

ALASKA LEGISLATURE SPECIAL COMMITTEE/SUBJECT FILE 8672
1723 SCOMM 69: HOUSE LIABILITY INSURANCE TASK FORCE, 1989-1990 291

Table 24

HOW RESPONDENTS WOULD FIND A LAWYER IF THEY NEEDED ONE

	<u>Number of Responses</u>	<u>% of Responses</u>
Look in the Yellow Pages	168	33.6
Ask an acquaintance	118	23.6
Know or have a lawyer	115	23.0
Never thought about it	43	8.6
Go to Legal Aid	25	5.0
Check with Lawyer's Referral Service	17	3.4
Other	<u>14</u>	<u>2.8</u>
TOTAL NUMBER OF RESPONSES	500	100.0

Slightly more than one-third of the nationwide sample reported that they would find a lawyer through the yellow pages and 23.6% indicated that they would ask a family member or friend. These data are consistent with that reported in other civil legal needs studies we have conducted.

CHAPTER VI

CONCLUSION

6.1 Comparison With Other Civil Legal Needs Studies

As we indicated at the beginning of this report, there have been at least 25 civil legal needs studies of the poor in this country conducted over the past 20 years. At least 15 of these studies have attempted to compute the annual rate per household of legal problems experienced in their jurisdiction. The range of response has been quite broad--from 1.0 to 5.5. There are several reasons for these results. They include the following:

- o Some surveys asked respondents to report their problems for a period as long as five years.
- o Some surveys asked as many as 250 specific problems.
- o Some surveys did not use random samples, e.g., the sample was limited to current legal services clients.
- o Some surveys asked respondents to report the number of times within a specified period that the problem had re-occurred.

Despite these limitations, it is important to note that all surveys conducted in the past 20 years report an annual average rate of unmet legal problems per household of at least 1.0.

The two studies that The Spangenberg Group has conducted that most closely mirror the methodology for the phone survey in the current ABA Study were conducted in New York and Illinois. The one major difference is that only 34 individual problems were contained in the ABA Study while there were 63 in Illinois and 66 in New York. Based upon a sample of 1,250 respondents in New York State, the average number of civil problems without legal assistance per household was 2.46. In Illinois, with a sample of 1,900 respondents, the figure was 1.69. The ABA Study, with only about one-half of the number of questions asked in New York and Illinois,

produced a figure of 1.08 problems for which respondents did not have legal help across the nationwide sample.

6.2 Nationwide Estimates of Civil Legal Needs

Based upon the results of this survey of 500 randomly selected households throughout the country with incomes of 125% of poverty or below, 682 problems were reported. Approximately 20% (142) involved legal help and 80% (540) involved no legal help.

The data for the entire sample of households also disclosed that the average number of problems per year for which legal help was obtained was 0.28. The comparable figure for problems for which no legal help was obtained was 1.08 problems per household per year.

The United States Bureau of the Census published in March 1988 their "Current Population Survey: Poverty in the United States - 1987, Series P-60 #163." This report discloses that in 1987 there were 11.945 million households below 100% of poverty. This figure was obtained by adding the two categories of "families" and "non-family householders." The non-family householders are a subgroup of "unrelated individuals."

The report further provides data for those "families" at or below 125% of poverty. While data is available at the 125% level for unrelated individuals, there is no data for the subgroup of non-family householders. However, we have calculated this figure for the 125% level by assuming the same percentage as obtained for the 100% level. The resulting figure when added to the family figure suggests that there were 17.569 million households throughout the country in 1987 with incomes of 125% of poverty or below.

In an effort to provide a nationwide estimate of the annual total number of problems with legal help for the 17.569 million households in 1987 based upon the survey results in this study, we have multiplied that figure by 0.28 to determine the figure for

those with legal help and 1.08 to determine the figure for those with no legal help. The resulting figures disclose that, based upon the current study, there were in 1987 approximately 4.9 million problems for which low income households below 125% of poverty had legal assistance and approximately 19 million problems for which low income households had no legal assistance.

Within the past few weeks, the Legal Services Corporation has published their "Fact Book for 1987-1988." Data from that report indicates that LSC-funded programs nationally represented approximately 1.6 million clients. This figure is approximately one-third of the 4.9 million cases estimated from the national survey for which legal assistance was provided. There are a number of possible explanations for this gap. First, the 1.6 million LSC figure does not reflect the caseload from some programs funded by LSC which do not report caseload for clients whose services are supported by non-LSC funds. Second, there are a number of privately funded legal aid societies handling a large volume of civil cases around the country. Third there are a large number of private bar pro bono programs around the country that have no direct connection to LSC-funded programs. Fourth, there is a large but unknown number of clients around the country who obtain free civil legal services on a one-time basis from private attorneys who have no formal connection with any agency or organization. Finally, this survey, as well as prior surveys we have conducted show that some households, below 125% of poverty, receive legal assistance that involves the payment of a fee to a private lawyer.

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REPORT ON THE 1989 SURVEY OF THE PUBLIC'S USE OF LEGAL SERVICES

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**REPORT ON THE 1989 SURVEY OF THE
PUBLIC'S USE OF LEGAL SERVICES**

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May 15, 1989

Summary of Survey Results

In 1974, a national survey of a representative sample of the U.S. adult population examined the incidence of personal, non-business legal problems and the use of legal services in their resolution. In February, 1989, a second national survey was conducted for the purpose of determining whether changes had occurred in the public's need for or use of legal services. This paper reports on the results of the 1989 survey. The following are the principal findings discussed in this paper.

A. Overall Use of Legal Services

1. The use of legal services for personal and family legal matters has increased since 1974. A larger proportion of the 1989 adult population had consulted lawyers at least once in their lives than was the case for the 1974 population. Moreover, wider use of legal services in the 1989 population was also reflected in recent use patterns, i.e., the proportion of the population using legal services in the three year period preceding the 1989 survey was greater than that for the comparable period preceding the 1974 survey.

Percent of adults ever
having used legal
services:

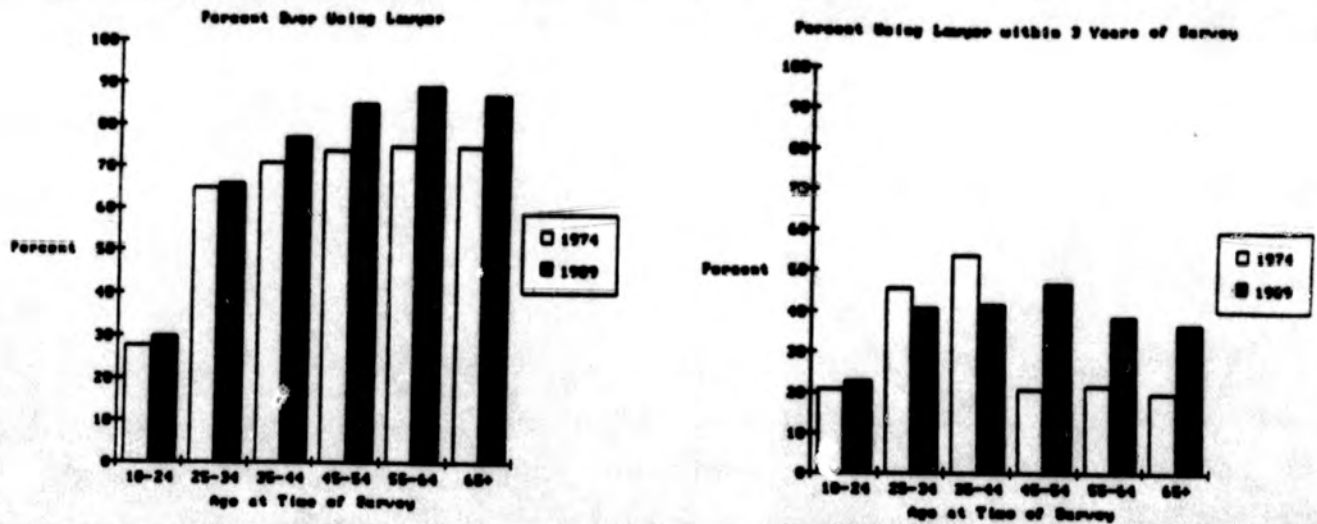
1974: 64%
1989: 72%

Percent of adults having
used legal services
within 3 years of survey:

1974: 27%
1989: 39%

2. The rise in lawyer use occurred primarily among persons over the age of 40.

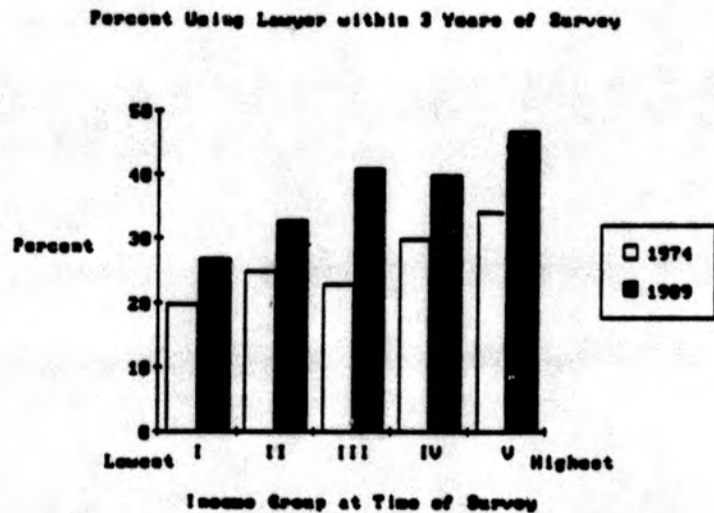
USE OF LEGAL SERVICES WITHIN AGE GROUPS



3. The disparity in lawyer use rates is substantial between highest and lowest income groups. While 49% of adults in the top 25% of the income scale had consulted lawyers in 1986-89, only 27% of adults in the lowest 10% used legal services during the same period.

