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Legal Malpractice and Compulsory Client Protection

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One question that has emerged from the legal profession's recent reexamination of professional liability insurance plans is whether the attorney as an individual or the legal profession as an aggregate owes the public a duty to ensure compensation for the client-victim who is injured as a result of attorney malpractice.

One proposed solution to the dual quandary of expanding ethical concerns and escalating insurance premiums is the Professional Liability Fund.[1] Under this proposal each attorney in private practice would be compelled to contribute to a fund that would be used to recompense those who can prove that they have been damaged as a result of attorney malpractice. These pooled funds would be administered much like a claims-made liability insurance plan.[2] The ad-

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1. *See* OR. REV. STAT. §§ 9.080, 9.191 *as amended* July 20, 1977, in conjunction with Resolution of the Board of Governors of the Oregon State Bar, 1977 Annual Meeting; A.B. 209 (1977-1978) Regular Session, California State Legislature, Jan. 13, 1977, *as amended* June 15, 1977. In Oregon the plan is referred to as the Professional Liability Fund, and in California it is known as the Client Protection Fund. The authors have chosen to use the former designation in order to prevent the reader from confusing this plan with the Client Security Fund, which serves a different but related function. See notes 40-42, 60-83 & accompanying text *infra*.

2. There are two basic forms of professional liability coverage: occurrence and claims-made. The occurrence type insures the attorney for the year in which the act complained of occurred, regardless of when the claim is actually made. The claims-made type insures the attorney against any claim made during the year of coverage regardless of when the act complained of occurred. The former requires the carrier to retain a greater capital reserve in anticipation of potential losses based upon years past for which the collected premium must be sufficient. The latter requires less capital

ministrators of this public corporation would defend the attorney accused of malpractice and pay an adverse judgment up to specified limits.[3]

Reaction to the Professional Liability Fund has differed significantly in the two states in which it has been formally proposed. In Oregon the proposal was seen primarily as a public service, and opposition was negligible.[4] The plan moved through the Legislature without objection and was immediately implemented by the Oregon State Bar.[5] In California there has been a great deal of opposition to the Fund. The public protection aspect of the plan has been obscured by contests over whether it would serve all lawyers well and whether the compulsory features of the plan are legal.[6] The State Bar of California recently polled that state's lawyers on the acceptability of the Professional Liability Fund.[7] Approximately half of the bar responded to the poll with fifty-two percent favoring the proposal and forty-eight percent disapproving.[8] The legislators who had introduced the bill that would have authorized the Professional Liability Fund then amended the legislation to set up a committee to study the problem[9] and even that proposal was vetoed by the Governor.[10]

The narrow scope of this Article necessarily excludes the presentation of a model program and, consequently, the multitudinous policy decisions concerning specific provisions of a public protection-professional liability plan are not addressed. The authors attempt only to demonstrate that the Professional Liability Fund meets the present need and does so within the existing legal framework.

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reserves because the loss for any year is known at year's end. The disadvantage to the attorney of claims-made insurance is the need to continue to carry liability insurance after discontinuing the practice of law until the statute of limitations has barred claims arising from the practice. *See* PRACTICING LAW INSTITUTE, PROFESSIONAL LIABILITY INSURANCE FOR LAWYERS AND ACCOUNTANTS 13 (1976).

3. *See* OR. REV. STAT. §§ 9.080, 9.191 *as amended* July 20, 1977, in conjunction with Resolution of the Board of Governors of the Oregon State Bar, 1977 Annual Meeting; A.B. 209 (1977-1978) Regular Session, California State Legislature, Jan. 13, 1977, *as amended* June 15, 1977.

4. Letter from Herbert C. Hardy of the Oregon Bar to Benjamin F. Boyer (Oct. 24, 1977) (on file with The Hastings Law Journal).

5. *Id.*

6. *See, e.g.*, STATE BAR OF CAL., Reports 2 (July and Aug. (1977)) [hereinafter cited as Reports]; letters from members of the State Bar of California (on file with The Hastings Law Journal).

7. Reports, *supra* note 6, at 1 (July 1977).

8. Reports, *supra* note 6, at 1 (Aug. 1977).

9. A.B. 209 (1977-1978) Regular Session, California State Legislature, *as amended* Sept. 14, 1977 (Assembly), Sept. 15, 1977 (Senate).

10. *Id.*, vetoed Oct. 1, 1977, ASSEMBLY JOURNAL, Oct. 6, 1977, at 10156.

The Need For A Client Protection — Professional Liability Plan

Because the Professional Liability Fund would eliminate private carriers from the basic coverage market in this field and compel participation by the state's attorneys, the Fund can be justified only if an important underlying and unmet need exists. Although there is a dearth of reliable data on the actual claims experience of the American lawyer,[11] what is known indicates a serious problem.

