

# PROFESSIONAL COUNSEL<sup>SM</sup>

ADVICE AND INSIGHT INTO THE PRACTICE OF LAW<sup>®</sup>

## Family Law – Professional Liability Fact Sheet

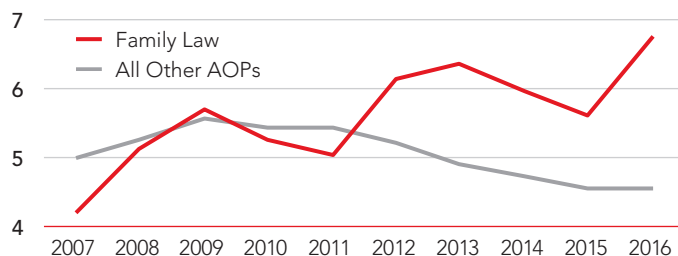
### Description of Practice Area

As an area of practice, family law includes all litigation and legal services related to antenuptial and domestic relationships, separation and divorce, alimony and child support, child custody, surrogacy and adoption.

### Frequency of Family Law Claims

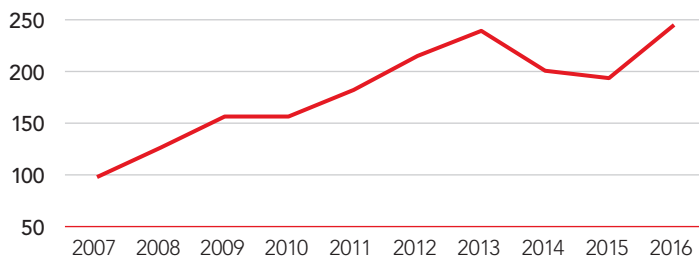
CNA claim frequency in the family law area of practice has been consistently higher when compared to all other areas of practice in the last six years. In fact, the most recent data reflects an upward trajectory of family law claims.

#### Historical Claim Frequency (per 1,000 attorneys)



Claim counts arising from family law have increased from 98 incurred claims in 2007 to 245 incurred claims in 2016.

#### Count of Family Law Claims Incurred Per Year



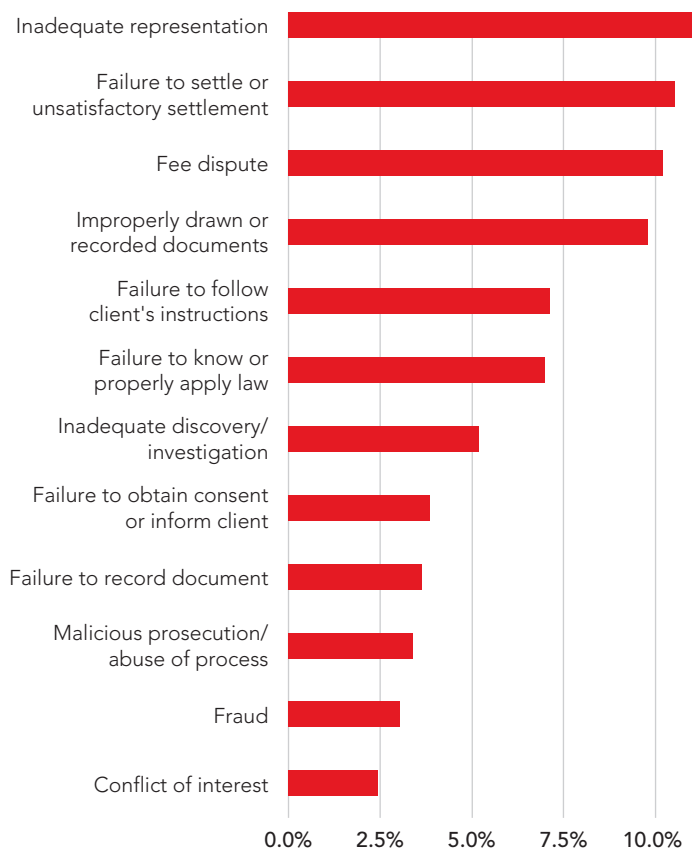
### Quick Stats

- Average of 498 claims reported per year
- Average of 181 claims paid per year
- Average cost per claim: \$65,755
- Average yearly cost of all family law claims: \$11.9 million
- #4 claims area by count

Source: CNA Lawyers Professional Liability Claim Data 2007-2016

### Top Causes of Family Law Claims

This chart represents the most common claim allegations against family law practitioners between 2007 and 2016. Disciplinary grievances are excluded from the data, which, if included, would represent more than one third of total reported incidents in the area of practice over that time.



## Risk Management Tips

### Screen New Clients

Be cautious when a prospective client has been represented by one or more prior attorneys for the same matter. Also be wary of a client who is overly concerned with fees or otherwise indicates an inability to pay. Most states do not permit contingency fees in domestic relations matters, but consider requiring a retainer up front to alleviate long-term financial stress.

### Be Wary of Conflicts

Even where a divorce is uncontested, an attorney cannot ethically represent both parties. Less obvious conflicts involve the prior joint representation of both spouses in a substantially related matter (e.g. estate planning or a real estate transaction). The practice of “conflicting out” potential attorneys—meeting with several attorneys solely to preempt their retention by the other spouse—can result in a disciplinary complaint if not properly recognized.

### Manage Emotions and Expectations

Keep expectations realistic by having frequent discussions about the client’s goals and explaining all possible outcomes. In the interest of obtaining a favorable resolution and avoiding a disciplinary complaint, maintain integrity and civility with opposing counsel, notwithstanding client pressure to the contrary.

### Watch for Substance Abuse or Mental Illness

If a client’s condition hinders his or her ability to participate in the representation, an attorney may be justified in taking certain actions to protect the client’s interests. In some cases, recommending therapy or counseling can pave the way for a more productive attorney-client relationship and a better outcome for the client.

### Maintain Sufficient Communication

Complaints related to inadequate communication arise in all practice areas, but clients in family law representations are often less sophisticated and may be working with an attorney for the first time. Consistent communication and patient, thorough explanations of case developments are therefore vital.

### Select the Right Jurisdiction

Early in the representation, discuss with the client whether geographical connections may permit filing in another state, and both understand and explain to the client why variations in terms of property distribution rules, grounds for divorce, tax laws and trends in custody or alimony awards would merit doing so.



### Document the File

More than in other practice areas, clients in family law representations may insist on courses of action and decline others based upon financial or emotional considerations. Memorialize these discussions, including the stated reasons for the client’s decision and the presented alternatives, to counter potential allegations that the attorney mishandled the case or acted without authority.

### Ensure Adequate Discovery/Investigation

Explore whether informal discovery is appropriate, but recognize where the nature of a client’s assets or the animosity between the parties will not allow for effective representation absent the initiation of formal discovery. Either way, inform the client of potential disadvantages of both strategies and document those discussions.

### Retain Experts if Necessary

Inaccurately valuing a business, trust, or piece of property can form the basis of a malpractice claim. Since most attorneys lack the expertise to produce these calculations on their own, selecting a qualified expert and complying with court rules regarding expert disclosure are critical. Many attorneys wisely turn to specialists for drafting qualified domestic relations orders (QDROs) as retirement plans have grown more complex.

### Draft Prenups Carefully

Even in states where both parties are not required to retain separate counsel, each party should have the time and information necessary to fully consent to the terms of the prenuptial agreement. Pay attention to circumstances indicating undue influence and avoid unconscionable or illegal provisions (e.g. modifications to future child support) that jeopardize overall enforceability.

## CNA Risk Control Resources

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- “Client Intake Procedures: Avoiding Problematic Clients”
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