4. Use of legal services increased for all income groups, but at the slowest rate among persons of limited means and at the highest rate among persons of moderate means.

USE OF LEGAL SERVICES WITHIN INCOME GROUPS



B. Use of Legal Services for Specific Problems

1. Although the overall use of legal services increased between 1974 and 1989, lawyer use actually decreased in some problem areas.

2. Use of lawyers by home buyers remained at the same level as in 1974, but the overall rate of use within the population at large declined as home purchase rates declined. Forty-one percent of home buyers during 1986-89 consulted lawyers in connection with home purchase.

3. Use of lawyers' services for will preparation also remained at the same high levels as in 1974, but the proportion of the population obtaining wills increased substantially. As of 1989, 40% of adults reported having wills, compared to 27% in 1974. Eighty-seven percent sought lawyers' help in will preparation in both 1974 and 1989.

4. Use of lawyers' services in divorce proceedings declined from 81% of divorcing persons in 1974 to 75% in 1989.

5. Use of lawyers' services for serious consumer problems seems to have increased since 1974, but the rate of use for such problems remains substantially lower than that for home purchase, wills, or divorce--36% of persons encountering serious consumer difficulties in the period from 1986-89 sought legal advice or help. Persons of low and modest means were most likely to report serious consumer problems but were least likely to use legal services in their resolution and most likely to do nothing about such problems.

C. Considerations Surrounding Use of Lawyers' Services

1. Cost remains a significant element in the decision to seek legal assistance. Those considering consulting lawyers are most likely to refrain from doing so in the case of consumer and marital problems.

2. The overwhelming majority of persons considering using legal services turn to friends and relatives for advice and help in choosing a lawyer. Almost 10% rely on advertisements and yellow pages.

3. Current income remains the principal way in which lawyers' services are financed by all income groups. Forty-two percent of those of limited means pay for lawyers' service out of current income or by borrowing.

Introduction

Fifteen years ago, the first national survey of the legal needs of the public was conducted by the American Bar Foundation in collaboration with the American Bar Association Special Committee to Survey Legal Needs.¹ Based on 2,064 personal interviews with a representative sample of the adult population, the purpose of the survey was to provide theretofore unavailable information on how and to what extent personal, non-business legal problems of persons of moderate and limited means were being served.

In addition to examining the incidence of various types of legal problems among the target population, the survey explored the ways in which ordinary people dealt with those problems, including their use of legal services. Significant variation in the kinds of problems encountered and in problem-solving approaches were found to exist among different demographic subgroups.

To understand more fully the reasons underlying the use, and non-use, of lawyers' services, the survey also explored the following: the nature of experiences with lawyers, general attitudes towards lawyers, and perceptions about accessibility to, and costs of, legal services. Even though the survey revealed some variation in attitudes and perceptions based on prior experiences with lawyers, and among demographic subgroups, the study pointed up commonly shared concerns about the cost of lawyers' services and the availability of competent lawyers interested in handling personal, family problems of ordinary persons.

In the intervening fifteen years since the survey, significant changes have taken place in the demography of the adult population and in the lawyer population itself that, in the former case, may well affect the incidence of legal problems, and, in the latter case, the availability of lawyers' services for persons of moderate and limited means. Moreover, changes which could affect availability of, and perceived accessibility to, lawyers' services have occurred in the rules regulating delivery of lawyers' services, in the ways in which law practice is organized, in the methods of paying for legal services, and in the availability of dispute resolution mechanisms to persons of moderate and limited means. Included in these changes were relaxation of rules against advertising, elimination of minimum fee schedules, the increased attention to pro bono

service responsibilities of lawyers, the rise of so-called retail law offices, the growth of prepaid and group legal insurance plans, the development of programs aimed at reduction of court costs and delay, development of alternative dispute resolution devices, and, in some jurisdictions, encouragement of *pro se* representation in matters such as marriage dissolution, small estate probate and administration, and small claims.

These changes raise the question whether the pattern of legal problem incidence and problem-solving behavior observed in the earlier survey hold true today. In mid-February of this year, a second national survey was conducted. The survey consisted of telephone interviews with 1500 persons, scientifically selected to be representative of the resident U.S. adult population living in households. Respondents to the survey provided information on their use of lawyers' services generally and for selected legal problems.²

The principal objective of the 1989 survey, undertaken for the American Bar Association Consortium on Legal Services and the Public, was to obtain information on certain key matters that would allow a preliminary assessment of the present situation and of changes that may have taken place since the earlier study. The 1989 survey was, by design, far more modest in scope and coverage than the earlier survey. There was no intention to replicate the earlier study in its entirety. Rather, the new study focuses on matters that are most likely to provide general insights into current patterns, permit reasonable inferences about the currency of findings from the prior study, and allow some conclusions to be drawn about the possible nature and direction of change since the mid-1970s.³

This paper reports on the findings of the 1989 survey and compares the results with those of the earlier study. The report presents preliminary findings on (1) the overall pattern of lawyer use for personal, non-business legal problems, (2) problem-solving responses to selected legal problems, and (3) the decision to consult a lawyer, the choice of lawyer, and payment for the lawyer's services.

I. Use of Lawyers' Services Generally

As of 1989, a larger proportion of the adult population had consulted lawyers for personal, family matters than was the case in 1974.⁴

Table 1. Distribution of adult populations by prior use of lawyer

	1974 Survey N=2062	1989 Survey N=1491
Had consulted a lawyer	64%	72%
Had never consulted a lawyer	<u>36</u>	<u>28</u>
TOTAL	100%	100%

Before concluding that a change in behavior underlies these statistics, differences in the demography of the two populations, particularly age distribution, must be taken into account. An older population will have had a greater exposure to risk and, consequently, a higher incidence of legal problems and reason for seeking legal help. And, indeed, the 1989 adult population is an older population. While 44% of the 1989 adult population were between the ages of 25 and 45, that age group comprised only 37% of the 1974 adult population.⁵ When, however, the 1974 and 1989 populations are compared on the basis of lawyer use within the various age groups, an upward trend may be observed across all ages.

Table 2. Comparison of 1974 and 1989 age groups by prior use of lawyer

Age at time of survey	Percent in each age group who had <u>ever</u> consulted lawyers	
	1974 Survey	1989 Survey
18-24	28%	30%
25-34	65	66
35-44	71	77
45-54	74	85
55-64	75	89
65 and older	75	87
All ages	64%	72%

Thirty-nine percent of the 1989 population had consulted a lawyer at least once within the three years preceding the survey, i.e., in the period 1986-89. Persons 45-54 years of age at the time of the survey were most likely to have done so. On the other hand, only 27% of the 1974 population had consulted lawyers within the three years preceding the 1974 survey (1971-74). The most striking aspect of the comparison of the two populations centers on the 35-44 and 45-54 age groups. In 1974, recent use of lawyers' services by 35-44 year olds was 54%, substantially higher than that of 45-54 year olds, 21% of whom had consulted lawyers in the preceding three years. By 1989, the pattern had reversed itself: 42% of persons 35-44 in 1989 had used lawyers in the recent past while 47% of persons 45-54 in 1989 had recently consulted lawyers.

Table 3. Proportion of each age group who consulted lawyers within 3 years of survey date

Age at time of survey	Proportion of each age group who consulted lawyers <u>within 3 years</u> of survey date	
	1974 Survey	1989 Survey
18-24	21%	23%
25-34	46	41
35-44	54	42
45-54	21	47
55-64	22	39
65 and older	20	37
All ages	27%	39%

In the 1974 survey, economic well-being was strongly associated with use of lawyers' services. In both the 1974 and 1989 surveys, persons of limited means were the least likely to have consulted a lawyer in the 3 year period preceding each survey. In 1989, less than one-third of the lowest income group reported having consulted a lawyer during 1986-89, compared to 49% of the highest income group.

Table 4 shows recent lawyer use for five income groups. The income groups are based on total household income and household size. Respondents to the 1989 survey were first divided into five groups based on size of household. The income distribution for each of the five groups was obtained. All individuals with household income falling in the lowest 10% of their household group were assigned to Group I; all individuals with incomes falling in the next 11% to 33% of their household-size group were assigned to Group II; all individuals in the next 34% to 50% of their household group were assigned to Group III; all individuals in the next 51% to 75% of their household group were assigned to Group IV; and all those in the top 25% of their household group were assigned to Group V. Thus, for example, 1989 Income Group I includes the following: Respondents in 1 person households with household incomes less than \$8,000; respondents in 2 person households with household incomes less than \$12,000; respondents in 3 person households with household incomes less than \$15,000; respondents in 4 person households with household incomes less than \$15,000; respondents in 5 or more person households with household income less than \$15,000. Respondents to the 1974 survey were assigned to five income groups using their income and household size in 1974. The full schedule of assignments to Income Groups I to V for both 1974 and 1989 is set forth in the footnotes.⁶

As shown by Table 4, the general trend was toward wider use of legal services in each income group in 1989 than was the case in 1974. The relative increase in recent lawyer use among those at the lowest income level was the most modest. Twenty-one percent of persons in Group I (the lowest income group) in 1974 had used legal services in 1971-74, while 27% of persons in Group I in 1989 had used legal services in 1986-89. The largest increase was among those of moderate income (Group III), rising from 23% recently using legal services in 1974 to 41% in 1989.