Nationwide, approximately one-third of the active bar is not covered by any professional liability insurance.[12] This incredible lack of coverage, with its concomitant risks to clients as well as to lawyers themselves, coincides with a dramatic increase in the incidence of claims. Since 1959 there has been a steep and continuous rise in the relative frequency of malpractice claims against attorneys.[13]

According to the Insurance Service Organization, a national data collection service, claims doubled between 1970 and 1975 from 6,780 to 13,333.[14] The sums paid on these claims more than tripled, from $33,000,000 to $111,000,000.[15] One commentator reported a rise in claims from 1.8 per 100 attorneys in 1973 to an expected incidence of 7.2 per 100 attorneys in 1976.[16] In addition, the cost of the average award has been increasing by twenty-five percent per year.[17] These data are useful, however, only to the extent they suggest a problem

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11. *See* Note, *Improving Information on Legal Malpractice,* 82 YALE L.J. 590 (1973).

12. Woytash, *Lawyer Malpractice: Is a Crisis Coming?*, BAR LEADER 18, 21 (Oct. 1976) [hereinafter cited as Woytash]. In Oregon it is estimated that 40% of the bar has no liability coverage; *see* letter from Herbert C. Hardy to Benjamin F. Boyer (Oct. 24, 1977) (on file with The Hastings Law Journal). For California figures, see text accompanying note 22 *infra.*

13. R. MALLEN & V. LEVITT, LEGAL MALPRACTICE 15 (1977).

14. Statement of the Board of Governors, Oregon State Bar, 1977 Annual Meeting at 1. Woytash, *supra* note 12, at 23 (reporting a tripling of claims in a three-year period).

15. Statement of the Board of Governors, Oregon State Bar, 1977, Annual Meeting at 1.

16. Woytash, *supra* note 12, at 23. In California the incidence of claims for 1976 was expected to be 6.6 per 100 insureds. Booz, Allen Consulting Actuarial Review of a Legislative Proposal for State Bar of California (April 8, 1977), app. I, exhibit 1 (on file with the Hastings Law Journal) [hereinafter cited as Booz, Allen].

17. Woytash, *supra* note 12, at 23. In California the average award is estimated to be $20,000 for 1978. Booz, Allen, *supra* note 16, at app. II. *But see* Stern, *The Virginia*

and a trend; virtually no statistics on the actual claims experience of the uninsured attorney exist. Additionally, there is no way to gauge how many clients decide not to press their claims upon discovering that their attorneys have no professional liability insurance.

As the number of claims and the cost of awards have risen, there have been emphatic reactions in the insurance industry. Between 1972 and 1976 sixteen of the twenty companies offering professional liability insurance stopped accepting new applications for coverage.[18] This flight from the field has occurred notwithstanding sharply escalating premium charges. Within a period of two years, premiums have increased by at least 500% in California,[19] 400% in Ohio, 600% in Arizona, and at least 300% in other states.[20] This rise in premium costs has occurred notwithstanding a general switchover from occurrence coverage to the less expensive claims-made type of insurance.[21]

As the cost of insurance continues to outpace a general rise in income, it is reasonable to expect that fewer attorneys will voluntarily pay the higher premiums. In California alone approximately 20,000 of the state's 55,000 attorneys are uninsured.[22] As a consequence of this anticipated increase in the number of uninsured practitioners, increasingly more clients are exposed to the risk of loss based on uncollectible damages from negligent attorneys. Many clients, furthermore, will voluntarily forego their valid claims rather than sue the uninsured attorney.

Although substantiating statistics are not available, it is reasonable to assume that, for financial reasons, recent admittees to the bar and others with economically marginal practices are disproportionately represented among the uninsured. The inexperienced attorney may

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Attorney Malpractice Experience, 22 VA. B. NEWS 11 (1974), *reprinted in* D. STERN, AN ATTORNEY'S GUIDE TO MALPRACTICE LIABILITY 53, 55 (1977), where the author reports a median and mean claim against Virginia attorneys of less than $5,000 in 1972.

18. Stern, *Malpractice is a Lawyer's Problem Too*, BARRISTER 26, 28 (Spring 1976). *Cf.* Folsum, *Attorney's Professional Liability Insurance*, BRIEF CASE 10 (Summer 1976) (five companies offer professional liability insurance for attorneys).

19. Folsum, *Attorney's Professional Liability Insurance*, BRIEF CASE 10 (Summer 1976). The author reports a rise in premiums of 125% in 1975 and 383% in 1976. It is reported that yearly premiums have risen from approximately $300 before the 1976 increase to $2,100 in 1977. Reports, *supra* note 6, at 7 (July 1977).

20. Stern, *Malpractice is a Lawyer's Problem Too*, BARRISTER 26, 28 (Spring 1976). *See also* Woytash, *supra* note 12, at 21.

21. Stern, *Malpractice is a Lawyer's Problem Too*, BARRISTER 26, 28 (Spring 1976).

22. The Recorder, Aug. 8, 1977, at 1, col. 3.

also be more likely to commit the common errors that harm the client. It is estimated that as much as forty-five percent of malpractice results from time lapses such as missed filing deadlines and the running of statutes of limitations.[23] To the extent that the attorney with an economically marginal practice is represented among the uninsured, one can assume that he or she is less able to respond in damages when a client is injured through incompetence or neglect.

