

# 2011 ANNUAL REPORT

Oregon  
State  
Bar

PROFESSIONAL LIABILITY FUND  
[www.osbplf.org](http://www.osbplf.org)



**By Ira R. Zarov**  
*PLF Chief Executive  
Officer*

As Oregon lawyers are aware, there was no increase in the 2012 assessment for the PLF's Primary Claims Made Plan. The 2011 increase successfully stabilized the assessment in the face of the significant challenges identified in the PLF 2010 Annual Report. The identified challenges included increases in the number of claims filed (frequency), increases in the cost of claims (severity) – especially defense costs – a difficult investment environment, and concerns that pending claims might cost more than the current estimates.

In 2011, the PLF had 914 claims. This was the fourth consecutive year with a claim count above 900, a number that had previously been reached only one time in PLF history. Based on the successive years of high claims, it appears that elevated claim counts are, at a minimum, a feature of the current economy and, more likely, a permanent part of the landscape. Although it is early in the year, the projected claim count for 2012 is in the range of 930 to 940 claims.

Fiscally, the PLF suffered a loss of \$3.1 million in 2011, attributable to poor investment performance. Each year, the PLF routinely projects and budgets conservative estimates of investment gains. The PLF continually monitors its investment portfolio, and a historical look at investment results indicates that investments have regularly produced substantial income. In some years, strong investment returns have

been sufficient to cover all PLF administrative costs. Last year, however, investments did not meet projections.

The positive aspect of the 2011 fiscal picture is that claim costs and operating expenses were within the budgeted amounts. Nonetheless, the last several years have seen a continuing upward trend in defense costs. As with increased claim frequency, this trend appears to be sustained and not the result of anomalous factors. The average cost per claim reflects this trend, rising from \$19,000 in 2009 to \$19,500 in 2010 and to \$20,000 in 2011. The increase can be attributed almost entirely to defense costs.