Table 4. Proportion of each income group who consulted lawyers within 3 years of survey date

Income at time of survey*	Percent of total persons in income group specified	
	1974 Survey	1989 Survey
Group I [lowest]	20%	27%
Group II	25	33
Group III	23	41
Group IV	30	40
Group V [highest]	34	49
All income groups	27%	39%

*I-lowest 10% of income scale; II=10%-33%; III=33%-50%; IV=50%-75%; V=top 25%.

II. Use of Lawyers for Specific Problems

One of the most important findings of the 1974 legal needs survey was the extent to which use of lawyers' services varied substantially by problem type and, in turn, the extent to which problem incidence varied with respect to the individual's age and economic situation. The overall use rates for legal services at any given time thus reflect the interaction of a variety of factors including the demography of the population. The 1974 survey elicited information on more than thirty specific problems and on the ways in which individuals dealt with those problems. Four problems were selected for the 1989 survey: (1) home purchase, (2) serious problem with a seller of goods or services, a landlord, or creditor, (3) divorce, and (4) preparation of a will. The particular problems selected were the most frequently reported problems in the 1974 survey and use of lawyers' services differed significantly among the four. This section presents incidence of, and lawyer use for, such problems in 1989 and compares the results with the 1974 findings.

A. Home Purchase

In 1989, the probability that an individual would seek the advice or help of a lawyer in connection with the purchase of a home was lower than in 1974.

**Yearly lawyer use among all adults
for home purchase:**

1974: 24 per 1000 adults per year
1989: 22 per 1000 adults per year

**Yearly lawyer use by
home buyers:**

1974: 400 per 1000 home buyers per year
1989: 410 per 1000 home buyers per year

The downward shift was not, however, the result of a decline in the proportion of home buyers who sought the advice and help of lawyers at the time of purchase. In both 1974 and 1989, around 40% of home buyers consulted lawyers. Rather, the reduction in lawyer use is attributable to the decline in home purchases.⁷

Yearly incidence among all adults of home purchase:

1974: 60 per 1000 adults per year
1989: 54 per 1000 adults per year

The decline in home purchase occurred primarily among adults under 35 years of age and was most pronounced among 25-34 year olds. In 1974, about one third of those who were 25-34 years old at the time of the survey had purchased a home during the three years preceding the survey. In contrast, less than one quarter of 25-34 year olds in 1989 had made such a purchase during 1986-89.

Table 5. Proportion of each age group who purchased a home within 3 years of survey date

Age at time of survey	Percent of total persons in age group specified	
	1974 Survey	1989 Survey
18-24	14%	10%
25-34	32	23
35-44	24	24
45-54	14	15
55-64	10	11
65 and older	4	5
All ages	18%	15%

While home purchase declined, lawyer use among home buyers (about 40% of all home buyers) has remained basically stable over the last fifteen years across all age groups. The proportion of buyers consulting lawyers on home purchase made in the three year period preceding each survey were essentially the same in 1974 and 1989. Moreover, about 40% of buyers in each age group used lawyers' services for purchases both in the 1971-74 period and the 1986-89 period. Thus, the decline in yearly lawyer use from 24 per 1000 adults in 1974 to 22 in 1989 reflects a decline in residential purchases, particularly among young adults, rather than shifting pattern of lawyer use among those who are home buyers.

In both 1974 and 1989, home purchase was strongly related to income--the higher the household and family income at the time of the survey, the more likely an individual reported having purchased a home in the preceding three years. In both surveys, the proportion of home buyers was greater in each successively higher income group.

Table 6. Proportion of each income group who purchased a home within 3 years of survey date

Income at time of survey*	Percent of total persons in income group specified	
	1974 Survey	1989 Survey
Group I [lowest]	6%	9%
Group II	16	12
Group III	20	16
Group IV	19	19
Group V [highest]	23	23
All income groups	18%	15%

*I-lowest 10% of income scale; II=10%-33%; III=33%-50%; IV=50%-75%; V=top 25%.

Buyers in the upper half of the income scale were somewhat more likely to consult lawyers at the time of purchase than buyers in the lower half in both 1971-74 and 1986-89.

Table 7. Proportion of home buyers in each income group using a lawyer for home purchase within 3 years of survey date

Income at time of survey	Percent of total persons in income group specified	
	1974 Survey	1989 Survey
Bottom half of income scale	36%	33%
Top half of income scale	43	48
All income groups	40%	41%

B. Wills

At the time of the 1989 survey, 40% of the adult population reported having a will. This was a substantial increase over 1974 when 27% had wills. The overwhelming majority of wills (87%) were prepared by lawyers in both 1974 and 1989. While the rate of lawyer use for will remained at the same high level, the rise in the proportion of adults who decided to have wills accounts for the significant increase in the yearly lawyer use rate for wills.

Yearly lawyer use among all adults for wills:

1974: 27 per 1000 adults per year
1989: 43 per 1000 adults per year

Yearly lawyers use for adults making wills:

1974: 870 per 1000 will makers per year
1989: 870 per 1000 will makers per year

Having a will is highly related to age. In 1989, seventy percent of the population age 55 years of age or older reported having wills, compared to 23% of the population under the age of 45 years. When, however, the results from the two surveys are compared, it becomes clear that estate planning has in fact increased among both younger and older age groups since 1974. Particularly noteworthy is the growth rate among the 45-54 age group. While 9% of those 45-54 in 1974 had a will prepared in 1971-74, 18% of 45-54 year olds in the 1989 survey reported having a will prepared in the three years preceding the 1989 survey. On the other hand, no important differences were detected in lawyer use for will preparation among different age groups in either 1974 or 1989.

Table 8. Proportion of each age group who had a will prepared within 3 years of survey date

Age at time of survey	Percent of total persons in age group specified	
	1974 Survey	1989 Survey
18-24	1%	4%
25-34	7	11
35-44	11	14
45-54	9	18
55-64	18	20
65 and older	17	29
All ages	10%	15%

Given that an individual wants a will, the probability that a lawyer's help will be sought is similar among all income groups. However, as one might expect, income is highly related to whether or not an individual chooses to have a will in the first place.

Table 9. Proportion of persons in each income group who had a will prepared within 3 years of survey date

Income at time of survey*	Percent of total persons in income group specified	
	1974 Survey	1989 Survey
Group I [lowest]	4%	10%
Group II	7	13
Group III	7	13
Group IV	9	14
Group V [highest]	17	35
All income groups	10%	15%

*I-lowest 10% of income scale; II=10%-33%; III=33%-50%; IV=50%-75%; V=top 25%.

C. Divorce

The proportion of adults in the 1989 population who had ever divorced was 21% compared to 15% in the 1974 population. However, the yearly lawyer use rate had declined over the same period.

Yearly lawyer use among all adults
for divorce:

1974: 8 per 1000 adults per year
1989: 7 per 1000 adults per year

Yearly lawyer use for divorcing
adults:

1974: 810 per 1000 divorcing adults per year
1989: 750 per 1000 divorcing adults per year

The reduction in the lawyer use rate is primarily a function of a decline in the use of lawyers' assistance in divorce proceedings and not to any absolute decline in divorces. Between 1974 and 1989, the relative size of the married adult population had decreased: married persons comprised 63% of the adult population in 1988 compared to 70% in 1974.⁸ Since the yearly lawyer use rate shown above is for the total adult population, one might be tempted to attribute the depressed yearly lawyer use rate solely to the reduction in the relative size of the married population, i.e. the population at risk.

The shrinkage in the population at risk was offset, however by an increase in the proportion of individuals within that population who divorced. Three percent of the adult population divorced in the three year period preceding the 1989 survey, substantially the same proportion who divorced in the 1971-74 period. The 3% of total adult population who divorced in 1986-89 made up, however, roughly 5% of the then married population, while the 3% of total adults in 1974 made up approximately 4% of the then married population. Thus, the growth of divorce in the married population was offset by the decline in the relative size of that population. As a result, the decline in the yearly lawyer use rate for divorce can be attributed, in substantial measure, to the fact that a smaller proportion of divorcing persons (75%) in the 1989 population sought lawyers' assistance in marriage dissolutions than was the case in 1974 when 81% of the divorcing population consulted lawyers in connection with marriage dissolution.

The 1974 survey simply asked whether respondents had lawyers' advice or help in connection with their divorces. The 1989 inquiry went further and explored whether both, either, or neither of the parties had a lawyer in divorce proceedings.

Table 10. Distribution of divorcing persons by use of lawyer (1979-89)

	N=132
Each party to divorce had a lawyer	41%
Only one party had a lawyer	36
Neither party had a lawyer	11
Parties shared same lawyer	10
One party had lawyer, other unknown	1
One party no lawyer, other unknown	1
TOTAL	100%

Almost two-thirds of those who had obtained a divorce in the ten years preceding the 1989 survey were between 25 and 45 years of age at the time of the survey. The proportion was similar to that for persons in the 1974 survey who divorced during 1963-74. Since the earlier survey, however, the use of lawyers for divorce in the 25-44 age group declined from 84% in 1974 to 72% in 1989. The decline in lawyer use appears to have occurred among those at all income levels except for those in the top 25% of the income scale.