Action directed towards compelling attorneys to carry professional liability insurance with private firms is unlikely to solve the problem. Insurance cannot reasonably be demanded as a condition of licensure unless the carriers are required to accept all applicants. The insurance industry, otherwise, could effectively "disbar" those who failed to meet their insurability criteria. Although the present rate of coverage refusal may be as low as one-half of one percent,[24] insurance companies resist being required to accept the high risk minority.[25]

An assigned risk program, assuming it is an available alternative, probably would cause an increase in premiums substantially greater than the present escalating rates. The pool of attorneys from which the insurers must draw their funds is very small in relation to other liability insurance pools, and, in combination with there being so few carriers remaining in the field, there is little room over which to spread the greater anticipated loss.

As an example of the insurance industry's reluctance to accept all risks in this field, the state of Washington's experience is instructive. When the Washington State Bar petitioned the state supreme court for a rule of court requiring all attorneys to carry professional liability insurance, the only insurer in the field withdrew.[26] It appears, furthermore, that the state cannot compel companies offering other kinds of liability insurance to enter the professional liability field.[27] North Carolina attempted to ease its crisis in medical liability insurance by requiring virtually all of the insurance companies that handled some

23. Note, *Improving Information on Legal Malpractice*, 82 YALE L.J. 590, 603 n.55. *Compare id. with* Woytash, *supra* note 12, at 19.

24. Agenda Item, California State Bar Meeting (April 24, 1975) (on file with The Hastings Law Journal).

25. *Id.* See text accompanying notes 26-28 *infra*.

26. Letter from G. Edward Friar, Executive Director, Washington State Bar Association to Benjamin F. Boyer (Sept. 29, 1977) (on file with The Hastings Law Journal).

27. Hartford Accident and Indem. Co. v. Ingram, 290 N.C. 457, 226 S.E.2d 498 (1976).

kind of liability insurance to join a state medical malpractice pool.[28] The North Carolina Supreme Court in invalidating the statute held that professional liability insurance is a business different in kind from other forms of insurance. Because such coverage requires unique expertise on the part of the carrier, a company cannot be required to engage in it as a condition of carrying on a totally different business.[29]

As these two instances illustrate, although mandatory insurance from private companies would protect the public from the threat of loss, it is probably not a realistic alternative. Even if it were available, the cost may be so prohibitive as to preclude a substantial number of attorneys from practicing law. The ethical duty to provide the public with protection from professional negligence and the need to provide attorneys with a source of coverage at a reasonable price requires, however, some alternative to the inadequate system of voluntary coverage with private carriers now in effect.

A professional liability fund would not only protect the thousands of clients who now, practically speaking, have no present remedy against execution-proof lawyers for their injury, but it would also benefit the profession. It has been estimated that such a plan would provide savings of thirty-five to fifty percent over comparable private insurance.[30] More importantly, the bar's voluntary development of a client protection plan would go a long way toward restoring public confidence in a profession that has in many other ways accepted its responsibility to protect the public from inadequate legal counsel.

The Existing Logic

The legal profession has long recognized its duty to protect the public from incompetence and misconduct.[31] Every state has established minimum educational requirements for applicants to the bar.[32] In addition, most states require prospective lawyers to prove their

28. An Act to Establish a Health Care Liability Reinsurance Exchange, 1975 N.C. Sess. Laws, ch. 427, § 2.

29. Hartford Accident and Indem. Co. v. Ingram, 290 N.C. 457, 226 S.E.2d 498 (1976).

30. Booz, Allen, *supra* note 16, at 3-6.

31. As early as 1401 A.D. the courts of England were allowed to regulate who could practice before them. State v. Cannon, 206 Wis. 374, 385, 240 N.W. 441, 446 (1932) (quoting 4 HENRY IV, ch. 18).

32. *See, e.g.*, ABA LAW SCHOOLS AND BAR ADMISSION REQUIREMENTS at 49 (1975).

competency by passing a thorough examination.[33] Once the scholastic requirements are met, the bar candidate must satisfy the state that he or she is morally fit and deserving of the public trust.[34] Additionally, a growing number of states require attorneys to participate in continuing legal education programs.[35]

Notwithstanding these elaborate safeguards, some attorneys still neglect their client's interests, and a few fail to meet the minimal standards of professional competence. To guide the practicing lawyer and to establish disciplinary standards, states have adopted rules of professional conduct.[36] These professional codes are also a part of the public protection scheme. In *Ames v. State Bar of California*,[37] the Supreme Court of California explicitly recognized this dual function: "The Rules of Professional Conduct are intended not only to establish ethical standards for members of the bar, but are also designed to protect the public."[38]

American Bar Association Rules of Professional Responsibility Ethical Consideration (EC) 2-7 acknowledges that in our modern, complex, and mobile society the public is frequently unable to make an informed choice as to the competency of counsel to be retained and that generally any given lawyer may be incompetent to handle some legal matters.[39] Under EC 6-3[40] lawyers are, nonetheless, al-

33. *Alphabetical State-by-State Listing of Bar Requirements*, 2 BEFORE THE BAR 7 (1976-77); *see* Robertson & Buehler, *The Separation of Powers and the Regulation of the Practice of Law in Oregon*, 13 WILLAMETTE L.J. 273, 291 (1977), where the authors report that four states (Montana, South Dakota, West Virginia, and Wisconsin) have diploma privilege. All four states have the privilege through court order as well as statute. *See, e.g.*, W. VA. SUP. CT. R. 1.202; W. VA. CODE ANN. § 30-2-1 (1972).

