Improving Information on Legal Malpractice

Lawyers, accustomed to resolving the disputes of others, sometimes find themselves in the unfamiliar role of party when disputes arise out of their performance of professional services. They and their insurers have become more and more concerned about malpractice claims which, they believe, are increasing sharply in number.[1] Such an increase, if indeed there is one, could reflect an increase in negligent conduct and resulting damage, a greater willingness on the part of clients to press claims when dissatisfied with lawyers' services, or a combination of these factors.

Whatever explanation is correct, legal malpractice should not be viewed as simply a business risk to be allocated between the lawyer and his client or spread among a wider group by means of insurance. Malpractice has harmful effects on the legal system itself, and thus should be a subject of more general concern.

The importance of the malpractice problem justifies an effort to discover something about the frequency, costs, and underlying facts of malpractice claims, yet surprisingly little information is actually available. As this Note attempts to demonstrate, the available data lacks the detail and completeness required for measuring the alleged increase in claims and analyzing its causes.

A necessary first step in dealing with legal malpractice, therefore, is to improve the quality and quantity of raw data. To this end, the Note proposes that a set of uniformly defined categories of relevant information be established and that statistics be assembled and made public by the insurance industry under the direction of state insurance commissions. Some specific ways such information might be used in

1. This concern is shown in numerous recent articles dealing with the problem of legal malpractice claims. Some of these articles have appeared in law reviews. *See, e.g.*, Brewster, *Professional Responsibility: The Lawyer's Task of Sisyphus*, 54 MARQ. L. REV. 180 (1971); Wallach & Kelly, *Attorney Malpractice in California: A Shaky Citadel*, 10 SANTA CLARA LAWYER 257 (1970). Others have been published in bar association journals. *See, e.g.*, Blaine, *Professional Liability Claims: An Increasing Concern for Lawyers*, 59 ILL. B.J. 302 (1970); Lynch, *Professional Liability*, BENCH & B. OF MINN., Jan. 1970, at 8. Insurance industry journals have also carried articles on lawyers' professional liability. *See, e.g.*, Denenberg & Huling, *Professional Liability Insurance: The Peril, the Protection and the Price*, 1970 INS. L.J. 389; Rottman & Stern, *Analysis of the Lawyer Malpractice Problem*, 1971 ANNALS OF THE SOC'Y OF CHARTERED PROPERTY & CASUALTY UNDERWRITERS 63. The popular press has also carried discussions of the problem. *See, e.g.*, Falk, *Suing the Lawyer*, Wall St. J., Oct. 10, 1969, at 1, col. 6; *People Suing Their Lawyers—A Growing Trend*, U.S. NEWS & WORLD REPORT, June 7, 1971, at 30.

reducing legal malpractice and its resulting harmful effects are discussed. It is argued, finally, that current developments in the insurance industry demonstrate the feasibility of the proposed improvements.

I. The Significance of Legal Malpractice

Legal malpractice bears many similarities to other torts. Certainly, the governing principles are similar to those in other types of negligence law.[2] The attorney's relationship with his client[3] imposes a duty to act with ordinary professional skill and care;[4] and the attorney is legally liable for injuries proximately caused by breach of that duty.[5]

Legal malpractice differs significantly from other torts, however, in its particularly close relationship to the functioning of the legal system. Lawyers' negligence constitutes a malfunction of the system through

2. Ishmael v. Millington, 241 Cal. App. 2d 520, 50 Cal. Rptr. 592 (Dist. Ct. App. 1966). A contract theory may sometimes be applied, but this does not alter the standard of care required. Lucas v. Hamm, 56 Cal. 2d 583, 592, 364 P.2d 685, 689, 15 Cal. Rptr. 821, 825 (1961), *cert. denied*, 368 U.S. 987 (1962); Floro v. Lawton, 187 Cal. App. 2d 657, 672-73, 10 Cal. Rptr. 98, 107 (Dist. Ct. App. 1960); Licata v. Spector, 26 Conn. Supp. 378, 380, 225 A.2d 28, 29 (C.P. 1966); Lindner v. Eichel, 34 Misc. 2d 840, 843-44, 232 N.Y.S.2d 240, 244-45 (Sup. Ct. 1962), *aff'd*, 17 App. Div. 2d 735, 233 N.Y.S.2d 238 (1962). Whether the action is in contract or tort may, however, determine what statute of limitations applies. Neel v. Magana, Olney, Levy, Cathcart & Gelfand, 6 Cal. 3d 176, 180-82, 491 P.2d 421, 423-24, 98 Cal. Rptr. 837, 839-40 (1971) and cases cited *supra* (all by implication). See note 30 *infra* for the states included in this study.

3. This relationship may exist even if compensation is nominal or comes from a source other than the client. Lawall v. Groman, 180 Pa. 532, 537-39, 37 A. 98, 99 (1897). The relationship may also be found to exist in cases where the attorney receives no compensation for his services. Fort Myers Seafood Packers v. Steptoe & Johnson, 381 F.2d 261, 262 (D.C. Cir. 1967); Turner v. Maryland, 318 F.2d 852, 854 (4th Cir. 1963); Central Cab Co. v. Clarke, 259 Md. 542, 549, 270 A.2d 662, 666-67 (1970); American Employers Ins. Co. v. Goble Aircraft Specialties, Inc., 205 Misc. 1066, 1073, 131 N.Y.S.2d 393, 401 (Sup. Ct. 1954).

4. A common definition of the standard is "such skill, prudence and diligence as lawyers of ordinary skill and capacity commonly possess and exercise in the performance of the tasks which they undertake." Neel v. Magana, Olney, Levy, Cathcart & Gelfand, 6 Cal. 3d 176, 181, 491 P.2d 421, 422-23, 98 Cal. Rptr. 837, 838-39 (1971), *quoting* Lucas v. Hamm, 56 Cal. 2d 583, 591, 364 P.2d 685, 689, 15 Cal. Rptr. 821, 825 (1961).

The standard takes into account the lawyer's field of practice, Dorf v. Relles, 355 F.2d 488, 492 (7th Cir. 1966). The geographical area in which the lawyer practices may also be considered. There is some trend to consider wider areas. *See, e.g.*, Cook, Flanagan & Berst v. Clausing, 73 Wash. 2d 393, 395-96, 438 P.2d 865, 866-67 (1968) (applying a state-wide standard). In some jurisdictions, however, the particular locality is still important. *See, e.g.*, Martin-Marietta Corp. v. United Bonding Ins. Co., 11 Adams L.J. 148 (Adams County Ct., Pa., 1970).

It has been assumed that the standard of skill and care is higher for a specialist, Neel v. Magana, Olney, Levy, Cathcart & Gelfand, *supra*, 6 Cal. 3d at 188, 491 P.2d at 495, 98 Cal. Rptr. at 842, but the question appears never to have been specifically decided. *Id.* at n.22. *See also* Hoeveler, *A Lawyer's Professional Exposure*, TRIAL, May/June 1971, at 52.

5. *See, e.g.*, Neel v. Magana, Olney, Levy, Cathcart & Gelfand, 6 Cal. 3d 176, 181, 491 P.2d 421, 423, 98 Cal. Rptr. 837, 839 (1971); American Hemisphere Marine Agencies v. Kreis, 40 Misc. 2d 1090, 1092, 244 N.Y.S.2d 602, 604 (Sup. Ct. 1963).

which society seeks to enforce its definition of justice.[6] When an attorney's negligence deprives his client of property or rights to which he would otherwise be entitled under the applicable law, damage is done not only to that person but also to the societal objectives embodied in the substantive rule and to the capacity of the legal system as a dispute-solving mechanism.