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## PLF Statistics

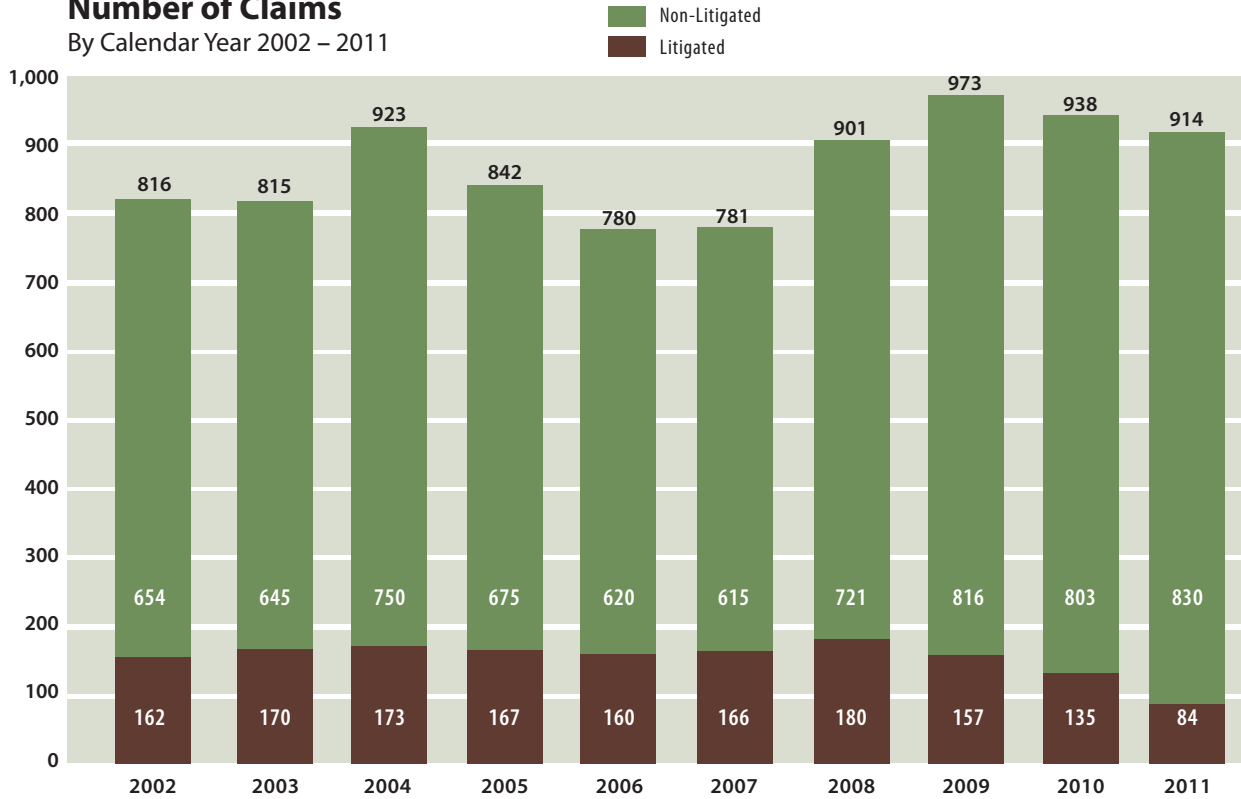
1997 – 2012

	Assessments	Claims
1997	\$2200	769
1998	\$2100	761
1999	\$1900	830
2000	\$1800	798
2001	\$1800	775
2002	\$2200	816
2003	\$2600	815
2004	\$2600	923
2005	\$3000	842
2006	\$3000	780
2007	\$3200	781
2008	\$3200	901
2009	\$3200	973
2010	\$3200	938
2011	\$3500	914
2012	\$3500	932*

\* Extrapolated

## Number of Claims

By Calendar Year 2002 – 2011



## Average Cost per Claim

By Year of Reporting



## SUMMARY FINANCIAL STATEMENTS (Unaudited)

(Primary and Excess Programs Combined)

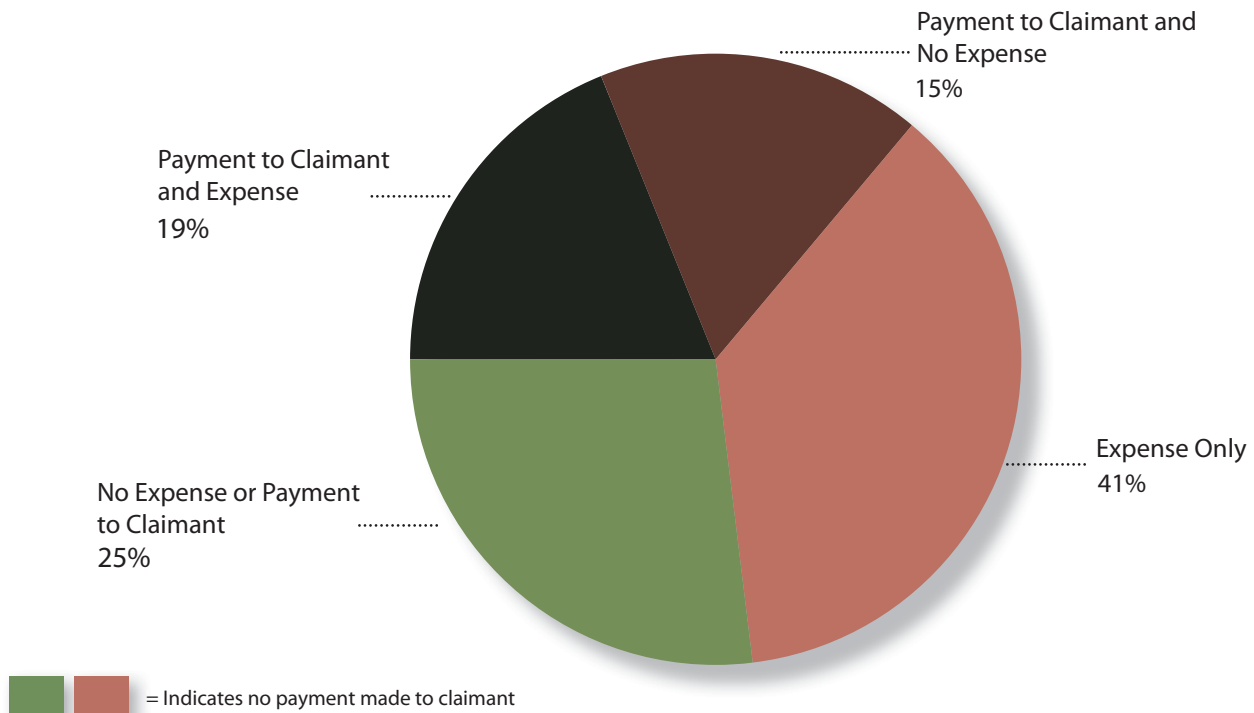
	<u>12/31/2011</u>	<u>12/31/2010</u>
<b>ASSETS</b>		
Cash and Investments at Market	\$32,717,259	\$33,415,582
Other Assets	1,284,207	1,293,798
<b>TOTAL ASSETS</b>	<b><u>\$34,001,466</u></b>	<b><u>\$34,709,380</u></b>
<b>LIABILITIES AND FUND EQUITY</b>		
Estimated Liabilities for Claim		
Settlements and Defense Costs	\$34,100,000	\$31,900,000
Other Liabilities	682,634	459,949
Fund Equity	(781,168)	2,349,431
<b>TOTAL LIABILITIES AND FUND EQUITY</b>	<b><u>\$34,001,466</u></b>	<b><u>\$34,709,380</u></b>
	<b>For the Year Ending December 31</b>	
	<u>2011</u>	<u>2010</u>
<b>REVENUE</b>		
Assessments	\$24,465,415	\$22,244,406
Investment and Other Income	643,006	5,119,157
<b>TOTAL REVENUE</b>	<b><u>\$25,108,421</u></b>	<b><u>\$27,363,563</u></b>
<b>EXPENSE</b>		
Administrative	\$7,302,307	\$6,791,936
Provision for Settlements	9,649,812	9,346,993
Provision for Defense Costs	11,286,901	10,595,590
<b>TOTAL EXPENSE</b>	<b><u>\$28,239,020</u></b>	<b><u>\$26,734,519</u></b>
<b>NET INCOME</b>	<b><u>(\$3,130,599)</u></b>	<b><u>\$629,044</u></b>