D. Consumer Problems

Ten percent of adults in the 1989 survey reported having had at least one "serious" problem with a seller of goods or services, a landlord, or a creditor in the preceding three years. Thirty-six percent of those having such a problem consulted a lawyer in connection with it.

Yearly lawyer use rate for
entire adult population for
serious consumer problems:

1989: 12 per 1000 adults per year

Yearly lawyer use rate for
adults having serious consumer
problems:

1989: 360 per 1000 problem havers per year

The statistics for 1989 are not readily comparable with those from the 1974 survey. The reason is that, in the prior survey, the inquiry into consumer problems was far more detailed than was the case in 1989. It is likely that the earlier survey elicited affirmative responses to questions about incidence of certain types of consumer problems that respondents either overlooked or did not characterize as "serious" in the 1989 study. Forty-seven percent of respondents to the 1974 survey reported having had at least one consumer problem (as defined for them in 1974) in the period 1971-74--a somewhat higher proportion than 1989 and possibly an artifact of the different approaches used in the two surveys. On the other hand, only eleven percent consulted lawyers for consumer problems encountered in the three year period preceding the 1974 survey. Because of the uncertainty surrounding comparability of results from the two different periods, the following discussion will focus only on the 1989 situation.

Two-thirds of those with serious consumer problems in the period from 1986-89 did not consult a lawyer. The following table shows how consumers went about dealing with their most recent consumer problems.

Table 11. Distribution of persons with serious consumer problems by action taken (1986-89)

	N=147
Did nothing about the problem	13%
Dealt directly with adversary	24
Went to court (no lawyer)	3
Used other dispute resolution agency	6
Consulted a lawyer	36
Consulted other help source	2
Took other action	<u>16</u>
TOTAL	100%

Consumers 25-34 years old at the time of the survey were the most likely to report encountering serious consumer problems in the three years preceding the survey. Those 55 years of age and older were least likely to report such problems. On the other hand, those

under 35 years of age were least likely to consult lawyers about such matters (32% consulted lawyers) than those 35 or over (49% of those with problems).

Persons in the lowest 10% of household income were more likely than persons in any other income group to report serious consumer problems in the preceding three years.

Table 12. Proportion of each income group encountering serious consumer problems (1986-89)

Income at time of survey*

Income Group I: (N=145)	16%
Income Group II: (N=227)	11
Income Group III: (N=222)	9
Income Group IV: (N=291)	7
Income Group V: (N=296)	11
All income groups	11%

*I-lowest 10% of income scale; II=10%-33%; III=33%-50%; IV=50%-75%; V=top 25%.

Those in the lowest two income groups, representing one-third of the population, were more likely to do nothing in the face of consumer difficulties than were those in the higher income groups: 28% of those in Income Groups I & II did nothing, compared to 14% of those in Income Groups III-V. On the other hand, those in the upper income groups were more likely to consult lawyers: 39% in Groups III-V consulted lawyers about consumer matters compared to 28% in Groups I & II.

E. Multiple Problems and Lawyer Use Across Problem Types

In the preceding sections, each problem type was examined separately. This section will examine the extent to which survey respondents encountered multiple problem types, the ranking of problem types in relation to use of lawyers' services, and variability among age and income groups with respect to these matters.

1. Multiple Incidence of Problems

Eighty percent of 1989 survey respondents reported having ever encountered at least one of the four problems described above and 28% reported at least one such problem in the three years preceding the survey.⁹ Most reported having confronted only one problem in the last three years. And, none reported having confronted all four problems during that period.

Table 13. Distribution of adults by number of problems encountered (1986-89)

	N=1500
One problem	28%
Two problems	7
Three problems	1
Four problems	0
No problems	<u>65</u>
TOTAL	100%

Those encountering only one problem were equally likely to have cited either home purchase or will. Consumer difficulties ranked third for those who encountered one problem only. Among those who reported two problems, the most frequently mentioned was home purchase, followed by will and consumer problem, respectively.

Table 14. Distribution of problems by number of problems encountered (1986-89)

Problem area	Problems identified by 413 persons mentioning one problem only	Problems identified by 100 persons mentioning two problems
	N=413	N=202
Home purchase	35%	41%
Consumer	23	22
Divorce	5	8
Will	<u>36</u>	<u>29</u>
TOTAL	100%	100%

For those who reported having two problems, the most likely combination was home purchase and will followed by home purchase and consumer problem. Forty-six percent of individuals had home purchase combined with will and 30% had home purchase combined with consumer problem. No other combination (e.g., consumer and will) was identified by more than 8% of respondents.

Those 25-44 years of age at the time of the survey were the most likely to have had at least one problem in the last three years. Moreover, they were also the most likely to have two or more problems.

Table 15. Distribution of each age group by number of problems encountered (1986-89)

	Age in 1989					
	18-24 N=215	25-34 N=331	35-44 N=319	45-54 N=216	55-64 N=210	65+ N=189
One problem	23%	31%	30%	25%	22%	30%
Two problems	3	10	10	7	4	2
Three problems	0	1	1	1	0	0
Four problems	0	0	0	0	0	0
No problems	<u>74</u>	<u>58</u>	<u>60</u>	<u>66</u>	<u>73</u>	<u>68</u>
TOTAL	100%	100%	100%	100%	100%	100%

The specific problems that individuals were most likely to report were highly related to age. Consumer problems ranked first among the youngest age group and dropped in rank in succeeding age groups. Home purchase ranked highest among the 25-44 age group and wills ranked highest among those 45 and over. The following table shows the ranking of problems for each age group. The ranking for each group is based on the total number of problems mentioned by that group.

Table 16. Ranking of problems by frequency of occurrence in each age group (1986-89)

1st=most frequent			4th=least frequent			N=total problems			
Age in 1989									
Rank	18-24 years			25-34 years			35-44 years		
1st	Consumer	46%		Home buy	43%		Home buy	45%	
2nd	Home buy	31		Consumer	33		Will	25	
3rd	Will	14		Will	19		Consumer	20	
4th	Divorce	<u>9</u>		Divorce	<u>5</u>		Divorce	<u>10</u>	
TOTAL		100%		100%			100%		
		N=64		N=180			N=165		

Rank	45-54 years			55-64 years			65 +		
1st	Will	39%		Will	60%		Will	81%	
2nd	Home buy	33		Home buy	34		Home buy	14	
3rd	Consumer	19		Consumer	6		Consumer	5	
4th	Divorce	<u>9</u>		Divorce	<u>0</u>		Divorce	<u>0</u>	
TOTAL		100%		100%			100%		
		N=94		N=65			N=64		

Persons in the lowest income group and those in the top two income groups were most likely to have confronted at least one problem.

Table 17. Distribution of each income group by number of problems encountered (1986-89)

	Income in 1989*				
	Lowest Grp I N=147	Grp II N=230	Grp III N=224	Grp IV N=293	Highest Grp V N=304
One problem	30%	23%	25%	30%	32%
Two problems	5	7	5	6	11
Three problems	1	1	1	0	1
Four problems	0	0	0	0	0
No problems	<u>65</u>	<u>70</u>	<u>68</u>	<u>64</u>	<u>57</u>
TOTAL	100%	100%	100%	100%	100%

*I-lowest 10% of income scale; II=10%-33%; III=33%-50%; IV=50%-75%; V=top 25%.

The most frequently mentioned problem by persons in the lowest income groups was consumer. Consumer difficulties ranked third for all other income groups. Although divorce ranked last for all income groups, divorce comprised a larger share of total problems encountered by the lowest income group than was the case for other income groups.

Table 18. Ranking of problems by frequency of occurrence in each income group (1986-89)

Rank	1st=most frequent		4th=least frequent		N=total problems	
	Income in 1989*		Income in 1989*		Income in 1989*	
	Groups I & II		Groups III & IV		Group V	
1st	Consumer	33%	Home buy	43%	Home buy	42%
2nd	Will	31	Will	32	Will	35
3rd	Home buy	27	Consumer	19	Consumer	19
4th	Divorce	<u>10</u>	Divorce	<u>6</u>	Divorce	<u>5</u>
TOTAL	100%		100%		100%	
	N=147		N=211		N=172	

*I & II-lowest 33%; III & IV=33%-75%; V=top 25%

2. Lawyer Use Across Problems

Almost two-thirds of those who had at least one problem consulted lawyers. However, those with one problem only were less likely to have consulted a lawyer. While 55% of those with only one problem consulted lawyers, 83% of those with two or more problems consulted a lawyer for at least one of their problems. However, less than half (40%) of those with two problems consulted a lawyer for both.

Younger persons were less likely to consult lawyers. In fact, as shown by the following table, lawyer use was strongly related to age.

Table 19. Proportion of problem havers in each age group consulting lawyers for at least one problem (1986-89)

Percent of problem havers in specified
age group using lawyers (1986-89)

Age in 1989

18-24 (N=56)	48%
25-34 (N=140)	53%
35-44 (N=139)	57%
45-54 (N=73)	64%
55-64 (N=56)	75%
65+ (N=56)	84%

Income was also related to lawyer use. As shown by the following table, persons of most limited means were least likely to seek lawyers' help for their problems.