The negligence test[7] would function more effectively to protect clients' interests if certain practical enforcement problems were eliminated. At present, there exists an array of obstacles to malpractice suits which weaken the deterrent power of tort liability. In litigating a malpractice claim, the client faces the problem, which also arises in other types of professional liability litigation, of finding members of the profession to appear as expert witnesses and testify to the required standard of skill and care and its violation.[8] A client often has difficulty finding a lawyer to represent him in the malpractice proceeding.[9] Furthermore, the judge who hears the case is himself a member of the legal profession and may be more sympathetic to a fellow professional than to a disgruntled client.[10]

6. Of course, willful misconduct of an attorney is also a malfunctioning of the legal system. This is dealt with through disciplinary proceedings of state courts with the assistance of bar associations. These proceedings are in addition to any tort remedies that may be available to the client, *e.g.*, an action for fraud or conversion. Gross negligence has been held to be a proper ground for the imposition of disciplinary sanctions. *See, e.g.*, Stephens v. State Bar of California, 19 Cal. 2d 580, 581, 122 P.2d 549, 550 (1942); Boin v. Equitable Life Assurance Soc'y of the United States, 28 Misc. 2d 489, 490-91; 208 N.Y.S.2d 323, 325 (Dist. Ct. 1960). But ordinary negligence is not within the committees' present range of concern.

For a more extensive discussion of disciplinary committees and their problems, see ABA SPECIAL COMMITTEE ON DISCIPLINARY ENFORCEMENT, PROBLEMS AND RECOMMENDATIONS IN DISCIPLINARY ENFORCEMENT (1970); Comment, *Controlling Lawyers by Bar Associations and Courts*, 5 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 301 (1970).

7. Considering only the client's interests, a strict liability standard may seem preferable to the present negligence test, since the effects of a defect in legal services are equally injurious to him whether or not his lawyer's error could have been avoided through the exercise of reasonable professional skill and care. However, such a standard would be unlikely to gain acceptance and extremely difficult to apply. While courts may sometimes provide relief from non-negligent errors, improved enforcement of the present negligence standard and the use of means other than the threat of tort liability to prevent errors seem preferable, at least as initial steps, to adopting a strict liability standard.

8. *Cf.* Dorf v. Relles, 355 F.2d 488, 492-94 (7th Cir. 1966). Lawyers have been accused of maintaining a "conspiracy of silence." Peacock, *Legal Malpractice*, 1968 TRIAL LAWYERS' GUIDE, May 1968, at 81, 84. An American Bar Association study found that "lawyers will not appear or cooperate in [disciplinary] proceedings against other lawyers but instead will exert their influence to stymie the proceedings." ABA SPECIAL COMMITTEE ON DISCIPLINARY ENFORCEMENT, *supra* note 6, at 1.

9. While it is difficult to document cases of clients unable to obtain counsel for malpractice actions, an American Bar Association study found that "in communities with a limited attorney population disciplinary agencies will not proceed against prominent lawyers or law firms." ABA SPECIAL COMMITTEE ON DISCIPLINARY ENFORCEMENT, *supra* note 6, at 1. That assertion is discussed, *id.* at 167-74. It is not unreasonable to assume that the same hesitation occurs with respect to malpractice actions.

10. Of course, it cannot be proved that judges have such prejudices, but the California Supreme Court, commenting on a long-standing judicial construction of the

Even if a client succeeds in bringing his claim before a court and establishing the negligence of his attorney, proof that this negligence was the cause of injury may be virtually impossible. Because there are so many intangible factors which contribute to the outcome of any legal proceeding, the question of proximate cause may be more difficult in malpractice cases than in other tort actions. If the negligence occurred in the conduct of litigation, the client must establish that, but for the negligence of his attorney, he would have prevailed on the merits;[11] this requires essentially a retrial of the entire case in which the error occurred, something courts may be reluctant to undertake. Even where litigation is not directly involved, the client faces difficulties in demonstrating what would have resulted had the attorney not been negligent.[12]

Damages are similarly difficult to demonstrate. There may be some easy cases—failure to perfect a security interest or to discover a defect in title, for example,[13] but in many other cases damages are necessarily speculative.[14]

statute of limitations which favored attorneys, acknowledged the possibility:

> An immunity from the statute of limitations for practitioners at the bar not enjoyed by other professions is itself suspicious, but when conferred by former practitioners who now sit upon the bench, it is doubly suspicious.

Neel v. Magana, Olney, Levy, Cathcart & Gelfand, 6 Cal. 3d 176, 190, 491 P.2d 421, 429-30, 98 Cal. Rptr. 837, 845-46 (1971).

11. *See, e.g.*, Kilmen v. Carter, 274 Cal. App. 2d 81, 78 Cal. Rptr. 800 (Dist. Ct. App. 1969) (since plaintiff would have lost his case on appeal, no recovery allowed against attorney who was negligent in failing to prosecute the appeal); Campbell v. Magana, 184 Cal. App. 2d 751, 8 Cal. Rptr. 32 (Dist. Ct. App. 1960) (evidence supported conclusion that plaintiff in malpractice action did not have a good cause of action on a personal injury claim negligently handled by lawyer; therefore, there was no damage and could be no recovery for malpractice); Gladden v. Logan, 28 App. Div. 2d 1116, 284 N.Y.S.2d 920 (1967) (failure to prosecute action, plaintiff must prove facts which would enable jury to find she would have recovered had attorney not been negligent); Troll v. Glantz, 57 Misc. 2d 572, 573, 293 N.Y.S.2d 345, 346 (Sup. Ct. App. T. 1968) (not error to dismiss malpractice complaint where there was no proof that plaintiff had a good defense in litigation against him).

12. *See, e.g.*, Feldesman v. McGovern, 44 Cal. App. 2d 566, 566-70, 112 P.2d 645, 646-47 (Dist. Ct. App. 1941) (complaint based on alleged negligence in failing to file petition for discharge in bankruptcy stated no cause of action since plaintiff failed to prove that the attorney's doing so would have benefited plaintiff); Lewis v. Alper, 15 App. Div. 2d 795, 796, 224 N.Y.S.2d 996, 998 (1962) (evidence did not show that money expended by plaintiff was attributable to attorney's delay in filing certificate of incorporation).

13. *See* Lally v. Kuster, 177 Cal. 783, 787-91, 171 P. 961, 962-64 (1918) (the amount that should be recovered by a client from his attorney who negligently failed to prosecute a foreclosure suit is the amount that could have been recovered in the suit minus the actual value of the barred note as determined by the trial court); Theobald v. Byers, 193 Cal. App. 2d 147, 152-53, 13 Cal. Rptr. 864, 867 (Dist. Ct. App. 1961) (measure of recovery for negligent failure to record chattel mortgage is amount of loan plus interest minus the amount plaintiffs could recover as general unsecured creditors).

14. *See, e.g.*, Lewis v. Alper, 15 App. Div. 2d 795, 796, 224 N.Y.S.2d 996, 998 (1962) (damage resulting from delay in filing certificate of incorporation); Flynn v. Judge, 149 App. Div. 278, 280, 133 N.Y.S. 794, 796-97 (1912) (since the commission of an executor is uncertain, he cannot recover from attorney even if the latter's negligence caused his removal).

Because of these difficulties of proof, a client who brings suit against his attorney[15] may well be unsuccessful in recovering the compensation to which he is theoretically entitled; other clients may be discouraged from even seeking compensation for their injuries. If this occurs, liability is not properly assessed, and the negligence system is probably not maintaining the prescribed standard of professional skill and care. To reduce the frequency and resulting harmful effects of legal malpractice, therefore, it may be necessary to improve the operation of the present system for imposing tort liability for negligence, to utilize supplementary means of inducing more careful conduct, or to do both.

Before undertaking any course of action, reliable information is needed about the incidence and costs of attorney negligence. Such information is also essential for the evaluation of any changes made. Since more and better data is a prerequisite to rational action, its collection is the next topic for discussion.

II. Potential for Information Collection

Although complete information about the nature, frequency, and costs of all negligent acts by lawyers is probably impossible to obtain, it should be feasible to collect data on those negligent acts which lead to malpractice claims. Data on these claims would offer a promising starting point. Considering all of the groups with an interest in legal malpractice—clients, courts, independent researchers, bar associations and insurers—it appears that the insurance industry has the greatest potential for effective collection of this claims data.