34. *See, e.g.*, CAL. BUS. & PROF. CODE §§ 6060(b), 6062(b) (West 1974); Konigsberg v. State Bar of Cal., 353 U.S. 252 (1957); Schware v. Board of Examiners of N.M. 353 U.S. 232 (1957); *Ex parte* Garland, 71 U.S. (4 Wall) 333, 378 (1866); *In re* Stepsay, 15 Cal. 2d 71, 73, 98 P.2d 489, 489-90 (1940); Annot., 64 A.L.R.2d 288 (1959).

35. Minnesota, Wisconsin, and Iowa now have mandatory continuing education of the bar. Benjamin, *You Must Go Back to Class*, BARRISTER 30, 32 (Spring 1976).

36. WISE, LEGAL ETHICS *xi* (Supp. Jan. 1977), reports that 49 states and the District of Columbia have adopted the ABA Code of Professional Responsibility. This information comes from the foreward to the 1975 edition. In 1975 California, the lone holdout, adopted disciplinary rules based on the ABA Code. CAL. BUS. & PROF. CODE § 6076 (West Supp. 1977). Because of variations in the text actually adopted by the states, the reader must examine the code in the particular state whose rules are of concern.

37. 8 Cal. 3d 910, 606 P.2d 625, 106 Cal. Rptr. 489 (1973).

38. *Id.* at 917, 606 P.2d at 629, 106 Cal. Rptr. at 493 (citations omitted).

39. ABA CODE OF PROFESSIONAL RESPONSIBILITY (1975).

40. *Id.*

lowed to accept such cases if they have a good faith intention to become competent. Recognizing that the public is, therefore, at a special disadvantage in dealing with lawyers, EC 6-6[41] admonishes attorneys to do nothing to limit their liability in regard to malpractice. It is reasonable, in light of these ethical considerations, to interpret this provision as meaning that an attorney should not handle a matter to which he or she would be unable to respond in damages should his or her own neglect or incompetence impose a loss on the client. The bar opens itself up to criticism when it allows attorneys to accept cases that are not within their competence, if at the same time it fails to require that attorneys be able to respond in damages in the event that the unwary client is injured through neglect or incompetence. Disciplinary sanctions alone are insufficient because they fail to address the economic loss suffered by the injured client.

Several states have already set up Client Security Funds to protect against the *wilful* misconduct of attorneys.[42] Recognizing that disciplinary procedures alone failed to protect the individual client in the case of attorney embezzlement or other intentional misuse of client property, thirty-six states now require all active members of the bar to contribute to the Client Security Fund from which the victim is compensated.[43] Just as disciplinary standards alone were an insufficient response to wilful misconduct, they are also an insufficient response to our present concern of attorney negligence and incompetence.

The present public protection scheme includes guards against unqualified applicants, methods of removing grossly incompetent, negligent, and dishonest attorneys, and security against wilful wrongdoers. The logic would be completed by providing security for the unwary victim of attorney incompetence or neglect.

The Legal Bases

Although the professional liability fund may appear to be the next logical step in a comprehensive plan by which the legal profession can ensure quality services while securing the public against

41. *Id.* Corresponding disciplinary rules make these ethical considerations more than aspirational: ABA CODE OF PROFESSIONAL RESPONSIBILITY, CANON 6, DR 6-101, 6-102 (1975).

42. *See, e.g.*, CAL. BUS. & PROF. CODE § 6140.5 (West 1974).

43. *Clients' Security Fund*, 96 ABA ANNUAL REPORTS 595 (1971).

occasional professional lapses and providing lower cost liability insurance, many attorneys question the legality of the plan.[44] The state, generally, has broad power to regulate attorneys.[45] Because of the lawyer's unique, traditional role as an officer of the court, the inherent power to exercise this regulatory function vests in the courts.[46] The power of the court to make reasonable rules and regulations regarding the conduct of attorneys is no longer open to question.[47] The legislature, through the use of its police power, also has the right to regulate the bar.[48] The legislative power to regulate attorneys is incidental to its general power to protect the public.[49] Either the court or the legislature could require the implementation of the Professional Liability Fund.