These statements have been adjusted to remove prepaid assessments (e.g., payments of the 2012 assessment received in December of 2011). A complete copy of the December 31, 2010, audit report is available upon request.

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## Closed Claims

January 1, 2002 – December 31, 2011

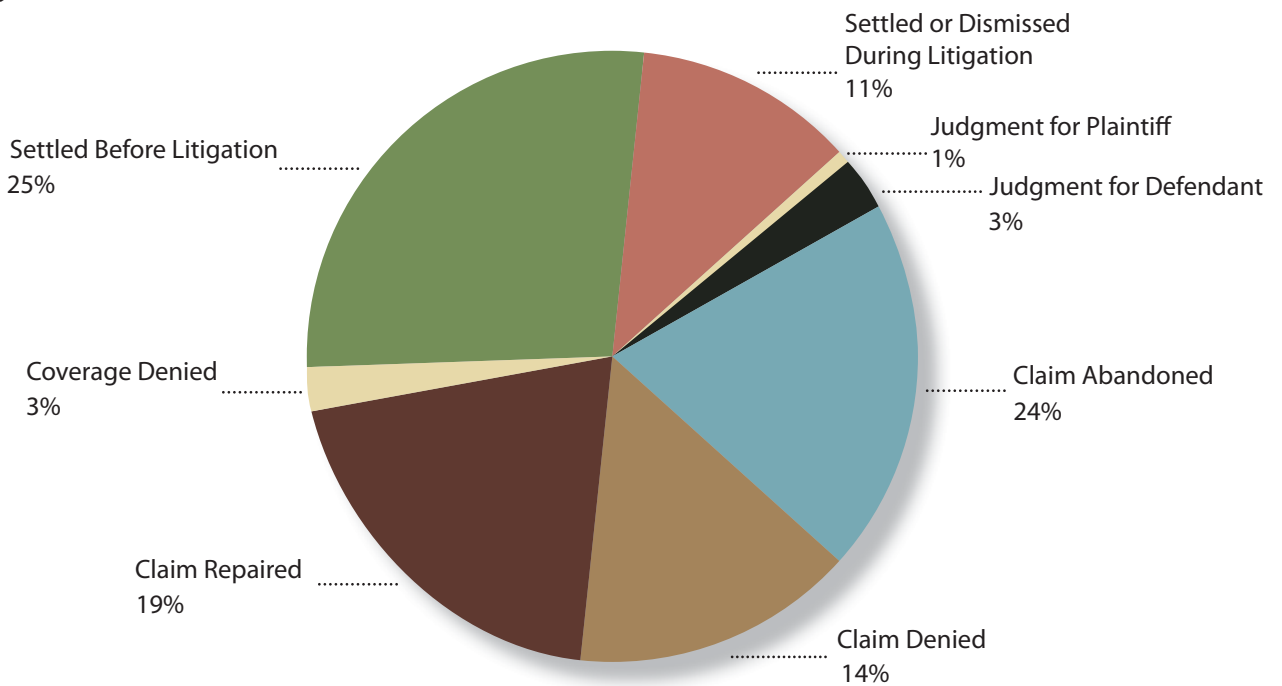


Expense = Cost of outside counsel, court costs, experts, and other payments made other than to claimants