Clients, although they may be taking an increased interest in the quality of legal services they receive,[16] have no organization with the power to compel reporting of information on malpractice or the facilities for assembling such data. Courts have been developing improved

15. Malpractice may be alleged as a defense or counterclaim in an attorney's action against his client for fees or expenses; the client is not always the first to sue. *See, e.g.*, Kissam v. Bremerman, 44 App. Div. 588, 61 N.Y.S. 75 (1899); Senftner v. Kleinhans, 80 Misc. 519, 141 N.Y.S. 533 (Sup. Ct. 1913); Enterline v. Miller, 27 Pa. Super. 463, 465, 467 (1905).

16. Increasing consumer consciousness is often cited as a reason for the increase in malpractice claims. *See, e.g.*, Blaine, *supra* note 1, at 305; Denenberg & Huling, *supra* note 1, at 397; Letter from Henry Nussbaum, Senior Account Manager, Associated Property and Casualty Division, CNA/Insurance, to the authors, Nov. 18, 1971, on file with the *Yale Law Journal*.

Further evidence of client interest in the quality of legal services is the recent formation of a national legal services consumer group, although this group has not yet considered the malpractice problem. *See, e.g.*, Graham, *Legal Fees: Plea on Behalf of the Clients*, N.Y. Times, Sept. 10, 1972, § 4, at 6, col. 1.

data processing facilities[17] but their traditionally passive role in the legal process precludes their investigating the vast majority of legal malpractice claims which never result in litigation.[18] Independent researchers, because they also lack the power to compel reporting, are unable to obtain adequate samples for studies of legal malpractice.[19]

Bar associations, with their national, state and local levels of organization, may seem potentially superior as data-collection agencies. These associations, however, do not include all practicing attorneys. More importantly, they lack expertise in data collection and have a record of reluctance in pursuing[20] and disclosing[21] information regarding even willful misconduct.

While these groups should have some role in information collection, they cannot be relied upon for more than a minor part of the data needed. The insurance industry, which offers malpractice or "professional liability"[22] coverage to lawyers, seems far better suited to a central role than any of the other groups.

Insurers necessarily gather much information about claims in the process of resolving them. Moreover, the insurers can require the attorney to disclose relevant background information such as education or

17. *See, e.g.,* Adams, *The Move Toward Modern Data Management in the Courts,* 23 U. FLA. L. REV. 250 (1971).

18. For a discussion of one insurer's claim settlement procedures, see Stephenson, *An Insurer Looks at Lawyers' Professional Liability Insurance,* BENCH AND BAR OF MINN., Nov. 1966, at 17, 22.

A spokesman for another insurance company states that, because lawyers fear the publicity associated with malpractice claims, they often want to settle claims even when they are not liable. He believes that, by putting pressure on attorneys to defend against nonmeritorious claims, insurers could help check the rise in premiums and transform lawyers' professional liability insurance into a more profitable line. Letter from Nussbaum, *supra* note 16.

19. Surveys of local bar associations were the bases of two recent studies.

In one, questionnaires were sent to all 3800 members of the Philadelphia Bar Association. Only 902 lawyers responded. Denenberg & Murray, *The Market for Attorneys' Group Malpractice Insurance,* 1967 ANNALS OF THE SOC'Y OF CHARTERED PROPERTY & CASUALTY UNDERWRITERS 333. At the time of the study, Denenberg was a professor at the Wharton School of the University of Pennsylvania where he had access to sophisticated automatic data processing facilities. Yet, because the sample responding was not necessarily representative, the data obtained from the study was inherently weak and could not be improved by further processing.

The information obtained in the second study is of questionable value for the same reason. Questionnaires were sent to 1000 members of the Missouri Bar Association; only 306 replied. Rottman & Stern, *supra* note 1, at 69, n.21. Again the authors were respected researchers: Rottman was an associate professor of finance at the University of Nevada; Stern was a member of the Missouri Bar and a faculty member at Missouri-Columbia University. *Id.* at 63.

20. *See generally* ABA SPECIAL COMMITTEE ON DISCIPLINARY ENFORCEMENT, *supra* note 6.

21. *Id.* at 143-46.

22. *See* Denenberg & Huling, *supra* note 1, at 392-402, for an excellent comparative discussion of the terms of lawyers' professional liability policies.

field of practice when he applies for coverage.[23] The insurance companies also have the facilities and experts necessary for the compilation and analysis of statistical data. Although the insurance market is divided among several companies, the industry already utilizes statistical agents and rating services to assemble data from various companies.[24] The industry's only major disadvantage as a collector of data on malpractice claims is that, because not all attorneys carry professional liability coverage, insurers do not have contact with all of the claims made.[25] Despite this, the insurance industry's advantages are such that it could provide a useful information system.

It would seem that the insurers' own interests should lead them to assemble information concerning the risks they insure. Reporting should be mandated, however, by state insurance commissions, which should also participate in deciding what information is necessary. In most states the commissions have authority to approve the rates charged for insurance[26] and to require submission of information by insurers

23. Considerable background information is presently required of applicants. *See, e.g.*, CNA/Insurance, Application for Comprehensive Lawyers' Liability Insurance (form G-40466-A undated); The St. Paul Companies, Application for Lawyers' Professional Liability Insurance (form 12595 CLF Rev. 1-72).

24. Two organizations act as statistical agents for United States writers of lawyers' professional liability insurance. One is the National Association of Independent Insurers (NAII). Interview with Paul Blume, Vice-president, Legislative Affairs, National Association of Independent Insurers, by telephone, Nov. 2, 1972. The other is the Insurance Services Office (ISO). Letter from S. Larry Snyder, General Liability Division, Insurance Services Office, to the authors, Dec. 10, 1971, on file with the *Yale Law Journal*. Since NAII member companies write only a negligible amount of this type of insurance, ISO is the only statistical agent with any significant figures on lawyers' malpractice coverage. Interview with Blume, *supra*.

Only ISO acts as a rating service, *i.e.*, an organization which handles rate-making activities for several companies, as well as a statistical agent. *Id.* ISO is the product of a 1970 merger of the Insurance Rating Board and a number of its competitors. ISO member companies ("members") contribute financially to its operations, control its board and policy decisions, and agree to have ISO gather statistics and set their rates for specified lines of insurance.

Other insurance companies who use ISO services without having to set their rates at the level it prescribes are called "subscribers." Finally, some insurers use the rating organization's services only in selected lines and jurisdictions; they are referred to as "service purchasers." Interview with Richard Elliot, Vice-president, Commercial Casualty Division, Insurance Services Office, by telephone, Nov. 2, 1972.

25. The significance of this limitation depends, of course, on the percentage of attorneys currently insured. For estimates of this, see notes 46, 47 *infra*. This problem would, of course, be eliminated if professional liability insurance were made mandatory for all attorneys. *See* p. 607 *infra*.

26. *See, e.g.*, CAL. INS. CODE §§ 1850, 1852 (West 1972); CONN. GEN. STAT. REV. §§ 38-187, 38-188 (1958); MONT. REV. CODES ANN. § 40-3634 (Supp. 1971); N.Y. INS. LAW § 183 (McKinney 1966); PA. STAT. ANN. tit. 40, § 1184 (1971).

Insurance brokers who sell Lloyd's coverage on a "surplus lines" basis, providing individual rates and policies for customers who cannot obtain the desired coverage through a licensed company are also licensed and regulated by the states although the insurer itself is not. CAL. INS. CODE § 1760.5 (West 1972); CONN. GEN. STAT. REV. § 38-78 (Supp. 1972); MONT. REV. CODES ANN. § 40-3419 (1961); N.Y. INS. LAW § 122 (McKinney 1966); PA. STAT. ANN. tit. 40, §§ 1006.6-1006.7 (1971).

in support of proposed rates.[27] The responsibility of the commissions is not just to lawyers who purchase the professional liability insurance, but also to the public.[28] The possible impact of professional liability insurance (or its absence) clearly justifies the commissions' requiring that adequate information on this line be collected and made publicly available. Although insurance regulation takes place at the state level, the National Association of Insurance Commissioners[29] should coordinate state efforts and help to standardize reporting requirements.