Table 20. Proportion of problem havers in each income group consulting lawyers for at least one problem (1986-89)

Percent of problem havers in specified income group using lawyers (1986-89)	
Income in 1989*	
Group I [Lowest] (N=51)	41%
Group II (N=70)	61%
Group III (N=71)	55%
Group IV (N=73)	67%
Group V [Highest] (N=56)	66%

*I-lowest 10% of income scale; II=10%-33%; III=33%-50%; IV=50%-75%; V=top 25%.

The ranking of lawyer use by problem type was the same across all income groups. That is to say, in all income groups, lawyers were more likely to be consulted for will preparation than for consumer problems. However, as shown by the following table, those with most limited means were less likely to consult a lawyer for any one problem type than those at higher income levels.

Table 21. Ranking of problems for each income group by proportion of problems taken to lawyers (1986-89)

1st=most frequent		3rd=least frequent		N=total problems	
Income in 1989*					
Rank	Groups I & II		Groups III & IV		Group V
1st	Will (N=40)	76%	Will (N=61)	91%	Will (N=57) 90%
2nd	Home buy (N=45)	30	Home buy (N=90)	44	Home buy (N=71) 46
3rd	Consumer (N=48)	27	Consumer (N=41)	37	Consumer (N=29) 38

*I & II=lowest 33%; III & IV=33%-75%; V=top 25%

III. Considerations in Using Lawyers' Services

This section examines reasons why individuals do not consult lawyers, how lawyers are chosen, and methods of paying for lawyers' services.

A. Reasons for Not Consulting Lawyers

In both the 1974 and 1989 surveys, respondents were asked whether they had considered consulting a lawyer on a personal, family matter but had not done so. Of those responding to the question, 9% of the 1989 survey group indicated they had considered consulting a lawyer at some time during the three years preceding the survey while 14% of the 1974 survey group had done so in the three year period preceding the 1974 survey.

While the proportion of those considering, but not consulting lawyers, had declined marginally at about the same rate for all age groups between 1974 and 1989 the decline varied among the lower and upper income groups, moderating the discrepancies that existed among income groups in 1974.

Table 22. Proportion of each income group who considered but did not use lawyers within 3 years of survey

Income at time of survey*	Percent of total persons in income group specified	
	1974 Survey	1989 Survey
Group I [lowest]	11%	8%
Group II	10	9
Group III	15	10
Group IV	18	9
Group V [highest]	14	8
All income groups	14%	9%

*I-lowest 10% of income scale; II=10%-33%; III=33%-50%; IV=50%-75%; V=top 25%.

When asked about the nature of the problem under consideration, consumer problems, marital difficulties, and real estate matters were the single most frequently mentioned problems. These three together made up over one-half of all problems mentioned.

Table 22. Distribution of problems that individuals considered but did not take to lawyers (1986-89)

	N=94
Consumer problems	18%
Marital problems	18
Real estate problems	16
Will	9
Estate admin. & probate	6
Problem with employer	4
Personal injury	3
All others	<u>26</u>
TOTAL	100%

The "All others" category includes an array of problems, like traffic citations, problems with governmental agencies, each of which made up less than 2% of problems encountered in 1986-89. The one exception was damage to respondent's property and personal injury claims against respondent, particularly those arising out of automobile accidents. The proportion of problems not taken to lawyers that are represented by these types of matters is not known for the 1989 survey. They are included in the category of "All others" shown in the above table. In all probability they represent well over 2% of problems not taken to lawyers. In the 1974 survey, such matters made up about 8% of problems not taken to lawyers.

Twenty-nine percent of respondents reported that they had not consulted a lawyer because they had found some other way to solve the difficulty. The second most frequently given reason was the cost involved in taking the matter to an attorney or pursuing the matter through legal processes.

Table 24. Distribution of reasons given for not consulting lawyers (1986-89)

	N=91
Solved other way	29%
Cost	22
Decided not to pursue further	15
Procrastination	12
Finding the right lawyer	6
Problems ought to be solved without lawyer	3
Didn't think attorney would be of any help	3
Didn't know why lawyers not consulted	4
Other reasons	<u>6</u>
TOTAL	100%

The reasons given are not mutually exclusive. Concern about cost or selecting the "right" lawyer may well have influenced decisions not to pursue the matter further or solving the matter in some other way.

B. Selecting a Lawyer

Friends and relatives who were not lawyers remain the major source of information for individuals in selecting a lawyer. The second most frequently mentioned resource is a friend or relative who is a lawyer. Together, advertisements and information provided in yellow pages made up the third most frequently used resource--but ranked far below friends and relatives.

Table 25. Distribution of lawyer users by information sources (1986-89)

Information Source	N=382
Friend or relative (not lawyer)	54%
Lawyer friend or relative	21
Advertisement	5
Yellow pages	4
Referred by prior lawyer	4
Employer	2
Group or prepaid legal service	1
Union	1
Lawyer Referral Service	1
Other ways	<u>7</u>
TOTAL	100%

The majority of persons in every age group turned to friends and relatives to advise on lawyer selection. However, persons 35 and over were more likely to rely on friends and relatives who were lawyers than were the under 35 age group. And, while 11% of persons under 55 years used advertisements and yellow pages as a referral source, those 55 and over relied almost exclusively on relatives and friends.

Table 26. Distribution of lawyer users in each age group by information sources (1986-89)

Information Source	Age in 1989		
	18-34 N=132	35-54 N=159	55+ N=89
Friend or relative (not lawyer)	61%	46%	59%
Lawyer friend or relative	12	23	30
Advertisement	6	5	2
Yellow pages	5	5	0
Referred by prior lawyer	2	6	2
Employer	3	1	3
Group or prepaid legal service	1	3	0
Union	1	1	1
Lawyer Referral Service	1	1	1
Other way	<u>8</u>	<u>9</u>	<u>1</u>
TOTAL	100%	100%	100%

All three income groups relied primarily on friends and relatives. However, the highest income group were more likely than others to seek a recommendation from a friend or relative who was a lawyer. Fourteen percent of middle income persons used advertisements and yellow pages for information compared to 4% of low income and 8% of high income persons.

Table 27. Distribution of each income group by information sources used to select lawyers (1986-89)

Information Source	Income Group in 1989*		
	Lowest N=77	Middle N=138	Highest N=99
Friend or relative (not lawyer)	64%	53%	46%
Lawyer friend or relative	17	19	27
Advertisement	3	6	2
Yellow pages	1	8	6
Referred by prior lawyer	1	4	5
Employer	4	1	2
Group or prepaid legal service	2	0	3
Union	1	1	1
Lawyer Referral Service	0	1	0
Other way	<u>6</u>	<u>7</u>	<u>8</u>
TOTAL	100%	100%	100%

*Lowest=Bottom 33% of income scale; Middle=33%-75%; Highest=Top 25%

Although other information sources are used by a small segment of persons who consult lawyers, the overwhelming majority continue to rely primarily on their own networks of friends and relatives to inform their lawyer selection.

C. Paying for Lawyers' Services

One half of the persons who consulted lawyers during 1986-89 reported that they paid for the lawyers' services out of current income.

Table 28. Distribution of lawyer users by how lawyer was paid (1986-89)

	N=398
Paid out of current income	51%
Paid by credit card or loan	2
Paid out of recovery or settlement	12
Paid by group or prepaid insurance	3
Paid other way	8
Free legal service program	2
Lawyer decided not to charge	<u>22</u>
TOTAL	100%

The "Other ways" mentioned by respondents included payment made by a third party such as the co-plaintiff or co-defendant, insurance company, adversary, or relative. The proportions of cases in which lawyers decided not to charge (22%) was the same as in 1974. Although the 1989 survey did not inquire further into why lawyers decided not to charge a fee, the 1974 survey, which did so inquire, indicates that in many cases the lawyer was a friend or relative and the lawyer's services consisted of advice only. The 1974 survey also indicated that consumer problems, difficulties with employer and with governmental agencies were the types of cases in which lawyers were most likely to have refrained from charging a fee.

Table 29. Distribution of lawyer users in each income group by how lawyer was paid (1986-89)

Information Source	Income Group in 1989*		
	Lowest N=78	Middle N=144	Highest N=96
Paid out of client's current income	37%	49%	64%
Paid by client's credit card or loan	5	1	1
Paid out of recovery or settlement	14	13	4
Paid by group or prepaid insurance	2	2	7
Paid other way	10	6	5
Free legal service program	6	2	1
Lawyer decided not to charge	<u>25</u>	<u>26</u>	<u>18</u>
TOTAL	100%	100%	100%

*Lowest=Bottom 33% of income scale; Middle=33%-75%; Highest=Top 25%

Lawyer users in the lowest income group were least likely to pay for lawyers' services out of current income but most likely to use credit. One interpretation of this statistic is that there is available to persons of limited means an adequate array of legal services for which they are not required to pay. A second interpretation is that many low income persons who cannot pay for lawyers' services out of income simply do not seek legal help. Statistics provided in previous sections of this report suggests the latter may be the case: In general, low income persons are less likely than any other group to consult lawyers when legal problems are encountered.

Footnotes

1. Curran, Barbara A. *The Legal Needs of the Public: The Final Report of a National Survey*. (Chicago: American Bar Foundation, 1977). Also see *Final Report of the Special Committee to Survey Needs*. (Chicago: American Bar Association, 1978).