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## Disposition of Closed Claims

January 1, 2002 – December 31, 2011



## Cost of Claims by Area of Law

January 1, 2002, to December 31, 2011

AREA OF LAW	PERCENT INDEMNITY PAID	INDEMNITY PAID	PERCENT EXPENSES PAID	EXPENSES PAID	TOTAL PAID
Personal Injury	19%	\$13,120,368	12%	\$6,920,921	\$20,041,289
Real Estate	16%	\$11,290,833	13%	\$7,335,737	\$18,626,570
Business Transactions / Commercial Law	13%	\$9,254,368	16%	\$8,938,559	\$18,192,927
Estate Planning & Estate Tax	12%	\$8,150,315	10%	\$5,713,448	\$13,863,763
Domestic Relations / Family Law	9%	\$6,219,726	9%	\$4,966,377	\$11,186,103
Bankruptcy & Debtor-Creditor	9%	\$5,974,215	9%	\$4,761,662	\$10,735,877
Securities	2%	\$1,415,980	4%	\$2,476,992	\$3,892,972
Workers' Compensation / Admiralty	4%	\$2,639,752	2%	\$874,117	\$3,513,869
Criminal	2%	\$1,544,697	3%	\$1,670,449	\$3,215,146
Tax	1%	\$665,169	3%	\$1,641,798	\$2,306,967
Other	13%	\$8,859,723	19%	\$10,540,135	\$19,399,858
	<b>100%</b>	<b>\$69,135,146</b>	<b>100%</b>	<b>\$55,840,195</b>	<b>\$124,975,341</b>

## Frequency of Claims by Area of Law

January 1, 2002, to December 31, 2011

AREA OF LAW	PERCENT OF CLAIMS	NUMBER OF CLAIMS
Personal Injury	16%	1,306
Domestic Relations / Family Law	16%	1,270
Bankruptcy & Debtor-Creditor	12%	986
Real Estate	11%	890
Estate Planning & Estate Tax	11%	834
Business Transactions / Commercial Law	9%	681
Criminal	7%	546
Workers' Compensation / Admiralty	2%	193
Tax	1%	60
Securities	1%	53
Other	14%	1,107
	<b>100%</b>	<b>7,926</b>

The increase in defense costs is a national trend. Industry wisdom attributes the increase to higher defense counsel rates, the demands of electronic discovery, and the increasing complexity of claims. In PLF experience, the latter of these appears to be the most significant factor. A fourth factor also appears to be at work. In recent years, more out-of-state claims have been brought against Oregon covered parties. Out-of-state litigation is simply more costly.

We feel that an experienced, highly qualified claims department reduces the cost of outside counsel. Several claims attorneys have retired in recent years, necessitating additional hiring. Richard Wyman retired in 2010 and Bill Kwitman retired in 2011, both after 20-plus years with the PLF. We expect additional retirements over the next two years. Two new claims attorneys have been hired, Pamela Stendahl, formerly with Bodyfelt Mount LLP, and Holli Houston, formerly with Kilmer, Voorhees & Laurick, PC. Both were members of the PLF defense panel. Given the sustained increase in frequency and the increasing complexity of claims, the PLF will be hiring another claims attorney in the middle of 2012.

In conclusion, the cost of 2011 claims was consistent with actuarial projections; defense costs increased; frequency remained high; and a shortfall in investment returns resulted in a moderate loss.