III. The Present State of Information

The adequacy of information can best be evaluated by considering the data available for a series of categories that appear relevant to an assessment of the legal malpractice problem. Although some of the data to be discussed comes from published sources, most was obtained in a special study of insurance industry statistics conducted for this Note.[30]

27. CAL. INS. CODE §§ 1857.1, 1857.3 (West 1972); CONN. GEN. STAT. REV. §§ 38-187, 38-188 (1958); MONT. REV. CODES ANN. §§ 40-3634, 40-3665 (Supp. 1971); N.Y. INS. LAW § 184 (McKinney 1966); PA. STAT. ANN. tit. 40, § 1184 (1971).

Surplus lines brokers are also required to submit information. CAL. INS. CODE § 1760.5 (West 1972); CONN. GEN. STAT. REV. § 38-78 (Supp. 1972); MONT. REV. CODES ANN. § 40-3419 (1961); N.Y. INS. LAW § 122 (McKinney 1966); PA. STAT. ANN. tit. 40, §§ 1006.6-1006.7 (1971).

28. *See* CAL. INS. CODE § 1850 (West 1972); MONT. REV. CODES ANN. § 40-3634 (Supp. 1971); N.Y. INS. LAW § 180 (McKinney 1966); PA. STAT. ANN. tit. 40, § 1181 (1971). The term "public welfare" used in all these statutes could be broadly and reasonably construed to include the welfare of a broader class than merely the "insured."

29. NAIC is a research institute formed through cooperative efforts of state insurance commissioners. Interview with Bruce Clements, Assistant to the Executive Secretary, National Association of Insurance Commissioners, by telephone, Sept. 14, 1972.

30. The study consisted of the following:

I. Questionnaires to
   A. Five insurers often named as major writers of attorneys' professional liability coverage:
      1. The St. Paul Insurance Companies (St. Paul)
      2. CNA/Insurance (CNA)
      3. The Lloyd's Underwriters' Fire and Non-Marine Association (Lloyd's) (sent to Lloyd's United States Counsel)
      4. The Travelers Insurance Company (Travelers)
      5. The American Home Assurance Company (American Home)
   B. The Insurance Services Office (ISO) (*see* note 24 *supra*)
   C. Insurance commissioners of five states:
      1. California
      2. Connecticut
      3. New York
      4. Pennsylvania
      5. Montana

The same five states were used as a focus in the study of the substantive law of malpractice. *See* p. 591 *supra*. The first four states were chosen because their population and commercial importance promised a relatively well-developed body of case law and a potential fund of raw information about legal malpractice. Montana, a less populous state with no large business law practice, was chosen to provide a contrast.

II. Interviews with officials of the above and other organizations

Response to the questionnaires took a variety of forms, often involving multiple letters or interviews.

A. *General Deficiencies*

There are a number of general, overall weaknesses in the available information. First, the data is incomplete. Some information is not available from any industry source;[31] there are gaps in the information provided by every source; and there are simply no reliable industry-wide figures.[32] Also, the data that does exist lacks comparability. Often, sources do not collect statistics for the same general categories[33] or for comparable time periods. In addition, sources may use categories which appear similar but are of unequal breadth or slightly varying definition.[34] Other defects, such as outright self-contradiction[35] and time lag in reporting,[36] further reduce the usefulness of the data.[37]

31. Some industry sources provided no information. This was true of Travelers, which referred the authors to ISO, letter from J. R. Bland, Supervising Underwriter, Products Management Division, Travelers Insurance Co., to the authors, Nov. 10, 1971, on file with the *Yale Law Journal*. This was also true of American Home, and of Lloyd's. (The Lloyd's association presents unique problems for statistical gathering. Lloyd's is not an insurance company as such, but an association of underwriters. These underwriters comprise a market in which admitted brokers obtain insurance for their clients. *See generally* M. LEVY, A HANDBOOK OF PERSONAL INSURANCE TERMINOLOGY 308 (1968).)

However, even ISO, CNA and St. Paul, sources which provided the most information, did not provide a number of requested items. No information was made available, for example, concerning the number of each type of policy sold, and no breakdown of claims by type of practice or by the characteristics of the party claiming against the attorney was given.

32. The composite figures given by ISO include an undeterminable portion of the market. ISO will not specify which, or how many, companies' experience is reflected in its figures. The explanation given is that insurers subscribe to ISO services for a particular "line" of insurance. During any one year a company may write any subline within the broader line. Attorneys' professional liability insurance is a subline of all professional liability insurance. Because the number of companies writing a subline changes from year to year, it is said to be difficult to collect and make available a list of exactly who is using which ISO subline services in a given year. Interview with Elliott, *supra* note 24. However, as ISO does bill individual companies according to the ISO services used per subline, *id.*, it would seem that such information must be available.

33. Some, but not all, sources provided information, for example, on number of insured attorneys.

34. *See, e.g.*, notes 51-52 *infra* (regarding claims and incurred losses).

35. For example, in a letter to the authors, an official of St. Paul's stated, "We don't keep any statistics showing claims volume." Letter from R.S. Brant, Supervising Underwriter, General Casualty Department, St. Paul Insurance Companies, to the authors Jan. 3, 1972, on file with the *Yale Law Journal*. However, such information *was* supplied by St. Paul to the Pennsylvania Insurance Department. *See* note 44 *infra*

36. Some of the time lag is due to the "tail" inherent in this type of coverage. Interview with Henry Nussbaum, Senior Account Manager, Associated Property and Casualty Division, CNA/Insurance, by telephone, Dec. 8, 1971. That is, an error may not be discovered until long after it occurs, and the filing of a claim and its final settlement will be still later. Considering all these factors, another insurance official asserts that it takes at least twenty-seven months after the end of a policy year for meaningful statistics to be available. Interview with Sheldon Kass, Actuarial Assistant, Insurance Services Office, by telephone, Mar. 8, 1972.

37. Insurance sources believe that the rate of increase in claims frequency has accelerated in recent years. Interview with Kass, *supra* note 36; Interview with Henry Nussbaum, Senior Account Manager, Associated Property and Casualty Division, CNA/Insurance, by telephone, Nov. 10, 1972. Commentators agree that the area is one of rapid change. *See, e.g.*, Brewster, *supra* note 1, at 182-84; Denenberg & Huling, *supra* note 1, at 389-92; Wolf, *Attorney's Negligent Failure to Comply with Procedural Deadlines and Court Calendar Orders—Sanctions*, 47 TEXAS L. REV. 1198 (1969).

If they are correct, then time lag in reporting is a particularly significant defect.

Secondary materials compound these weaknesses. In general, they tend to give a more authoritative cast to descriptions of the malpractice area than the data warrants.[38] Some articles rely on assertions for which no basis is given[39] or which are attributed only to a vague source.[40] Others appear to make overly broad generalizations from small and unrepresentative samples.[41]

It is possible, of course, that the insurance companies have more and better data but are unwilling to release it, either because of the inconvenience of doing so or because they believe business secrets are involved. On the other hand, certain informational deficiencies seem genuine. There is a definite lack of comparability in data; indeed this condition is virtually inevitable when each of a relatively large number of information-gathering entities is free to define the categories it will use in collecting information. Incompleteness in some categories may also reflect the fact that insurance commissions generally have only minimal reporting requirements[42] or that insurers consider this line of insurance comparatively unimportant.

The hypothesis that the information gap is real is supported by two recent experiences of a state insurance commission. In the first, the commission sought clarification of statistics submitted in support of a proposed rate increase and was told by the Insurance Services Office (ISO), an organization controlled by member insurance companies, that the increase was not based on experience figures.[43] More recently,

38. One researcher, however, has written of his frustrations in attempting to obtain data on legal malpractice from the insurance industry. Gross, *Insurance–Malpractice Style*, QUEENS CO. B. BULL., Jan. 1969, at 5.