2. The 1989 project is a part of the American Bar Foundation Liaison Research Services Program directed by Joanne Martin. The project director was Barbara A. Curran who was also the project director of the 1974 survey. The questions were administered in telephone interviews by Cambridge Report, Inc., to a sample of 1500 persons designed to be representative of all adults (persons 18 years of age or over) residing in households. The questions were included in the February, 1989 Omnibus public opinion survey conducted by Cambridge Reports. Cambridge Reports is a national survey organization. It conducts eight Omnibus surveys per year, each based on national samples of 1500 adults each. An "Omnibus" survey is one which includes a battery of questions from each of several organizations.

A sample of adults living in households is different from a sample of households. The Bureau of Census reports that, as of March, 1988, there were 91,067,000 households in the U.S. and 177,676,000 adults (persons age 18 and older) living in those households. The aggregate of adults plus persons under 18 years of age living in households at that time was 241,155,000. Persons living in households are made up of the total resident U.S. population minus the civilian institutional population and minus armed forces living without families on post in the United States. The universe represented by the 1500 sample for the 1989 survey is the 177,676,000 adults (as adjusted to February, 1989) living in households. The following shows the age distributions of adults living in households as reported by the Census Bureau and for the survey sample. Census figures are from Bureau of the Census, Current Population Reports, Series P-60, No. 162, (Issued 1989).

Age Distributions of Adults Living in Households

Age in years	Census Bureau March, 1988 N=177,676,000	1989 Survey N=1500
18-24	15%	14%
25-34	24	22
35-44	20	21
45-54	13	14
55-64	12	14
65 and older	16	13
No information		1
Total	100%	100%*

*Percentages do not add up to 100% because of rounding.

3. A copy of the questions used in the 1989 survey are appended at the end of this report. The questionnaire used in the 1974 survey was 97 pages in length and is reproduced in the Final Report of that survey cited in note 1 above. Questions selected for the 1989 survey were worded, as far as practicable, the same as the comparable question in the 1974 survey.

4. Both surveys limited the inquiry to personal, family matters and expressly excluded

matters related to respondents' business--although matters related to respondents' own employment were included. In each survey, respondents were asked about their use of lawyers up to the time of the survey. The general questions about lawyer use were not limited to consultations for the specific legal problems discussed in section II of this report, but rather for any and all personal, non-business legal problems. Thus, statistics relating to general lawyer use cover all problems of whatever kind taken to lawyers by survey respondents.

5. Bureau of the Census, Current Population Reports, Series P-60, NO. 162, (Issued 1989). Bureau of the Census, Current Population Reports, Series P-60, NO. 97, (Issued 1976).

6. Size of household for income purposes includes all persons in the household--adults and children.

1989 Survey: Composition of Income Groups I-V.

	Income Group I	Income Group II	Income Group III
Household size			
1 person	< \$ 8000	\$ 8000-11999	\$12000-19999
2 person	< 12000	12000-19999	20000-29999
3 person	< 15000	15000-24999	25000-29999
4 person	< 15000	15000-24999	25000-34999
5 or more	< 15000	15000-24999	25000-34999

	Income Group IV	Income Group V
Household size		
1 person	\$20000-29999	\$30000 or more
2 person	30000-49999	50000 or more
3 person	30000-49999	50000 or more
4 person	35000-49999	50000 or more
5 or more	35000-49999	50000 or more

1974 Survey: Composition of Income Groups I-V.

	Income Group I	Income Group II	Income Group III
Household size			
1 person	< \$ 2000	\$ 2000-2999	\$ 3000-6199
2 person	< 3000	3000-6999	7000-9299
3 person	< 5800	5800-8999	9000-12499
4 person	< 6600	6600-10999	11000-14399
5 or more	< 6700	6700-9999	10000-14499

	Income Group IV	Income Group V
Household size		
1 person	\$ 6200-8999	\$ 9000 or more
2 person	9300-17749	17750 or more
3 person	12500-19499	19500 or more
4 person	14400-19999	20000 or more
5 or more	15000-19999	20000 or more

7. It should be noted that the yearly rate for home purchase is based on the number of persons making a home purchase. It is not a rate for number of home purchases because it is not adjusted for joint purchases of property.

8. Bureau of the Census, Current Population Reports, Series P-60, NO. 162, (Issued 1989). Bureau of the Census, Current Population Reports, Series P-60, NO. 97, (Issued 1976).

9. Respondents reported on the most recent problem in each of the four problem categories. The statistics on problem incidence and lawyer use are based on the most recent problem reported. It is therefore possible that the total incidence in the 3 years preceding the survey for any problem type is somewhat understated for consumer problems, but less so for the other three problem types.

These next questions describe matters you may have dealt with.

- ___ 1. Have you ever purchased a home or other real property?
(If "yes") What year was your most recent purchase made?
[RECORD EXACT YEAR] [INCLUDE ONLY PURCHASES MADE FOR FAMILY
OR PERSONAL PURPOSES, NOT BUSINESS-RELATED PURCHASES]
1. No--[SKIP TO Q. #3]
2. (Not sure/can't remember/refused)--[SKIP TO Q. #3]
3. Yes, _____
- ___ 2. (If "yes" to q. #1) In making this most recent purchase,
did you have your own personal lawyer advise or help with
the transfer of this property to your name? For
example, did you have your own personal lawyer examine
the deed for you, or review mortgage documents or other
papers for you before you signed them?
1. Yes 2. (Not sure/can't remember/refused) 3. No
- ___ 3. Have you ever had a serious disagreement or difficulty
with a landlord, or with a seller of goods or services, or
with a creditor? (If "yes") What year was your most recent
problem of this type? [RECORD EXACT YEAR] [INCLUDE ONLY
PERSONAL PROBLEMS, NOT THOSE THAT ARE BUSINESS-RELATED]
1. No--[SKIP TO Q. #6]
2. (Not sure/can't remember/refused)--[SKIP TO Q. #6]
3. Yes, _____
- ___ 4. (If "yes" to q. #3) What did you do about the most recent
of these problems, including seeking a lawyer's or someone
else's advice or help in resolving this problem?
___ 5. [INTERVIEWER: PROBE FOR TWO RESPONSES; RECORD COMPLETELY]
- ___ 6. Have you ever been divorced? (If "yes") In what year
were you divorced? [RECORD EXACT YEAR OF FINAL DIVORCE]
[IF DIVORCED MORE THAN ONCE, MOST RECENT DIVORCE]
1. No--[SKIP TO Q. #8]
2. (Not sure/can't remember/ refused)--[SKIP TO Q. #8]
3. Yes, _____

____ 7. (If "yes" to q. #6) Which one of the following applies to your divorce? [READ RESPONSES]

1. You and your spouse each had your own lawyer
2. You had a lawyer advise or represent you but your spouse did not
3. Your spouse had a lawyer but you did not
4. Neither you nor your spouse had a lawyer
5. You and your spouse had the same lawyer
6. You had a lawyer but don't know or can't remember whether your spouse had a lawyer
7. You did not have a lawyer and don't know or can't remember whether your spouse had a lawyer
8. (Other)
9. (Don't know/can't remember/refused)

____ 8. Do you presently have a will? (If "yes") What year was your most recent will prepared? [RECORD YEAR EXACTLY]

1. No--[SKIP TO Q.10]
2. (Not sure/can't remember/refused)--[SKIP TO Q. #10]
3. Yes, _____

____ 9. (If "yes" to q. #8) Did you have the advice or help of a lawyer in the preparation of this most recent will?

1. Yes
2. (Not sure/can't remember/refused)
3. No

____ 10. Have you ever consulted a lawyer on any kind of personal or family legal problem, or other personal or family matter for which you wanted a lawyer's advice or help? (If "yes") What was the most recent year?

[RECORD YEAR EXACTLY] [INCLUDE CONSULTATIONS COVERED IN EARLIER QUESTIONS]

1. No--[SKIP TO Q. #17]
2. (Not sure/can't remember/refused)--[SKIP TO Q. #17]
3. Yes, _____

(If "yes" to q #10)

____ 11. Was this the first time you ever consulted a lawyer?

1. Yes
2. (Not sure/can't remember/refused)
3. No

- ___ 12. Thinking about the most recent lawyer you consulted, how did this lawyer or firm come to your attention--did a friend
- ___ 13. tell you, did you see an advertisement on TV, or what? Any other ways? [IF RESPONDENT SAYS HE/SHE USED THIS LAWYER BEFORE, ASK HOW THIS LAWYER FIRST CAME TO RESPONDENT'S ATTENTION] [PROBE FOR TWO RESPONSES, RECORD COMPLETELY]
1. Friend told me
 2. Saw advertisement on TV
 3. (Other)--[Specify:
- ___ 14. Thinking about the most recent matter you took to this lawyer, did, or will, this lawyer charge you for the services?
1. No--[SKIP TO Q. #16]
 2. (Not sure/can't remember/refused)--[SKIP TO Q. #17]
 3. Yes
- ___ 15. (If "yes" to q. #14) What is the major way you paid, or will pay, for this lawyer's services? [READ RESPONSES]
1. Current income or savings
 2. Credit card or loan or time payments
 3. Paid out of what lawyer collects
 4. Paid out of benefits from group or prepaid legal services plan
 5. (Other)
 6. (Don't know/can't remember/refused)
- ___ 16. (If "no" to q. #14) What is the major reason you were not charged or won't be charged for this lawyer's services? [READ RESPONSES]
1. Lawyer decided not to charge for this matter
 2. Lawyer was with a free legal service program such as Legal Aid, Public Defender, Military Legal Assistance, or a similar program
 3. Lawyer's charge was taken care of by group or prepaid legal services plan
 4. Lawyer's fee deducted from final judgment or settlement of case
 5. Fee paid some other way
 6. (Don't know)
 7. (Can't remember, refused)

(Ask all respondents)

- ___ 17. Did you ever have a personal or family matter that you considered consulting a lawyer about, but did not do so?
(If "yes") What was the most recent year this occurred?
[RECORD EXACT YEAR]
1. No--[SKIP TO Q. #20]
 2. (Not sure/can't remember/refused)--[SKIP TO Q. #20]
 3. Yes

(If "yes" to q. #17)

- ___ 18. What was was it that you wanted to consult a lawyer about this most recent time?
[RECORD RESPONSE IN FULL; PROBE FOR DETAILS]

- ___ 19. What is the major reason why you didn't or havent consulted a lawyer about this matter? [RECORD COMPLETELY]

(Ask all respondents)

Now, Id like to ask you some questions for statistical purposes only.