## **THE 2013 PRIMARY PROGRAM ASSESSMENT**

When the 2012 assessment was being determined in 2011, the PLF Board of Directors (Board) expressed concern that the slow economic recovery could negatively impact investment performance. The Board was also concerned that the empirical nexus between difficult financial times and increased claim frequency and severity would increase PLF liabilities. To a large degree, both of these concerns were realized in 2011. Although these results were not severe enough to require an increase in the 2012 assessment, the same dynamic potentially exists as we face 2013. However, we are pleased that the performance of the financial markets has been positive in the first quarter of 2012, and frequency seems to have stabilized. Claim costs, however, continue to be high. We hope the positive trends will continue, but it is difficult to make any prediction at this time.

As the process of determining the 2013 assessment unfolds, the Board will consider the results of the mid-2012 actuary report, the claim frequency rate, investment returns, and any identifiable trends. Of these factors, the cost of claims as projected in the actuary report will be the most important. Although the PLF may face significant external headwinds, the Board is committed to making every effort to maintain the assessment at its current rate in 2013.

## **HOW IS THE PLF DOING WITH CLAIMS HANDLING?**

Historically, covered parties who returned the PLF claims-handling evaluation form have been overwhelmingly satisfied with the performance of the PLF claims department. Although past evaluations set a high bar, the results reported in the 2011 evaluations maintained their extraordinarily positive character.

The claims-handling evaluation form asks whether covered parties were satisfied, very satisfied, or not satisfied with their total experience, the performance of the claims attorney, and the performance of the defense counsel, if one was assigned. In 2011, the PLF closed 1,033 claims and received 456 responses (a 44% response rate).

The performance of claims attorneys was particularly noteworthy, with 92.51% of respondents stating that they were “very satisfied” with how their claim was handled, 7.27% stating that they were “satisfied,” and only 0.22% (1 response) “not satisfied” – remarkable numbers. In total, 99.78% of the respondents were “very satisfied” or “satisfied” with the PLF claims attorneys’ handling of the claim.

Covered parties’ satisfaction with defense counsel was also very high. Among the 267 covered parties who responded to the questionnaire about defense counsel, 89.14% were “very satisfied,” 9.36% were “satisfied,” and just 1.5% were “unsatisfied.” (The fewer responses regarding defense counsel reflect the fact that many cases are handled by the PLF claims attorneys without being assigned to defense counsel.)

The combined average responses for claims attorneys and defense counsel totaled 88.16% “very satisfied” and 11.18% “satisfied” – 99.34% either “very satisfied” or “satisfied.”

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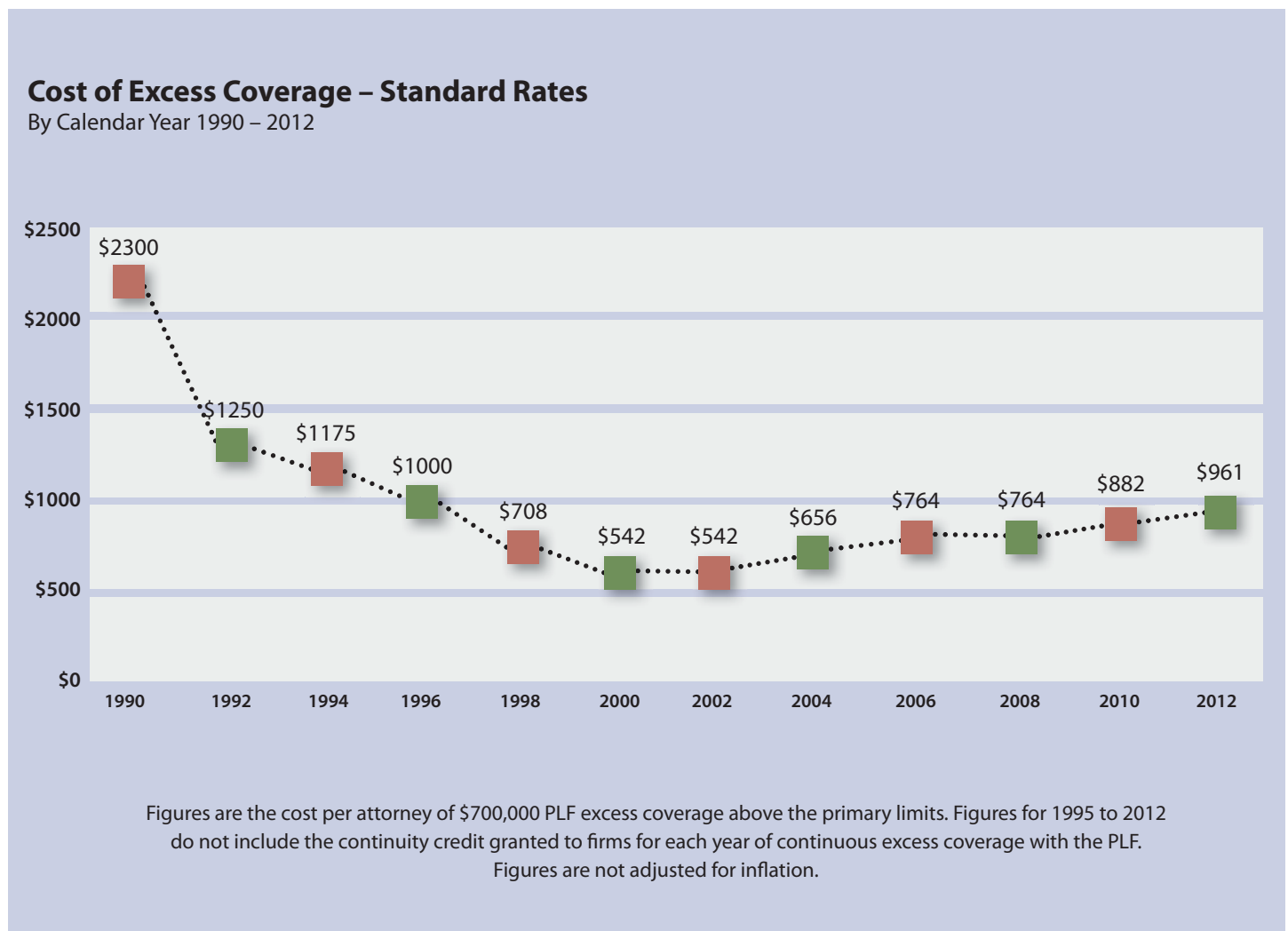
## WHAT IS THE PLF DOING IN THE AREAS OF PERSONAL AND PRACTICE MANAGEMENT ASSISTANCE?