39. "It's estimated that. 95% of all practicing lawyers carry malpractice coverage now." Falk, *supra* note 1, at 1, col. 6. "Successful claims against attorneys have increased by 25 per cent in the last 5 years." U.S. NEWS & WORLD REPORT, *supra* note 1, at 30.

40. "Says an insurance company executive: . . . ." U.S. NEWS & WORLD REPORT, *supra* note 1, at 30.

41. A St. Paul claims attorney, in preparation for a speech at the 1966 Annual Meeting of the American Bar Association, surveyed 100 cases drawn at random from his company's files. Forty-five of these involved some time limitation problem and fifteen, title search and real estate transactions. Stephenson, *supra* note 18, at 19-20. In a later article, a St. Paul official stated, "One fairly recent sampling of claims on a nationwide basis pointed out that 45% of the claims against lawyers involved missing of some time limitations, another 15% involved title searches and real estate transactions. Here in Minnesota these two categories also involved 60% of the claims, however, the order of importance was reversed." Lynch, *supra* note 1, at 8. *See also* note 19 *supra*.

42. ISO is required, as representative of insurers writing general liability insurance in New York State, to submit information annually concerning general liability experience. The only data submitted concerns earned premiums, number of incurred claims and incurred losses. Letter and statistical report from George Gallant, statistician for ISO to Benjamin R. Schenck, Superintendent of Insurance for the State of New York, June 19, 1972.

43. As we have indicated previously, our proposed change was not mathematically calculated from the experience in the filing nor does it reflect the mathematical application of a factor to account for claim cost increases since the experience

the commission sought, for the first time, extensive and detailed information about legal malpractice insurance. The information received by the commission was not significantly superior to that received by the authors of this Note, even though the commission's call for information was backed by statutory authority and sanctions for noncompliance.[44]

B. *Specific Categories of Information*

Two basic types of claims data are necessary for an evaluation of the legal malpractice problem and possible solutions. First, economic data is needed to determine the current costs of malpractice claims and the allocation of these costs through the insurance mechanism. Secondly, information about the underlying facts of these claims is necessary if the quality of legal services is to be improved.

Economic data. Since insurers keep information only on insured attorneys[45] it is essential to know the number and percentage of practicing attorneys currently insured against malpractice. Not only would this help to determine the limitations of insurance data, but it would also be useful in assessing the impact of the insurance system on malpractice claims. Such information would also indicate the magnitude of the increase in coverage that would result if professional liability insurance were made mandatory.

No accurate figures are available, however, on the number of attorneys currently insured.[46] Even if that were known, the percentage of

> period. In view of this, and in light of the claim cost data in the exhibit attached hereto, we would hope that you could further consider the justification of our proposal.

Letter from Nicholas Pandullo, Manager of the Insurance Rating Board (now ISO) to Nicholas Stathas, Casualty Actuary, Pennsylvania Insurance Department, July 27, 1970.

44. By letter dated September 14, 1972, the Pennsylvania Insurance Department issued a call for information concerning attorneys' professional liability insurance. The letter was directed to three insurance companies: American Home, St. Paul, and CNA. It ordered those companies to submit, by September 26, 1972, statistics for the years 1969 through 1971. The information to be supplied was specified in detail.

American Home sent no statistics, explaining that it wrote no coverage for this line in Pennsylvania. After requesting an extension, St. Paul, on October 6, 1972, complied with the call for information. The reply was organized in roughly the same manner as the call had been, but for seven of a total of twenty-eight subcategories of information the response was "Not Available." Letter from D.L. Lynch, of the General Casualty Department, St. Paul Insurance Companies, to Dale W. Broadwater, Chief Statistician, Bureau of Regulation of Rates and Policies, Pennsylvania Insurance Department, Oct. 6, 1972. CNA asked for an extension, also. As of November 21, 1972, the insurance department had received no information from CNA in response to the call. Interview with Dale W. Broadwater, Statistician, Pennsylvania Insurance Department, by telephone, Nov. 21, 1972.

45. Letter from Brant, *supra* note 35; Letter from Henry Nussbaum, Senior Account Manager, Associated Property and Casualty Division, CNA/Insurance, to the authors, Jan. 11, 1972, on file with the *Yale Law Journal.*

46. St. Paul keeps no accurate statistics on number of insured attorneys. Letter from Brant, *supra* note 35. The company was only willing to give a "very" rough estimate that it insures about 35,000 attorneys. Interview with R.S. Brant, Chief Un-

practicing attorneys insured would still be unknown[47] because, surprisingly enough, there is no accurate count available of the number of attorneys currently active in private practice.[48]

The level of insurance coverage carried by insured attorneys is also significant. Too low a level will fail to protect the attorney and his clients against the most damaging claims; too high a level would be an unnecessary expense. The size of deductible provisions is relevant in the same way, since it might be more efficient for the attorney to cover small claims himself as they arise. The statistics on number of attorneys insured, even when available, are never broken down by level of coverage.[49]

Some information on premium volume is available, perhaps because premium payments are a major source of income to the insurance companies and must, therefore, be included in any traditional accounting system. Yet, even this data is incomplete and lacking in detail.[50]

The number and costs of claims would also be useful information for attempting to assess the scope of the malpractice problem and the

derwriter, Property and Casualty Division, St. Paul Insurance Companies, by telephone, Nov. 2, 1972. CNA estimates that it insures about 20,000. Interview with Henry Nussbaum, Senior Account Manager, Property and Casualty Division, CNA/Insurance, by telephone, Oct. 30, 1972. ISO reports that in 1969 the companies which submit statistics to it insured 56,716. Letter from Snyder, *supra* note 24. ISO did not indicate from which companies these statistics came. *See* note 32 *supra*.

47. Several estimates have, however, been made. One study estimated that eighty-three per cent of the firms, and fifty-six per cent of the sole practitioners in Philadelphia are insured. Denenberg & Murray, *supra* note 19, at 336. Another gives a sixty-five per cent figure for Missouri. Rottman & Stern, *supra* note 1, at 71.

Nationally, the insured rate has been pegged at seventy-five per cent, U.S. NEWS & WORLD REPORT, *supra* note 1, and at ninety-five per cent, Falk, *supra* note 1.

48. Figures on the number of attorneys in the United States, such as those reported in the *Statistical Abstract of the United States*, are not helpful, since many attorneys are not active in private practice. Bar association membership figures include many who are not active in private practice and exclude those attorneys who are not members of the association.

One source states, "There are about 313,000 lawyers in the United States, but only about 214,000 are in private practice. Some 113,273 are individual practitioners," Denenberg & Huling, *supra* note 1, at 392; but no source is given for these figures.

The Pennsylvania Bar Association and the Pennsylvania Governor's Justice Commission are presently trying to determine the number of attorneys and the number of practicing attorneys in Pennsylvania. Interview with Paul Rader, Executive Director of the Pennsylvania Bar Association, by telephone, Mar. 10, 1972; Interview with Peter Rompler, Director of Planning and Research, Governor's Justice Commission, by telephone, Mar. 10, 1972.

49. The ISO figures for New York and Pennsylvania concern only one level of coverage, although many other levels are available. *See* Insurance Rating Board, Lawyers Professional Liability Manual (amended by ISO, 1971).

50. The companies submitting statistics to ISO had $4,013,551 in earned premiums on this line in 1969. Interview with Sheldon Kass, Actuarial Assistant, ISO, by telephone, March 10, 1972. Other sources are less precise. For example, St. Paul estimates that its premium volume "has exceeded $4,000,000 for the past couple of years." Letter from Brant, *supra* note 35. CNA did not provide such information for this study, but Thomas Tucker, Vice-president of CNA, has been cited as estimating that CNA had ten million dollars in earned premiums over a five-year period. U.S. NEWS & WORLD REPORT, *supra* note 1, at 30.

profitability of malpractice insurance to insurers. Presently, the data on claims is of limited usefulness. Figures given by different sources for "number of claims" cannot be compared because the category is not uniformly defined.[51] The same is true of "loss" figures, which usually combine defense costs with amounts paid to clients.[52] Administrative costs are separated from claims costs, but they, too, are inadequately described and measured.[53] In order to assess the impact of

51. ISO defines "number of claims" as claims paid plus claims pending but does not include claims which have been dropped or defeated. Interview with Elliot, *supra* note 24. ISO gives its "number of claims" figure for twenty-seven months' experience from the end of the policy year. Letter from Snyder, *supra* note 24. CNA gives figures for number of claims reported to it and an estimate of the number of claims on which an indemnity settlement will be made. Letter from Nussbaum, *supra* note 16. St. Paul did not reveal how it defined claims nor whether or not its claim figures were projected. Letter from Dale Broadwater, Chief Statistician, Bureau of Regulation of Rates and Policies, Insurance Department of Pennsylvania, to the authors Nov. 1, 1971, on file with the *Yale Law Journal*.