- ___ 20. [OBSERVATION] Sex: 1. Female 2. Male
- ___ 21. What is your race?
- | | |
|--------------|--------------|
| 1. White | 2. Black |
| 3. (Other) | 4. (Refused) |
| 4. (Refused) | |
- ___ 22. What was the last grade you completed in school?
- | | |
|---------------------------------|--------------------------------|
| 1. Some grade school (1-8) | 2. Some high school (9-11) |
| 3. Graduated high school | 4. Technical/vocational school |
| 5. Some college | 6. Graduated college |
| 7. Graduate/professional school | 8. (Don't know/refused) |
- ___ 23. What is your age? [PLEASE RECORD IN PROPER CATEGORY]
- | | |
|--------------|---------------|
| 1. 18-24 | 2. 25-34 |
| 3. 35-44 | 4. 45-54 |
| 5. 55-64 | 6. 65 or over |
| 7. (Refused) | |

____ 24. Would you please tell me in which of the categories I read is your total household income--of everyone living in this house?

- | | |
|-------------------|-----------------|
| 01. \$0-7,999 | 02. \$8-11,999 |
| 03. \$12-14,999 | 04. \$15-19,999 |
| 05. \$20-24,999 | 06. \$25-29,999 |
| 07. \$30-34,999 | 08. \$35-49,999 |
| 09. \$50 and over | 10. (Refused) |
| 11. (Don't know) | |

____ 25. Are you married, single, divorced, or what? Do you have any children?

01. Married, children
02. Married, no children
03. Single
04. Single, children
05. Divorced, children
06. Divorced, no children
07. Widow or widower, children
08. Widow or widower, no children
09. Separated, children
10. Separated, no children
11. (Other)

____ 26. Including yourself, how many persons 18 years of age or older live in your household?

- | | |
|--------------------------|------------------|
| 1. One | 2. Two |
| 3. Three | 4. Four |
| 5. Five | 6. Six |
| 7. Seven | 8. Eight or more |
| 9. (Don't know, refused) | |

____ 27. Including yourself, how many persons of all ages live in your household?

- | | |
|--------------------------|------------------|
| 1. One | 2. Two |
| 3. Three | 4. Four |
| 5. Five | 6. Six |
| 7. Seven | 8. Eight or more |
| 9. (Don't know, refused) | |

____ 28. Is anyone in this household a member of, or covered under a prepaid or group legal service plan available through one of the following: [READ RESPONSES; RECORD ONLY FIRST RESPONSE IF MORE THAN ONE GIVEN]

1. No
2. (Not sure)
3. Yes, union
4. Yes, employer
5. Yes, bank credit card or department store credit card
6. Yes, credit union
7. Yes, (other source)
8. Yes, (Don't know/can't remember)

SCOMM

69:B7

ALTERNATIVE CLAIM RESOLUTION MECHANISMS

- 1) Establishment of Alternative to Traditional Litigation
- 2) Letter: 01/02/1989 To: Governor Cowper From: Mary Pierce
- 3) Comparison of Medical Liability Reforms By: AWA, AMA, and FIAA
- 4) Physician Insurer

Model Alternative Medical Liability Determination Act

Reforming the Civil Litigation Process - 8/1984

- 1) Board of Overseers
- 2) Reforming the Civil Litigation Process
- 3) Characteristics of State-Court Annexed Arbitration Programs
- 4) Comprehensive State ADR Program Database
- 5) State Programs by Case Type
- 6) Memo: 03/15/1989 To: Sam Cotten From: Patricia Young
- 7) Court Annexed Arbitration in Hawaii
- 8) Hawaii Arbitration Rules
- 9) Executive Summary
- 10) Court-Annexed Arbitration Program - 01/1989
- 11) Court-Ordered Arbitration in North Carolina
- 12) Study Results
- 13) Summary
- 14) Memo: 11/07/1988 From: Patricia Young
- 15) Code of Virginia
- 16) Memo: 02/14/1989 From: Patricia Young

09.87

ALTERNATIVE CLAIM RESOLUTION MECHANISMS

ESTABLISHMENT OF ALTERNATIVE TO TRADITIONAL LITIGATION

1

ALABAMA	Ala. Code §6-5-485 (1975)
ALASKA *	Alaska Stat. §09.55.535 (Supp. 1983)
ARIZONA	--
ARKANSAS	--
CALIFORNIA	Cal. Civ. Proc. Code §1295 (West 1981)
COLORADO	--
CONNECTICUT	C.G.S.A. §§52-549 et seq. and 4-141 et seq.
DELAWARE	Chapter 682 (Arbitration Code)
FLORIDA *	-- Medical Mediation Panels ruled unconstitutional
GEORGIA	OCCA §§28-5-60 through 28-5-86
HAWAII *	Hawaii Revised Statutes, §§671-11 to 671-20
IDAHO	IC §6-1001 et seq. (medical malpractice claims)
ILLINOIS	Public Act 84-7, Ill. Rev. Stat., Ch. 110, par. 2-611.1
INDIANA	--
IOWA	--
KANSAS	--
KENTUCKY	K.R.S. Chapter 44
LOUISIANA	La. Rev. Stats. 13:5141-5157; 40:1299.41-1299.48
MAINE	14 MRSA §§1151-1155
MARYLAND *	Courts & Judicial Proceedings (CJ) Title 3, Subtitle 2 (1976)
MASSACHUSETTS *	-- See comments.
MICHIGAN	Mich. Comp. Laws Ann. §500.3051 to .3062
MINNESOTA *	Minnesota Statutes 1984, Ch. 494; see also 115B.25-115B.37 and 572.30
MISSISSIPPI	--
MISSOURI	Uniform Arbitration Act. §§435.350 to 435.470, RSMo. 1980, and H.B. 120:
MONTANA *	Ch. 449, L. 1977 (Title 27, Ch. 6, MCA); Ch. 684
NEBRASKA	--
NEVADA *	NRS 41A
NEW HAMPSHIRE	NHRSA 541-B
NEW JERSEY *	Yes
NEW MEXICO	--
NEW YORK *	Yes
NORTH CAROLINA	--
NORTH DAKOTA	--
OHIO *	Ohio Rev. Code Ann. §2711.21 to .24
OKLAHOMA	120.S.1984 §§1801 et seq.
OREGON *	See comments.
PENNSYLVANIA *	--
RHODE ISLAND	R.I. Gen. Laws §8-17-1
SOUTH CAROLINA *	§56-11-510, et seq. of S.C. Code
SOUTH DAKOTA	--
TENNESSEE	T.C.A. §9-8-101 through 9-8-406, as to claims against state only
TEXAS *	Article 4590, §6.03, Revised Statutes
UTAH	--
VERMONT	Vt. Stat. Ann. Title 12, §7002(a) (Supp. 1982)
VIRGINIA	Va. Code §§8.01-581.1 to 581.12:2 (Supp. 1983)
WASHINGTON	--
WEST VIRGINIA	--
WISCONSIN	--
WYOMING *	Proposal to create a pretrial screening panel
AMERICAN SAMOA	
GUAM	
PACIFIC TRUST	
PUERTO RICO	
VIRGIN ISLANDS	
TOTAL	

See Comments.

ESTABLISHMENT OF ALTERNATIVE TO TRADITIONAL LITIGATION - Comments

ALASKA

- 1) AS 09.43.190-.220 (arbitration of small claims)
- 2) AS 09.43.010-.180 (Uniform Arbitration Act)
- 3) AS 09.55.535 (Voluntary Arbitration of Medical Malpractice Claims)

HAWAII

Hawaii Medical Malpractice; Haw. Rev. Stat. Ch. 672, Design Professionals

MARYLAND

Health Care Malpractice Claims

MASSACHUSETTS

Maximum amount increased in area of small claims; Superior court can now remand cases to District Court for trial when amount is under \$15,000.

MINNESOTA

See also Minn. Stat. §§115B.25 to 115B.37 (only for hazardous substance injury); see also Minn. Stat. 572.30.

MONTANA

Montana L. 1985 (Title 27, Ch. 5, MCA). Medical Legal Panel Act; Uniform Arbitration Act.

NEVADA

Screening panel for medical malpractice actions.

NEW JERSEY

The State Supreme Court has instituted an arbitration program for automobile negligence claims where the amount in controversy does not exceed \$15,000. Any party has a right to de novo trial in Superior Court.

NEW YORK

The state may only be sued in Court of Claims (Court of Claims Act, §9). Arbitration is available in any case if all parties agree (CPLR, §7501). Medical malpractice actions must go to a medical malpractice panel (Judiciary Law, §148-a), but this does not preclude a civil trial.