Virtually every state that has considered the matter has determined that the legislature may pass laws supplementary to the inherent power of the court.[50] In California, the court has held that the only restraints on the legislature are reasonableness and noninfringement of the court's right to prescribe additional conditions,[51] although reasonable minimum legislative standards may be binding on the courts.[52] Some states give the legislature sole control over educational requirements.[53]

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44. See note 6 *supra.*

45. *See* United Mine Workers v. Illinois State Bar Ass'n 389 U.S. 217 (1967).

46. *See* Goldfarb v. Virginia State Bar, 421 U.S. 773, 789 n.18 (1975); Stratmore v. State Bar of Cal., 14 Cal. 3d 887, 538 P.2d 229, 123 Cal. Rptr. 101 (1975); Board of Comm'rs, Ala. State Bar v. State *ex rel* Baxley, 295 Ala. 100, 106, 324 So. 2d 256, 261 (1975); Beardsley, *The Judicial Claim to Inherent Power Over the Bar,* 19 A.B.A.J. 509 (1933).

47. American Trial Lawyers Ass'n v. New Jersey Supreme Court, 126 N.J. Super. 577, 316 A.2d 19 (1974) (upholding court-imposed contingent fee limits in personal injury cases).

48. *See generally Ex parte* Yale, 24 Cal. 241, 85 Am. Dec. 62 (1864); Annot., 144 A.L.R. 150 (1943).

49. *E.g., In re* Lavine, 2 Cal. 2d 324, 330, 41 P.2d 161, 163 (1935) (quoting State v. Cannon, 206 Wis. 374, 396, 240 N.W. 441, 450 (1932)).

50. *See* Annot., 144 A.L.R. 150, 151-54; Note, *Admissions to the Bar and Separation of Powers,* 7 UTAH L. REV. 82, 87 (1960). Robertson & Buehler, *The Separation of Powers and the Regulation of the Practice of Law in Oregon,* 13 WILLAMETTE L.J. 273, 289, n.82 (1977), reports that at present only New York gives exclusive power over admissions to the legislature.

51. *In re* Lavine, 2 Cal. 2d 324, 328, 41 P.2d 161, 162 (1935).

52. *Id.; Ex parte* Yale, 24 Cal. 241, 85 Am. Dec. 62 (1864). *See also* James v. State, 61 Ga. App. 860, 7 S.E.2d 398 (1940); Hanson v. Grahan, 84 Kan. 843, 115 P. 646 (1911).

53. *E.g.,* Institute of Metropolis, Inc. v. University of N.Y., 249 App. Div. 33, 291 N.Y.S. 893 (1936), *aff'd,* 274 N.Y. 504, 10 N.E.2d 521 (1937); Seawell v. Carolina Motor Club, 209 N.C. 624, 184 S.E. 540 (1926).

In addition, many states have given the boards of governors of the state bars the power to formulate rules of professional conduct with approval of the highest state court.[54] This practice has survived the challenge of being an unconstitutional delegation of legislative power.[55] There are, of course, limits on how much power can be delegated to the state bar associations. There is no longer any doubt that although these associations are subject to the antitrust laws,[56] a state's actions are not.[57] Whereas a bar-imposed mandatory insurance program would be subject to attack as a monopolistic practice. the state in its role as sovereign may compel attorneys to join together for concerted action in the public interest.[58]

An example of the state's broad power to regulate attorney conduct can be found in *Lathrop v. Donohue*,[59] where the Supreme Court of the United States held that the state may compel attorneys to join state-wide bar associations, known as integrated bars, even when these organizations use compulsory dues and assessments to support legislation to which an individual attorney is opposed.[60] Over half of the states now have such an integrated bar,[61] and it has been upheld whether established by statute[62] or by rule of court.[63]

Courts have also held that attorneys may be required to contribute to the maintenance of funds specifically established to reimburse the client-victim who has been damaged by an attorney.[64] In order

54. *See, e.g.*, Barton v. State Bar of Cal., 209 Cal. 677, 289 P. 818 (1930).

55. *Id.*

56. Goldfarb v. Virginia State Bar, 421 U.S. 773, 790 (1975).

57. Parker v. Brown, 317 U.S. 341 (1943). *See also* Cantor v. Detroit Edison Co., 428 U.S. 579 (1976).

58. For a more in depth look at the state action antitrust exemption, see Note, *The State Action Antitrust Exemption: The Confinement of the Parker Doctrine Within the Emerging Cantor Formula*, 29 HASTINGS L.J. 211 (1977).

59. 367 U.S. 820 (1961). *See also In re* Rhodes, 370 F.2d 411 (8th Cir.), *cert. denied*, 386 U.S. 999 (1967).

60. Lathop v. Donohue, 367 U.S. 820 (1961); *see* Annot., 151 A.L.R. 617 (1944); MCKEEN, THE INTEGRATED BAR (1963); State Bar Act, CAL. BUS. & PROF. CODE §§ 6000-6172 (West 1974).

61. ABA, DIRECTORY OF BAR ASSOCIATIONS, BAR EXECUTIVE HANDBOOK (1970)

62. Herron v. State Bar of Cal., 24 Cal. 2d 53, 147 P.2d 543, *cert. denied*, 323 U.S. 753 (1944); Hill v. State Bar of Cal., 14 Cal. 2d 743, 97 P.2d 236 (1939).