52. ISO includes in its definition of "incurred losses," (1) claims paid, (2) defense costs for claims paid, (3) other expenses attributable to a specific claim, and (4) expenses which are not easily allocable to any particular claim, but which vary directly with the number of claims. Interview with Elliot, *supra* note 24. However, no information was given as to what costs are actually included in categories (3) and (4), *supra*, nor what percentage of the whole is constituted by categories (2), (3) & (4), *supra*.

Another difficulty is that loss figures are often projected, or "developed," for some period after the end of the claim year in question. There is no uniformity in the period selected. ISO projects some figures to twenty-seven months, others to seventy-five months, and still others to ninety-nine. CNA and St. Paul do not indicate whether, or to what period, their "incurred loss" figures are "developed."

St. Paul also reports some "paid loss" as well as "incurred loss" data. No other source used both categories.

53. No data was received on actual dollar costs allocable to this line of insurance. Information was given on the proportion of earned premiums allocated to various "administrative expenses" categories. It should be noted that for ISO companies, some of the unallocated expenses are included in "incurred losses" and not in the administrative expense categories.

EXPECTED EXPENSES OF INSURANCE COMPANIES

EXPENSE CATEGORIES as stated by sources	INSURANCE COMPANIES REPORTING * ISO	** CNA (approximation)	*** ST. PAUL
Total Production Cost Allowance	25.0%		
General Administration	7.0		
Inspection, Exposure, Audit & Bureau	4.5		
Taxes, Licenses & Fees	3.0		
Profit	5.0		
Expected Loss & Loss Adjustment	55.5		
General Administration Including (Commissions, Taxes, Other Acquisitions, General Expenses, Unallocated Loss Expense)			31.5%
Defense Costs		25%	21.3
Sales Cost or Commission		17	16.5
General Administrative Including Unallocated Losses		17	

* Letter from Nicholas Pandullo, Manager, Insurance Rating Board (now ISO), to George Reed, Commissioner of Insurance, Pennsylvania, Apr. 3, 1970.

** Letter from Nussbaum, *supra* note 45.

*** Letter from D.L. Lynch, General Casualty Division, St. Paul, to Dale Broadwater, Pennsylvania Insurance Department, Oct. 6, 1972.

various reforms on these elements of total costs, it seems essential that payments to clients, defense costs, settlement costs and general administrative costs be recorded separately.

Facts underlying malpractice claims. While not as immediately relevant to the financial state of the insurance companies as the economic factors just discussed, information about the facts underlying legal malpractice claims is certainly necessary in any attempt to reduce errors or to spread the costs of negligent acts in a way consistent with objectives of justice and deterrence. Thus far, insurance companies appear to have assembled almost no information about these basic facts, although much of it is probably included in their files on individual claims.[54] The little information available is the result of a few studies with small data bases.[55]

It would be useful, first, to know something about the characteristics of attorneys who carry malpractice insurance: their education, size of firm, location, field of practice, and office procedures, for example. These could then be compared with the characteristics of attorneys against whom claims are made, to determine which, if any, of these factors correlate with greater than average size or incidence of malpractice claims. Most of this information is requested in applications for insurance,[56] but companies report that they keep no composite records of the answers to these questions and do not break down claims according to such factors.[57] The failure to record such information seems surprising, especially when one considers the great

54. For example, the figures in Stephenson, *supra* note 18, at 19, were derived from an examination of an insurer's claims files.

55. The available figures and their sources are:

(a) Blaine, *supra* note 1, at 305; based on information given to the Illinois Bar Association by CNA:
43% time lapse
21% preparation of contractual agreements
20-21% real estate transactions

(b) Stephenson, *supra* note 18, at 20; of 100 claims:
45 time limits
15 title search
6 bad or no advice
6 procedural technicalities
5 legal research errors
4 "crank cases"
19 miscellaneous

(c) U.S. NEWS & WORLD REPORT, *supra* note 1, at 30; based on "a survey made by a big insurance company":
45% forgetfulness
25% errors in legal judgment
21% unclear relationship between client and lawyer
9% alleged fraud

(d) CNA; Interview with Nussbaum, *supra* note 37.
45% time lapse

56. *See* note 23 *supra.*

57. Letter from Brant, *supra* note 35. Letter from Snyder, *supra* note 24.

variations among rates charged for professional liability insurance in different states[58] and the increasing concern that some legal specialities may carry particularly high risks of malpractice claims.[59]

More data must be made available about the specific negligent acts alleged by clients making claims before significant measures can be taken to prevent them. The consensus of opinion seems to be that time-lapse errors—that is, missed filing dates and similar errors—are responsible for a large proportion of malpractice claims.[60] More detailed breakdowns have been given, but none of these has been based on a very large (or necessarily representative) claims sample.[61]

Knowledge of the type of clients filing malpractice claims may also be important in designing solutions to the malpractice problem. While much of the increase in claims has been attributed to changes in client attitudes,[62] no one is sure what type of clients are involved.[63] The utility of various remedies might depend on whether the injured client is an individual, a small business, or a large corporation, and whether he is a one-time user of legal services or has a continuing demand for them.

Finally, information on the amounts initially sought by clients and

58. Lloyd's does not differentiate its rates according to geographic area. Denenberg & Hurling, *supra* note 1, at 399. But all American insurers questioned do. For an individual attorney the ISO annual rate for the basic $5,000/$15,000 coverage (*i.e.*, a maximum of $5,000 per claim, up to a total of $15,000 per year) varies from a high of 150 dollars in California to a low of thirty-five dollars in Montana. Insurance Rating Board, Lawyers Professional Liability Manual (amended by ISO, 1971).

For some areas, CNA reports it has sufficient data to draw rate distinctions according to geographical area. In some other regions of the country, however, (for example, the Montana-Wyoming-Idaho area) they do not think anyone has such information. Therefore, they conclude that any differentiation which does exist in those areas is based purely on conjecture. Interview with Nussbaum, *supra* note 46. CNA did not disclose the data on which it bases rate distinctions.

59. Insurers seem hesitant to provide coverage for specialists in certain areas of the law. "Attorneys who have been declined for coverage are patent attorneys, tax lawyers, those concentrating in securities work, title abstract work, or negligence cases and those with clients who are primarily from the theatrical area." Rottman & Stern, *supra* note 1, at 79. Lawyers employed as corporate counsel, or government counsel may also have difficulty obtaining coverage. Blaine, *supra* note 1, at 304.

Again, CNA feels that rate differentiation or refusal to insure certain legal specialties is based only on conjecture. While its new program, *see* pp. 608-10 *infra*, initially provided rate variations according to the lawyer's field of specialization, the differentials were dropped when questioning by bar associations as to the basis for such differentiation revealed that neither CNA nor anyone else had adequate information on size or frequency of claims to justify such distinctions. Interview with Nussbaum, *supra* note 36.

60. *See* note 55 *supra*.

61. *See* note 55 *supra*.

62. The decline in the public image of the legal profession is often cited as a key element in the purported increase in legal malpractice claims. *See, e.g.*, Blaine, *supra* note 1, at 305; Hoeveler, *supra* note 4, at 52; U.S. NEWS & WORLD REPORT, *supra* note 1; Stephenson, *supra* note 18, at 21 (suggesting the decline is deserved); CNA/Insurance, Property and Casualty Insurance and the Professional Association Market (release AG-40344-A, undated) [hereinafter cited as CNA Brochure].

