticeable uptick in claims filed against lawyers.

The economic downturn of 2007-2009 was no different. Distressed companies sued their legal counsel as a way of recovering losses; however, this time around it seemed much of this claim activity was slower to develop.

For one, many law firm clients first sought relief from other parties involved in failed business transactions or real estate deals. Only after these actions did not result in full recovery, did they turn their sights on their lawyers.

Secondly, many such claims have a fairly long development pattern and aren't fully recognized as claims until years after the original error or assumed loss.

As a result, the law firm market still experienced an uptick both in the frequency and severity of malpractice claims in 2012.

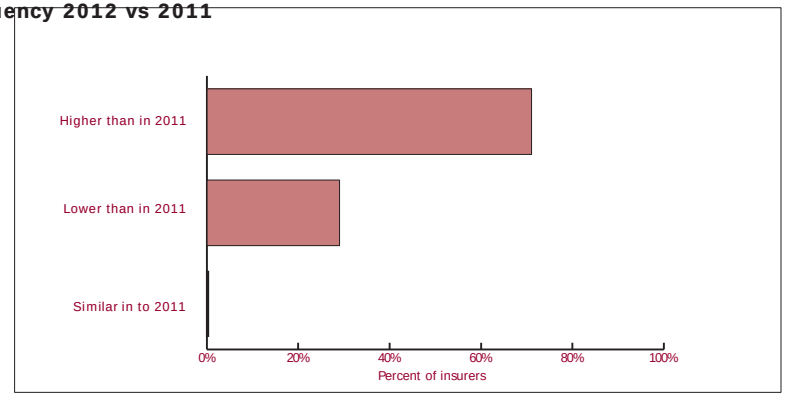
Seven of the leading insurance companies that write Lawyers' Professional Liability Insurance coverage participated in this year's survey, including AIG/Lexington, Alterra, AXIS, Beazley, CNA, Ironshore, and Swiss Re Corporate Solutions.

Together, they insure approximately **80 percent of the AM Law 250 firms**, with four of the seven insurance companies insuring 50 percent or more of the AM Law 100 firms. We are grateful for their participation in our study and are pleased to present the findings in this report.

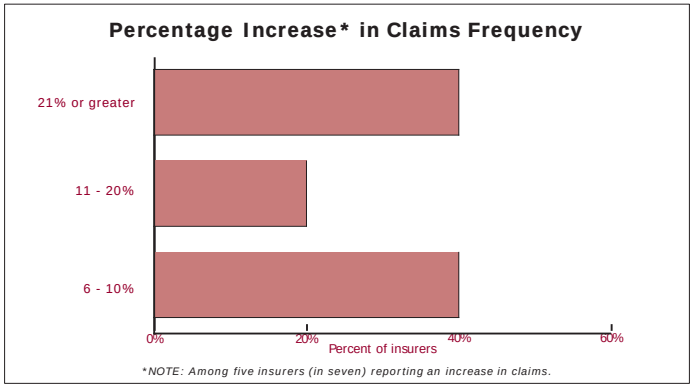
(1) Legal malpractice claims frequency is rising.

Although the incidence of legal malpractice claims appeared to be declining at the start of 2012, the number of new malpractice claims brought against law firms actually has trended upward since then. This generally fits the pattern of more claims as in previous post-recession periods (although some might say that the claims were slower to be filed than in past recessionary periods). Of the insurers participating in this year's survey, 71 percent indicated the number of new claims filed in 2012 is higher than in the prior year.

Lawyers' Professional Liability Claims Frequency 2012 vs 2011



Unfortunately, for some insurers, claims frequency is up markedly. Of those insurers experiencing an increase in law firm malpractice claims, 40 percent indicated frequency increased by 21 percent or more, while another 20 percent pegged the increase at 11 – 20 percent, and 40 percent saw an increase of 6 – 10 percent.



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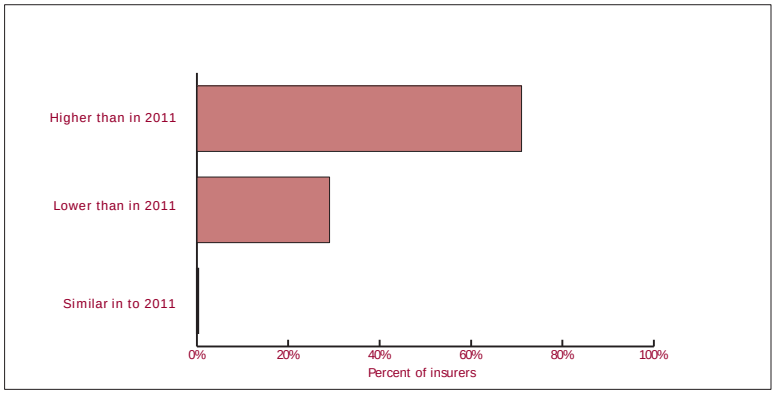

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