63. Lathop v. Donohue, 367 U.S. 820 (1961); Application of the President of Montana Bar Ass'n, 163 Mont. 523, 518 P.2d 32 (1974); *In re* Unification of N.H. Bar, 109 N.H. 260, 248 A.2d 709 (1968).

64. *E.g., In re* Member of the Bar, 257 A.2d 382 (Del.), *appeal dismissed sub nom. In re* Reed, 396 U.S. 274 (1969).

to protect the public from wilful conversions, embezzlements, and misuse of property, the Client Security Fund was proposed and first instituted in the United States in Vermont in 1959.[65] In each of the thirty-five states that has since adopted this plan,[66] all state-licensed attorneys are required to pay an annual assessment from which the victims of attorney misappropriation are reimbursed.[67] The Client Security Fund has been established by order of court[68] and by statute.[69] It has been upheld in states with an integrated bar[70] and in states with a nonintegrated bar.[71]

Although Justice Douglas dissented from the Court's approval of the integrated bar in *Lathrop*[72] because he believed that it intruded upon freedom of association,[73] he specifically distinguished the Client Security Fund as an example of the kind of compulsory group requirement that properly falls within the regulatory power of the state.[74] Justice Douglas viewed breaches of fiduciary responsibility as a risk properly distributed among all members of the profession.[75]

The Supreme Court of Delaware accepted Justice Douglas' idea of collective responsibility in upholding that state's Client Security Fund.[76] The court reasoned that the bar, by setting the standards for admittance, holds out to the public that all members in good standing are "*competent*, honest, and devoted to their client's inter-

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65. ABA, *ABA Develops a Model Plan for Client's Security Fund*, BAR EXECUTIVE KEY HANDBOOK (May 1971); Voorhees, *A Progress Report*, 46 A.B.A.J. 496 (1960). The Canadian pioneer statute is found in Alberta. ALTA REV. STAT. § 31a, ch. 294 (1942).

66. *Clients' Security Fund*, 96 ABA ANNUAL REPORTS 595 (1971).

67. *E.g.*, CAL. BUS. & PROF. CODE § 6140.5 (West 1974). *See generally* Annot., 53 A.L.R.3d 1298 (1973).

68. *In re* Member of the Bar, 257 A.2d 382 (Del.), *appeal dismissed sub nom. In re* Reed, 396 U.S. 274 (1969).

69. *E.g.*, CAL. BUS. & PROF. CODE § 6140.5 (West 1974).

70. *E.g.*, *In re* Client Security Fund, 254 Ark. 1075, 493 S.W.2d 422 (1973); Whittier Union High School Dist. v. Superior Court, 66 Cal. App. 3d 504, 510, 136 Cal. Rptr. 86, 90 (1977); Bennett v. Oregon State Bar, 256 Or. 37, 470 P.2d 945 (1970).

71. *E.g.*, *In re* Member of the Bar, 257 A.2d 382 (Del.), *appeal dismissed sub nom. In re* Reed, 396 U.S. 274 (1969).

72. 367 U.S. 820 (1961).

73. *Id.* at 881.

74. *Id.*

75. *Id.*

76. *In re* Member of the Bar, 257 A.2d at 383 (Del.), *appeal dismissed sub nom. In re* Reed, 396 U.S. 274 (1969).

est."[77] The court observed that it is only natural, therefore, for the organized bar as a whole to be considered responsible to the defrauded client.[78]

The Supreme Court of Oregon[79] and the Federal District Court in Massachusetts[80] have joined the Delaware court in rejecting constitutional arguments against these compulsory contribution public trust funds. The Oregon court, relying on the reasoning in *Lathrop*, held that it does not violate due process or equal protection of the laws to require the beneficiaries of a highly regulated profession to pay the cost of elevating standards[81] and that the assessment does not amount to a tax or unauthorized delegation of legislative power.[82] The courts have found the Client Security Fund to be associated with the ethical standards which the courts have primary responsibility to maintain[83] and have held it to be reasonably related to the legitimate state interest in raising the quality of legal services.[84]

The reasoning that supports the Client Security Fund also supports the Professional Liability Fund. There can be no doubt but that competence and care are legitimate ethical concerns and are subject to state regulation.[85] Incompetence and neglect, like dishonesty, are risks of the profession that should be distributed among the members. Indeed, the risk of harm from negligence is much greater than the risk of harm from fraud, both in terms of frequency and economic cost. The legal profession must accept its responsibility to insure the public against loss from either risk.