The PLF continues to provide free and confidential personal and practice management assistance to Oregon lawyers. These services include legal education, on-site practice management assistance (through the PLF’s Practice Management Advisor Program), and personal assistance (through the Oregon Attorney Assistance Program).

Personal and practice management assistance seminars in 2011 included programs on software updates, employment law, trust accounting, organizing e-mail and practicing in eCourt, technology tips, practice management, health insurance, retirement, stress hardiness, and compassion fatigue. In addition, the

PLF continues to offer free audio and video programs (currently 70 programs available), publications (*In Brief* and *In Sight*), over 351 practice aids, and the following handbooks: *Planning Ahead: A Guide to Protecting Your Clients’ Interests in the Event of Your Disability or Death* (2009), *A Guide to Setting Up and Running Your Law Office* (2009), *A Guide to Setting Up and Using Your Lawyer Trust Account* (2011), and *Oregon Statutory Time Limitations* (2010). Our practice aids and handbooks are all available free of charge. You can download them at [www.osbplf.org](http://www.osbplf.org), or call the Professional Liability Fund at 503-639-6911 or 800-452-1639.

During 2011, the PLF presented video replays of the following programs: Health Insurance Today, at 65 and in Retirement; 2010 Practice Management Update: An *continued on page 8*





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Introduction to Internet-Based Practice Management Software; Trust Accounting: Your Financial and Ethical Responsibilities; Stress Hardiness for Lawyers and Judges; Lawyers Using iPads; Survival Tips for Organizing Your E-mail and Practicing in eCourt; Legal Productivity: Seven Ways to Make Your Law Firm More Efficient; Practicing in the Cloud from Intake to Invoicing; and Less Paper (The Paperless Office). These video replays were presented in Astoria, Bend, Coos Bay, Eugene, Grants Pass, Klamath Falls, La Grande, Medford, Newport, Pendleton, Redmond, Roseburg, Salem, and Vale, Oregon.

**Practice Management Advisor Program.** Our practice management advisors (PMAs), Dee Crocker, Beverly Michaelis, and Sheila Blackford, answer practice management questions and provide information about effective systems for conflicts of interest, mail handling, billing, trust accounting, general accounting, time management, client relations, file management, and software. In a recent survey about our PMAs, 100% of those who responded said they would recommend the PLF's PMA services to others. In addition, 100% said they were either satisfied or very satisfied with reaching a PMA by telephone; amount of time between the request for an appointment and when the appointment took place; the PMA's ability to explain information clearly; how the lawyer was treated by the PMA (patience, courtesy, etc.); helpfulness of the information; follow up; and overall level of satisfaction with service. In 2011, the PMAs presented seminars all over the state on practice management. In addition to these presentations, the PMAs also provide in-house CLEs for law firms.