63. No responses were given as to types of clients bringing claims, in *e.g.*, Letter from Brant, *supra* note 35; Letter from Nussbaum, *supra* note 45; Interview with Nussbaum, *supra* note 36.

the eventual disposition of claims would aid in improving the handling of malpractice disputes. There are only a few estimates, however, of the proportions of claims dropped by the client, settled, or litigated,[64] and no comparisons of the amounts eventually recovered by clients to the amounts initially claimed.[65]

IV. Improving Data Collection

In order to realize the potential of the insurance industry as a source of information about legal malpractice claims, there must be established a set of relevant and clearly defined statistics to be collected by all companies, a system of assembling comprehensive industry figures and a means of making this information available to all interested persons. The state insurance commissions with their existing authority[66] are the key to accomplishing these goals.

The commissions, in consultation with industry sources, bar associations, and other interested groups, should develop precise information requirements. These reporting requirements should be standardized through the National Association of Insurance Commissioners.[67] The categories discussed in the previous section[68] are only suggestions and could be modified as seems necessary based on expert opinion and experience. The commissions should require that this information be provided by all insurers, possibly through ISO or a similar organization, and that it be made available to the public.

The information produced by such a system of reporting[69] would be of tremendous use in revising the legal rules governing malpractice. It would assist, for example, in evaluating proposed reforms in the

64. The only available information is CNA's statement that of the 1850 claims made against attorneys insured with it from 1967 to 1970, "approximately 75%, or 1390, will have an indemnity settlement." Letter from Nussbaum, *supra* note 45. Figures based on a sample of 100 cases are given in Stephenson, *supra* note 18, at 19.

65. *See* Letter from Brant, *supra* note 35; Letter from Nussbaum, *supra* note 46; Interview with Nussbaum, *supra* note 37.

66. *See* notes 26-28 *supra*.

67. That NAIC has the capacity to do this is indicated by the fact that it has promulgated a standard financial responsibility form for insurance companies on which companies report required financial data. This form is used by insurance commissions in forty-five states, including the five states covered in this study. Letter from Bruce Clements, Assistant to the Executive Secretary, National Association of Insurance Commissioners, to the authors, Nov. 3, 1972, on file with the *Yale Law Journal*.

68. *See* pp. 600-05 *supra*.

69. Even if not all states instituted such reporting requirements, comprehensive data could still be obtained. States are not restricted in their authority to gather information pertaining only to sales and claims within that particular state. *See* note 28 *supra*.

It is important, however, that states not impose undue burdens on the insurers by adopting varied reporting requirements.

rules.[70] Comparisons would be possible among jurisdictions with different rules or within a particular jurisdiction before and after a change in the law. For example, privity was first removed as a requirement in legal malpractice actions some ten years ago.[71] The court specifically mentioned the possibility that a burden on the legal profession might result from extending standing too far,[72] yet no data has been collected on the number of malpractice actions by people not themselves clients, actually brought under the new rule. Another important change[73] took place in some jurisdictions when the statute of limitations was held to run only from the time the client discovers or should discover his attorney's negligence.[74] The change was made in the complete absence of data and, while it is consistent with notions of the attorney's professional responsibility, information on its effects might be useful to jurisdictions which have not yet adopted the rule.

Similarly, the reporting system would aid in evaluating changes in procedures for resolving malpractice claims and compensating injured clients. If the data shows that many malpractice claims involve uncomplicated fact situations, an administrative board system resembling that used in workmen's compensation cases might be worth trying. The operation of such a board could be validly tested only if comparative information were available.[75]

By providing additional information on claims and administrative expenses, the reporting system would also aid in determining the effectiveness of less extensive changes in the administration of malpractice claims, such as the use of bar associations in group insurance selling

70. "Very few studies have been made of the effects of the cost in premium rates of a rule of law." F. HARPER & F. JAMES, THE LAW OF TORTS 766 (1956).

71. The leading case is Lucas v. Hamm, 56 Cal. 2d 583, 364 P.2d 685, 15 Cal. Rptr. 821 (1961), *cert. denied*, 363 U.S. 987 (1962). *See also, e.g.*, Heyer v. Flaig, 70 Cal. 2d 223, 449 P.2d 161, 74 Cal. Rptr. 225 (1969); Licata v. Spector, 26 Conn. Supp. 378, 225 A.2d 28 (C.P. 1966).

For a discussion of Lucas v. Hamm, see 75 HARV. L. REV. 620 (1962); 14 STAN. L. REV. 580 (1962). The privity question is also discussed in Wallach & Kelly, *supra* note 1, at 259.

72. Lucas v. Hamm, 56 Cal. 2d 583, 589, 364 P.2d 685, 688, 15 Cal. Rptr. 821, 824 (1961), *cert. denied*, 368 U.S. 987 (1962).

73. *See, e.g.*, Averill, *supra* note 8; Baxter, *Statutes of Limitations in Malpractice*, 18 CLEV.-MAR. L. REV. 82 (1969); Wallach & Kelly, *supra* note 1.

74. This was first held in Mumford v. Stanton, Whaley & Price, 254 Md. 697, 255 A.2d 359 (1969). The case changing the rule in California was Neel v. Magana, Olney, Levy, Cathcart & Gelfand, 6 Cal. 3d 176, 491 P.2d 421, 98 Cal. Rptr. 837 (1971). Justice Tobriner's opinion in this case gives an extensive discussion of the rule, its sources and the need for change.

75. An administrative board was proposed by Wallach & Kelly, *supra* note 1, at 270. Administrative boards are being tested in medical malpractice cases. *See, e.g.*, Gorney, *The Bane of Malpractice: A Doctor's Plea for Intelligent Compromise*, TRIAL, May/June 1971, at 53, 55.

and claims resolution.[76] Bar associations would need information to determine their proper share of savings resulting from such programs and to decide whether they should reject administrative duties that could be performed more efficiently by the companies themselves. It would also be essential that the insurance commissions and the public have information on the disposition of claims to assure that such insurer-bar association cooperation was not working to the disadvantage of clients with valid claims.

An improved reporting system would promote deterrence and cost spreading by furnishing information on the characteristics of attorneys against whom malpractice claims are made and the type of negligent acts that lead most frequently to such claims. Probably a major use of risk information would be in restructuring rates for lawyers' professional liability insurance. There are two reasons for providing insurance under rate schedules graduated according to degree of risk. First, to the extent risk factors are within the control of the attorney, conduct likely to lead to malpractice claims is to be discouraged.[77] Secondly, an improved rate structure could also reduce the average cost of insurance coverage by providing a larger group over which fixed or marginally declining costs would be spread.[78] If readjustment of rate structure is not sufficient to induce currently uninsured attorneys to obtain professional liability coverage, legislative action to require such protection may be justified.[79]

76. *See* pp. 608-10 *infra*.

77. Negligent conduct might be deterred either by an increase in rates following a successful claim against an attorney, or by a deductible provision requiring an attorney to pay a set amount toward any recovery by a client. *Cf.* G. CALABRESI, THE COSTS OF ACCIDENTS 68-74 (student ed. 1970). It would also be possible to provide more direct rewards, in the form of lower rates, to attorneys who adopt office procedures or participate in educational programs found to reduce malpractice. Such rewards have the advantage of avoiding the attorney's natural tendency to discount his own chances of incurring a malpractice claim, *cf. id.* at 55-57, which weakens the deterrent effect of after-the-fact sanctions.

78. While a rationalization of rate structures might make some high-risk attorneys now insured at low rates reluctant to purchase coverage, it would also give insurers an acceptable alternative to their current practice of refusing to insure those whom they (often on the basis of inadequate information) consider to be high risks. *See* note 59 *supra*. Furthermore, low-risk attorneys, who do not currently carry malpractice insurance because they feel its cost is not justified by the slight risk they face, might insure if the rates for them were lower. Thus, at both ends of the risk spectrum, additional attorneys and their clients could receive protection against malpractice damages.