The idea of compulsory liability insurance is neither new nor radical. There is no longer any question as to whether the states have the right to require insurance as a condition of carrying on an

77. *Id.* (emphasis added).
78. *Id.*
79. Bennett v. Oregon State Bar, 256 Or. 37, 470 P.2d 945 (1970).
80. Hagopian v. Justices of Supreme Judicial Court, 429 F. Supp. 367 (D. Mass. 1977), *aff'd*, 98 S. Ct. 34 (1977).
81. Bennett v. Oregon State Bar, 256 Or. 37, 43, 470 P.2d 945, 948 (1970) (quoting Lathop v. Donohue, 367 U.S. 820, 843 (1961)).
82. *In re* Member of the Bar, 257 A.2d 382 (Del.), *appeal dismissed sub nom. In re* Reed, 396 U.S. 274 (1969).
83. *Id.* at 383.
84. Bennett v. Oregon State Bar, 256 Or. at 43, 470 P.2d at 948 (quoting Lathop v. Donohue, 367 U.S. at 843).
85. See notes 11-12 & accompanying text *supra*.

activity that exposes the public to a significant risk of harm.[86] The United States Supreme Court has recognized such power as legitimate for over forty years.[87] For example, in the case of employers, the state has required financial responsibility for all injuries to employees arising in the course of employment, regardless of fault.[88] The state also imposes financial responsibility requirements on some occupations in which negligence could cause an unwarranted risk of financial harm, such as notaries and building contractors.[89]

Perhaps the most familiar type of compulsory liability insurance is that which relates to motor vehicles. The state's requiring this type of insurance was sustained by the United States Supreme Court, against a due process challenge, as a valid exercise of the police power: "Any appropriate means adopted by the states to insure competence and care on the part of its licensees . . . is consonant with due process."[90] The legality of compulsory automobile insurance cannot be distinguished from attorney malpractice insurance on the ground that it is concerned with a bodily injury as opposed to property damage. As is made evident by the contractor and notary statutes mentioned above, the state may require financial responsibility of those whose negligence would cause only financial harm. Furthermore, a mishandled legal matter can certainly have as lasting and damaging an impact on the well-being of a person as many physical injuries. The real interest of the state is in protecting members of the public from risks of harm from which they may be unable to protect themselves. The interest of the state is in protecting against a risk of harm: whether the harm is economic or bodily is not legally significant.

The courts have emphasized that, notwithstanding language providing indemnity for the insured, compulsory liability insurance is intended primarily for the innocent victim.[91] The issue, therefore, is not whether the attorney should be free to insure against his or her

86. *Ex parte* Poresky, 290 U.S. 30, 32 (1933) (auto liability insurance).

87. Bell v. Burson, 402 U.S. 535, 539 (1971); Continental Baking Co. v. Woodring, 296 U.S. 352 (1932) (regulation of highways for public safety).

88. *See, e.g.*, Madera Sugar Pine Co. v. Industrial Accident Comm'n, 262 U.S. 499 (1923); CAL. LAB. CODE § 3600 (West 1971).

89. *E.g.*, CAL. GOV'T CODE § 8212 (West 1966) (notary Bond); CAL. BUS. & PROF. CODE § 7071.5 (West 1975) (contractor Bond).

90. Reitz v. Mealey, 314 U.S. 33, 36 (1941), *quoted in* Escobedo v. State Dep't of Motor Veh., 35 Cal. 2d 870, 876, 222 P.2d 1, 5 (1950).

91. *See, e.g.*, American Homeowner's Ins. Co. v. Reserve Ins. Co., 264 F. Supp. 632, 634 (D. Md. 1967).

own negligence; the focus of the state's concern is on the client, not the attorney. The client bears the direct risk of injury from malpractice.

As the foregoing demonstrates, the base upon which to erect the Professional Liability Fund has already been provided by extant social institutions and policy, such as compulsory insurance for state licensees, the integrated bar, and the Client Security Fund. The Professional Liability Fund is an extension of existing logic and represents a difference only in degree, not in kind. It is well established that the practice of law is a privilege that the state may grant upon condition. Constitutional rights, however, do not turn upon whether a government benefit is characterized as a privilege or a right.[92] The client protection fund must be both reasonable and not overly burdensome if it is to withstand constitutional challenge.

"The presumption of reasonableness is with the state."[93] The legislature has relatively few limits where strictly social legislation is concerned, and it "has a broad discretion in classification in the exercise of its power of regulation . . . ."[94] Because lawyers cannot be considered a suspect class,[95] an equal protection challenge may be met by demonstrating that there is a rational relation between the classification, attorneys in private practice, and the legitimate state interest, protecting the public through raising ethical standards and the quality of legal services.[96] The argument that such a plan is unreasonable because it does not cover other professionals has no constitutional merit. An act is not unconstitutional merely because it does not reach every abuse or cover all classes for which it may be desirable.[97] Likewise, since the United States Supreme Court decision in *Nebbia v. New York*,[98] a substantive due process challenge

92. Graham v. Richardson, 403 U.S. 365, 374 (1971).

93. *See* Salsburg v. Maryland, 346 U.S. 545, 553 (1954).

94. Smith v. Cahoon, 283 U.S. 553, 566 (1931).

95. A suspect class is one "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment . . . as to command extraordinary protection from the majoritarian political process." San Antonio School Dist. v. Rodriguez, 411 U.S. 1, 28 (1973).

96. Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 314 (1976); Dandridge v. Williams, 397 U.S. 471, 485 (1970).

97. Railway Express Agency v. New York, 336 U.S. 106, 110 (1949); Bennett v. Oregon State Bar, 256 Or. 37, 39, 470 P.2d 945, 947 (1970) (quoting Semler v. Oregon Dental Examiners, 148 Or. 50, 63, 34 P.2d 311, 315 (1934), *aff'd*, 294 U.S. 608 (1935)).

98. 291 U.S. 502 (1934). See also United States v. Carolene Products Co., 304 U.S. 144, 152-54 (1937), where the court discusses the rational basis test.

of an economic regulation may be met by showing that the regulation may "reasonably be deemed to promote public welfare."[99]

Although the professional liability fund may, as some have argued, interfere with the attorney's right to contract, "[l]egislation otherwise within the scope of acknowledged state power not unreasonably or arbitrarily exercised cannot be condemned because it curtails the power of the individual to contract."[100] Because the need can be demonstrated, no real question of arbitrariness is involved.

The Professional Liability Fund would not be overly burdensome when its cost to the legal profession is weighed against the public benefit. Perhaps foremost in consideration is the reasonable expectation that such a plan would be instrumental in restoring public confidence in the profession. The importance of public regard and trust was mentioned by the Delaware court in upholding the validity of the Client Security Fund: "The proper administration of justice will falter if the Bar as a whole loses the confidence of the public . . . ."[101] There is a general feeling within the profession that there has been a serious erosion in public confidence over the past few years, and some commentators believe that this lower opinion of the bar is causally related to the increased incidence of claims.[102]

In addition to such an important intangible benefit as increased public confidence, the Professional Liability Fund would protect the public from the threat of millions of dollars in losses while making

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99. Nebbia v. New York, 291 U.S. 502, 537 (1934). Recently the Supreme Court of Kansas upheld a statute that, in addition to requiring mandatory medical malpractice for physicians, requires mandatory contributions by practitioners to a public trust fund the goal of which is to assure citizens redress should their damages from malpractice exceed private coverage. State *ex rel* Schneider v. Leggett ___ Kan. ___, 576 P.2d 221 (1978). In Jones v. State Bd. of Medicine, 97 Idaho 850, 555 P.2d 399 (1976), the Supreme Court of Idaho held that a statute making medical malpractice insurance mandatory was rationally related to the welfare of the citizens of that state. *Id.* at 868, 555 P.2d at 408 (remanded on other grounds). A similar Kentucky statute has been rejected in part because the state failed to present evidence demonstrating a need to which the statute could be rationally related. McGuffey v. Hall, 557 S.W.2d 401, 414-16 (Ky. 1977).

100. Alaska Packers Ass'n v. Industrial Accident Comm'n, 294 U.S. 532, 543 (1935).

101. *In re* Member of the Bar, 257 A.2d at 383 (Del.), *appeal dismissed sub nom. In re* Reed, 397 U.S. 274 (1969).

102. *See, e.g.*, Blaine, *Professional Liability Claims: An Increasing Concern for Lawyers*, 59 ILL. B.J. 302, 305 (1970); Stephenson, *An Insurer Looks at Lawyers' Professional Liability Insurance*, BENCH AND BAR OF MINNESOTA 21 (Nov. 1966).

insurance available to the attorney at a significantly reduced cost.[103] An incidental benefit would be better data collection on the causes and incidence of attorney malpractice. The very fact that all attorneys will have a financial stake in the quality of service, furthermore, may be a motivating factor in more positive action to remove the unfit from practice. Sometimes a squeeze of the purse results in better vision.

Conclusion

One criterion that supposedly sets the professional apart from the businessperson is a concern for public service before private profit. Dean Pound said that a profession is a group of people who are "pursuing a learned art . . . in the spirit of public service . . . ."[104] The legal profession has a virtual monopoly on formal conflict resolution. Lawyers benefit from a complex system that they control as judges and through high representation, relative to other vocations, in local, state, and national legislative bodies and executive governmental positions. They have been given the privilege of self-regulation and, therefore, have a responsibility to meet public expectations. Those who profit by the system should insure against the almost inevitable, if infrequent, injuries done to those who must turn to them to secure their rights and plead their causes.

Through its elaborate certification procedures, the bar holds out to the public that its members are competent and devoted to the clients' interests. This collective representation justifies, even demands, a collective acceptance of responsibility when a member does not live up to certain minimal expectations.

The bar now has the opportunity to accept this responsibility before the courts or the legislature impose it upon them. If it acts now, the bar can develop a cohesive plan to present to the court or legislature for action that will have the flexibility to protect the varied interests of the practitioners as well as the intergrity to protect the client. If it fails to act, the bar may eventually be saddled with a cumbersome piece of legislation that fails to meet the needs of the public or the profession.

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103. Booz, Allen, *supra* note 16, at 3-6.

104. POUND, THE LAWYER FROM ANTIQUITY TO MODERN TIMES 5 (1953).