**Oregon Attorney Assistance Program.** The Oregon Attorney Assistance Program (OAAP) attorney counselors, Meloney C. Crawford, Shari R. Gregory, Mike Long, and Douglas Querin, continue to provide assistance with alcohol and chemical dependency; burnout; career change and satisfaction; depression, anxiety, and other mental health issues; stress management; and time management. In 2011, the OAAP sponsored addiction support groups, lawyers-in-transition meetings, career workshops, a depression support group, a support group for lawyers going through divorce, an Inner Peace workshop, a women's support group, a support group for adult children of dysfunctional families, and a group for overcoming procrastination. In

addition, the OAAP attorney counselors assisted over 658 lawyers with personal issues in 2011, including alcoholism, drug addiction, career satisfaction, retirement, and mental health issues.

## CHANGES TO THE COVERAGE PLAN

In 2011, the PLF Board and the Oregon State Bar (OSB) Board of Governors approved three changes to the PLF Primary Coverage Plan for 2012. The first change provides clarity between the meaning of the plan language and Comments to Section IV.1.b(2).

Section IV.1.b(2) was revised as follows (additions in italics and bold; deletions noted by strikethrough):

(2) Two or more CLAIMS that are SAME OR RELATED CLAIMS, whenever made, will all be deemed to have been first made at the time the earliest such CLAIM was first made. ~~However, this provision will not apply to YOU if YOU have no other coverage from any source applicable to the CLAIM (or that would have been applicable but for exhaustion of limits under that coverage).~~ ***This provision will apply to YOU only if YOU have coverage from any source applicable to the earliest such SAME OR RELATED CLAIM (whether or not the available limits of liability of such prior policy or plan are sufficient to pay any liability or CLAIM).***

A second change was needed to further clarify how PLF coverage will respond to claims involving the administrative aspects of running a law firm. To accomplish this, changes were made to the Comments of Section III.3 and to the plan language and Comments of Section V, Exclusion 16. These changes clarify the definitions of "professional services," "covered activity," and "damages."

The Comments to Section III.3 were revised as follows (additions in italics and bold; deletions noted by strikethrough):

*Professional Services. To qualify for coverage under Section III.1 and III.2b, the act, error or omission causing YOUR liability must be committed "in rendering professional services in YOUR capacity as an attorney, or in failing to render professional services that should have been ren-*

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dered in YOUR capacity as an attorney.” This language limits coverage to those activities commonly regarded as the rendering of professional services as a lawyer. This language, in addition to limiting coverage to YOUR conduct as a lawyer, is expressly intended to limit the definition of COVERED ACTIVITY so that it does not include YOUR conduct in carrying out the commercial or administrative aspects of law practice. **Examples of commercial or administrative activities could include:** ~~such as collecting fees or costs;; guaranteeing that the client will pay third parties (e.g., court reporters, experts or other vendors) for services provided;; or~~ depositing, endorsing or otherwise transferring negotiable instruments;; **depositing or withdrawing monies or instruments into or from trust accounts; or activities as a trustee that require no specialized legal skill or training, such as paying bills on time or not incurring unnecessary expenses.** The foregoing list of commercial or administrative activities is not exclusive, but rather is illustrative of the kinds of activities that are regarded as part of the commercial aspect of law (not covered), as opposed to the rendering of professional services (covered).

**Example.** A client purports to hire the Covered Party and provides the Covered Party with a cashier’s check, which the Covered Party deposits into her firm’s client trust account. The Covered Party, on the client’s instructions, wire-transfers some of the proceeds of the cashier’s check to a third party. The cashier’s check later turns out to be forged and the funds transferred out of the trust account belonged to other clients. The Covered Party is later sued by a third party such as a bank or other client arising out of the improper transfer of funds. The Covered Party’s conduct is not covered under her PLF Plan. **Placing, holding or disbursing funds in lawyer trust accounts are not considered professional services for purposes of the PLF Plan.**

Section V, Exclusion 16 was revised as follows (additions in italics and bold; deletions noted by strikethrough):

[GENERAL TORTIOUS CONDUCT EXCLUSIONS]

**16.** This Plan does not apply to any CLAIM against any COVERED PARTY for:

a. Bodily injury, sickness, disease, or death of any person;

b. Injury to, loss of, ***loss of use of,*** or destruction of any real, personal, or intangible property ~~or loss of use thereof;~~ or

c. Mental anguish or emotional distress in connection with any CLAIM described under Subsections a or b.