79. Mandatory insurance may be the only way to provide a risk pool large enough for adequate cost spreading. It would also be consistent with the principle of professional responsibility that "A lawyer shall not attempt to exonerate himself from or limit his liability to his client for his personal malpractice." ABA, CODE OF PROFESSIONAL RESPONSIBILITY, DR 6-102(A) (Adopted Aug. 12, 1969). (In the discussion of ethical considerations, the Code does not address the possibility that the disciplinary rule quoted above might be construed to require malpractice insurance. *See id.* at EC 6-6.)

The harmful effects of malpractice on the legal system generally might be reduced

Improvements in information collection, rate structure and administration of malpractice insurance, and reduction of malpractice claims may seem rather distant possibilities, given the current situation. However, at least one insurance company, CNA, now espouses such measures. CNA decided a few years ago that the only way it could profitably write professional liability insurance was to develop a new method of selling and administering such coverage.[80]

The focus of the new CNA approach is on risk control[81] through data collection and cooperation with the bar association.[82] As part of the program, CNA will greatly expand its information gathering.[83] The company is obligated under its contracts with participating bar associations to "maintain a data bank of detailed information with respect to types of claims and suits by cause, by specialty, and other categories necessary to properly evaluate and analyze the program"[84]

and the reputation of lawyers improved if clients who prove their malpractice cases were assured of recovery. Any remaining reluctance of members of the legal profession in representing malpractice claimants might be lessened by the knowledge that the negligent lawyer would not bear the entire cost of the client's recovery himself. In addition, mandatory insurance would contribute to collection of more complete information and thus to further rationalization of the rate structure by providing a larger and fully representative data base.

80. For purposes of illustration, reference will be made to the CNA program now operating in New York State. The terms and conditions governing this program are embodied in a contractual "Agreement" executed December 1, 1970 among the Valley Forge Insurance Company (CNA), the New York State Bar Association, and Bertholon-Rowland, Inc. (administrator of the plan) [hereinafter cited as Agreement]. Individual policies issued to attorneys are subject to the Agreement. Agreement art. III.

81. Agreement, *supra* note 80, art. I.

Among the stated objectives of the program are: to minimize the causes of professional liability claims, to resist unfounded claims, to promptly and fairly resolve legitimate claims, to provide attorneys with financial protection, to enhance the image of the legal profession, and to establish or reinforce a system of strong professional involvement. *Id.*

82. A bar association participating in the CNA program must set up a claims review committee to handle disputes between lawyers and the insurer on individual claim or coverage questions, to assist in investigation and settlement of claims. Agreement, *supra* note 80, art. IX. The committee is also responsible for cooperating with CNA in educating association members about common causes of accidents and their prevention and for seeing that loss control measures are adopted. *Id.*

Rather than rating attorneys individually, the CNA program provides rate rebates to members of associations that succeed in reducing losses among their members. *Id.* arts. V, VIII. Coverage under CNA's program is provided in two layers. For the first layer, rates are explicitly based on the loss experience of the association, with lower rates for associations which succeed in avoiding losses among their members. *Id.* A second (excess coverage) layer protects against larger claims. *Id.* art. II.

The current state of information is not adequate for rate differentiation on an individual basis. *See* notes 58-59 *supra*. CNA is using a method it believes will induce groups of attorneys to reduce total malpractice claims against them. Interview with Nussbaum, *supra* note 36. As more detailed information becomes available, it may show whether or not membership in a bar association which takes an interest in reduction of malpractice claims actually reduces the chance that an individual attorney will have a claim made against him. If information shows that practice of a particular specialty is more significant than association membership in determining risk, those in lower-risk fields might be expected to seek a change in the method of rating.

83. Agreement, *supra* note 80, art. VIII.

84. *Id.*

and to make quarterly financial reports to the association, including premium and loss experience and actuarial projections.[85] CNA's reporting forms have been revised to include a computerized checklist indicating field of practice, type of error and cause of error.[86] The company has encouraged other insurers to follow its lead, believing that it would profit from the availability of industry-wide data.[87] CNA also favors mandatory insurance, which would increase the market for professional liability coverage.[88]

85. *Id.*

86.

CHECK ONE IN EACH COL. BELOW AS RELATED TO CLAIM

PRIMARY FIELD OF LAW	TYPE OF ERROR	CAUSE OF ERROR
.....05 Admiralty	.....01 Lost file or document	.....1 Carelessness/ oversight
.....10 Banking/Savings & Loan	.....02 Error in preparation or work done for client	..... 2 Inexperience
.....15 Commercial (incl. bankruptcy)	.....03 Improper interpretation of statute	.... 3 Absence due to illness
..... 20 Corporate	.....04 Erroneous advice to client	..... 4 Absence due to other
.....25 Criminal	.....05 Personal Injury (libel, slander, etc.) Limitation Lapses:	..... 5 Handled by employee
.....30 Domestic Relations	.....11 a. default judgment	.... 6 Burglary or theft
.....35 Labor	.....12 b. expiration of statute of limitations	.... 7 Poor office procedure
.....40 Municipal	.....13 c. lack of prosecution	.... 8 Inadequate docket control
.....45 Negligence—Def.	.....14 d. failure to file or comply within imposed court or admin. order	.... 0 Other
.....50 Negligence—Plain	.....15 e. failure to answer interrogatories within time imposed by law or court	
..... 55 Patent	.....16 f. failure to file tax returns or other documents within prescribed time	
..... 60 Real Estate	..... 00 Other	
.....65 Taxation		
.....70 Wills, Estate Planning & Probate		
.....00 Other		

CNA/Insurance, Association Lawyer's Professional Liability 30 Day Claim Form (CG-33024-A, undated). This reporting form is not CNA's only source of information. The application form also makes provision for systematized reporting of data about the insured. CNA/Insurance, Application for Comprehensive Lawyers' Liability Insurance (G-40466-A, undated).

87. Interview with Thomas Tucker, Vice-president of CNA/Insurance, by telephone, Oct. 28, 1972.

88. *Id.*

Due to the time-lag involved in malpractice claims, no data has yet been assembled under these new programs;[89] thus, it is difficult to predict how useful CNA's information will be. Potentially, the plan has a number of defects. Since CNA covers only eight states[90]—and only a part of the market in those eight—its information may not be representative of the industry as a whole. Also, the CNA information will be incomplete because there is no requirement that small claims paid by the attorney himself be reported.[91] Bar associations, to gain the maximum advantages from the program, must take an active interest in the information collected, perhaps seeking periodic reports on types of claims as well as on financial matters or requesting comparative data on other bar association programs. Because there is no provision in current contracts[92] that statistics collected by the insurer and given to bar associations be made public, clients may still have difficulty obtaining information. One fundamental danger in the CNA approach is that the objective of reducing losses may interfere with payment to clients for valid claims. Insurance departments and the public must be watchful to forestall this possibility, and all parties must be extremely conscious of ethical as well as financial considerations.

While the CNA program does not offer a complete solution of the legal malpractice information problem, it is a significant first step. This attempt to collect more useful information about legal malpractice might well be useful as a model for industry-wide data collection. Certainly, it demonstrates some willingness in the industry to assemble meaningful statistics. But it will be up to state insurance commissions to provide the coordination necessary to transform this willingness into usable, and publicly-available, data.

89. *Id.*

90. Arkansas, Illinois, Kansas, New York, Oregon, Pennsylvania (State Bar Association and Allegheny County have separate programs), Texas and Wisconsin. Interview with Henry Nussbaum, Senior Account Manager, Associated Property and Casualty Division, CNA/Insurance, by telephone, Nov. 14, 1972.

The Association of the Bar of the City of New York has set up a group program with American Home. While this program also involves cooperation of a bar association committee on claims and coverage questions, it does not emphasize improved information. Interview with Patrick Foley, General Counsel, American Home Assurance Company, in New York, Dec. 9, 1971, on file with the *Yale Law Journal.*

91. Interview with Nussbaum, *supra* note 46.

92. *See* Agreement, *supra* note 80, art. VIII.