This exclusion does not apply to any CLAIM made under ORS 419B.010 if the CLAIM arose from an otherwise Covered Activity.

The comments to the exclusion have also been changed to stay consistent with the above change. Specifically, the comments now read:

*Subsection b of this exclusion is intended to encompass a broad definition of property. For these purposes, property includes real, personal and intangible property (e.g. electronic data, financial instruments, **money,** etc.) held by an attorney. However, Subsection b is not intended to apply to the extent the loss or damage of property materially and adversely affects an attorney’s performance of professional services, in which event the consequential damages resulting from the loss or damage to property would be covered. For the purposes of this Comment, “consequential damages” means the extent to which the attorney’s professional services are adversely affected by the property damage or loss.*

The third change to the Plan includes a new exclusion created to address the loss, compromise, or breach of confidential or private information held by a covered party. The new Exclusion 22 and Comments have been added to Section V. They read as follows:

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[CONFIDENTIAL OR PRIVATE DATA EXCLUSION]

22. This Plan does not apply to any CLAIM arising out of or related to the loss, compromise or breach of or access to confidential or private information or data. If the PLF agrees to defend a SUIT that includes a CLAIM that falls within this exclusion, the PLF will not pay any CLAIMS EXPENSE relating to such CLAIM.

#### COMMENTS

*There is a growing body of law directed at protecting confidential or private information from disclosure. The protected information or data may involve personal information such as credit card information, social security numbers, drivers licenses, or financial or medical information. They may also involve business-related information such as trade secrets or intellectual property. Examples of loss, compromise, breach or access include but are not limited to electronically stored information or data being inadvertently disclosed or released by a Covered Party; being compromised by the theft, loss or misplacement of a computer containing the data; being stolen or intentionally damaged; or being improperly accessed by a Covered Party or someone acting on his or her behalf. However, such information or data need not be in electronic format, and a data breach caused through, for example, the improper safeguarding or disposal of paper records would also fall within this exclusion.*

*There may be many different costs incurred to respond to a data breach, including but not limited to notification costs, credit monitoring costs, forensic investigations, computer reprogramming, call center support and/or public relations. The PLF will not pay for any such costs, even if the PLF is otherwise providing a defense.*

#### EXCESS PROGRAM

The PLF Excess Program participation remained stable. For the 2011 plan year, 705 firms with a total of 2,317 lawyers purchased PLF excess coverage. Only two changes were made to the 2011 PLF Excess Claims Made Plan for 2012. The changes follow those made to Section IV of the PLF 2011 Primary Claims Made Plan for 2012 regarding same or related claims and the addition of the exclusion related to the loss of confidential data.

As in the past, the PLF Excess Program is entirely reinsured and financially independent from the PLF's mandatory Primary Coverage Program. Because of the success of the PLF Excess Program, we are able to negotiate very favorable reinsurance rates. That savings is passed on to Oregon lawyers in lower excess coverage rates. We continue to offer continuity credits of 2% for each year of participation (up to 20%).

#### CHANGES IN PLF BYLAWS AND POLICIES

No changes were made in 2011 for the 2012 PLF Bylaws and Policies.

#### FORECAST FOR THE FUTURE

Many factors underlie the process of setting the annual PLF assessment – projections of income, operational costs, projections of the number of claims, defense expenses related to claims, and indemnity paid on claims. Of these, only operational costs, which are a small percentage of the total budget, can be predicted with certainty. Currently, claim frequency is high but within the predicted range, defense expenses have risen, and indemnity costs appear to be remaining stable. A definitive analysis will not be known until the midyear actuarial report is received. Experience has shown that legal malpractice claims are volatile, as are the economic times; accordingly, circumstances may change over the remainder of the year. The Board will carefully monitor developments as it awaits the midyear actuarial report.

If you have questions or suggestions about the PLF, please contact me.

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