OHIO

See R.C. 2711.21-2711.24 relative to medical claims arbitration. See R.C. 9.83(E) relative to administrative "compromises" of motor vehicle, watercraft, and aircraft claims against the state. See entire R.C. Chapter 2711. relative to arbitration (often contract disputes). Also see Municipal Court Superintendence Rule 15 and Common Pleas Court Superintendence Rule 15.

OREGON

Trial Court Rules establish non-binding arbitration for cases where less than \$15,000 in damages are sought.

PENNSYLVANIA

Cities of Philadelphia and Pittsburgh provide arbitration for claims of \$20,000 or less; others for \$10,000 or less.

ESTABLISHMENT OF ALTERNATIVE TO TRADITIONAL LITIGATION - Comments

SOUTH CAROLINA

South Carolina Laws, 1976, as amended (Arbitration of Property Damage Liability Claims); South Carolina Supreme Court has issued rules for voluntary arbitration of appeals and disputes over attorney fees.

TEXAS

Creation of Texas Medical Disclosure Panel to determine proper disclosure for every medical and surgical procedure.

January 23, 1989

Steve Cowper, Governor
Third Floor, State Capitol
P.O. Box A
Juneau, AK 99811

Dear Governor Cowper:

We at the Medical Indemnity Corporation of Alaska have been concerned for some time about the existing inefficiencies and basic unfairness of the current tort system as regards medical malpractice. We are not alone in our concern with various national organizations appointing study groups to investigate the problem.

In fact "alternative" proposals to the current tort system have been developed by the American Hospital Association (AHA), the American Medical Association (AMA) and an organization to which we belong, Physician Insurers Association of America (PIAA).

Last May, I attended the annual meeting of the PIAA where their study group presented an overview of their alternative. Although they had not completed their proposal (they have just now done so), I was favorably impressed with their recommendations. I felt further investigation of an alternative system was warranted, especially since MICA had already been studying various types of arbitration legislation in other states.

In June of 1988 a unique opportunity was presented to us. Jerry Cogan, a medical student in Seattle, was looking for a project for a thesis and contacted us for suggestions. We concluded that Mr. Cogan could do a comparison study of the alternatives to the present system as proposed by the AHA, AMA and PIAA. The advantages of Mr. Cogan doing the research were: a) this was a project he could accomplish from Seattle, b) we would supply the needed information including Alaska's own statutes on arbitration as well as some direction, c) the resulting study would not be an expense to MICA.

We are forwarding that comparison to you. It is basically Mr. Cogan's analysis with some modifications by myself. We at MICA believe there is value to the citizens of this state to consider an alternative. I'm personally very encouraged by the PIAA study and will be traveling to Boston in late May for a presentation of the final results.

We would like an indication of interest from you. Do you believe that this is a viable option? Would you like us to forward further information as we receive it? Thank-you for your consideration.

Sincerely,



Mary A. Pierce
Executive Director

MAP/tmb/LETTER.SC

Enclosure

bcc: William Brock
Paul Roller

A COMPARISON OF MEDICAL LIABILITY REFORMS BY THE AHA, THE AMA, AND PIAA

**by
Jerry Cogan
for the Medical Indemnity Corporation of Alaska**

Medical liability reform can be broken down into five categories: "1.) the compensable event, 2.) the measure of compensation, 3.) the payment mechanism, 4.) the forum used to resolve disputes, and 5.) the method of implementing the new rights and responsibilities."

Three independent organizations have formed committees to come up with 'non-traditional' approaches to help resolve the medical malpractice crisis. They are the American Hospital Association, the American Medical Association, and Physician Insurers Association of America. In order to facilitate a comparison, their proposals will be broken down into the above categories.

Please note at this time that the PIAA proposal has not been finalized and the information contained herein is not complete.

THE COMPENSABLE EVENT

In the AHA Medical Malpractice Task Force Report on Non-traditional Approaches to the Medical Malpractice Crisis, the compensable event is specified in a private contract by defining the applicable standard of care. Thus, the matter of what is compensated becomes an event which is more fully understood by the patient and the physician. The matter of contracts will be considered later in the discussion of the method of implementing the new rights and responsibilities.

Besides defining the standard of care, the contract allows for the definition of kinds of evidence and witnesses which can be introduced, it could allow for the patient to elect not to sue in exchange for lower health care costs, and/or contract for no-fault compensation.

In the AMA/Specialty Society proposed alternative, the compensable event is broken down into several categories: 1.) the existence of duty, 2.) standard of care, 3.) proof of standard of care, 4.) causation, 5.) consent to medical care and informed consent, and 6.) damages.

The Existence of Duty

With this specific issue, the AMA/Specialty Society Committee felt that there were not enough problems with the current legal rules, and thus recommended only "codification and adoption of the standard rules governing the creation and extent of a duty on the part of the physician."

The Standard of Care

To ensure that a broad range of acceptable medical care is legally recognized as non-negligent, the AMA specifically proposed the following:

"A physician is under a duty to use that degree of care and skill which is expected of a prudent competent practitioner in the same or similar circumstances, using available resources, contemporary principles, and which is commensurate with the care and skill of others of similar training, experience, and/or certification. A physician is not a guarantor of good results from treatment reasonably given."

In addition to this, the AMA proposal seeks to protect the physician from the patient who refuses treatment even after being fully informed of the risks of treatment and of non-treatment.

This proposal provides health professionals, in a sense, with protection in the event of a poor outcome when that health professional acted in a responsible manner. To elaborate, if the health care provider used the expertise and means available, available medical facilities, and did so in a manner consistent with the state of medical knowledge at that time, that individual should not be held liable. Likewise, the general health of the patient would be taken into consideration, especially if the patient's general health limited appropriate medical options.

Proof of Standard of Care

The AMA/Specialty Society proposes three major rules under this heading. It would be required that an expert witness have the same education, training, and experience as the defendant and have practiced in the field within the past five years. Medical literature would be admitted as evidence, but could not be considered as conclusive evidence. Finally, the doctrine of *res ipsa loquitur*, which permits a plaintiff to prove negligence by circumstantial evidence, would be limited to evidence based on expert testimony. These proposals governing proof are not new, but include some adjustments to current rules.

Causation

Under the current tort system "the plaintiff must demonstrate both that the injury would not have occurred in the absence of the defendant's negligence (cause in fact) and that the injury was reasonably foreseeable and not too remote in time, space or logical connection from the negligent act (proximate cause)." Thus, under the current system, causation can be "difficult for the plaintiff to prove, even when negligence is clearly established." Thus, the AMA/Specialty Society proposes the following:

"The plaintiff must prove that it is more likely than not that the physician's negligence was a contributing factor in causing the plaintiff's injury. If the physician's negligence was a contributing factor, his liability is limited solely to the extent of his responsibility for the injury. The physician will not be liable for the patient, or other factors such as the patient's preexisting medical condition."

Consent to Medical Care and Informed Consent

Consent applies to the physician informing the patient of the nature of a proposed treatment and receiving the patient's agreement prior to medical treatment. The legal standards concerning consent are considered adequate by the AMA/Specialty Committee with one exception. Here it is only proposed that the 'reasonable person' standard be adopted for determining when voluntary consent has been given.

Informed consent implies that the patient must be sufficiently informed to make a reasoned choice concerning a treatment and/or alternatives. The AMA/Specialty Committee proposes four changes. They recommend that adequacy of disclosure be made from the perspective of the reasonable patient and not from the perspective of the reasonable practitioner. The current rule on causation, which requires that the patient prove that a reasonable person would not have chosen the treatment option pursued, is recommended. However, the practitioner should be permitted to defend by showing that a patient's views or beliefs would have caused that individual to act differently than a "hypothetical reasonable person." The privilege to withhold information should only be used on therapeutic grounds and then only when harm of disclosure is highly probable. This recommendation is an adoption of the guideline proposed by the President's Commission for the Study of Ethical Problems in Medicine. Finally, the responsibility for the disclosure should be placed on the physician who is going to perform the procedure.

Damages

Under the current tort system the plaintiff must prove that a compensable injury has been suffered. However, the proposed changes in this category relate to inconsistencies, inaccuracies, and the unpredictability in the assessment of damages. This will be addressed in the next section under the measure of compensation.

Specifics about the compensable event as defined by the PIAA proposal are unknown at this time.

Summary: The AHA and the AMA differ greatly in their handling of the definition of the compensable event. The AHA proposal is very flexible in that the compensable event is defined in a contract and can thus be applied specifically. The AMA proposal, on the other hand, specifically proposes codification of some standard rules and the limitation of others.

THE MEASURE OF COMPENSATION

In the AHA report, limitations on a patient's right to recover could be stipulated in the contract. These limitations could be for pain and suffering, for awards that duplicate compensation from a collateral source, or for punitive damages. In addition, the contract could provide for periodic payments, prejudgment interest, and a first refusal right of provider to provide reparative care. The contract could also provide for a voucher system to ensure payment for future medical care, payment for lost earnings, and other related losses.

The AMA/Specialty Society proposes several changes in this category. First, they propose that damages for pain and suffering, loss of enjoyment of life, loss of consortium, and punitive damages all be lumped into one award. In addition, they propose a cap on this award limited to fifty percent of the plaintiff's average annual wage multiplied by that individual's life expectancy. These changes provide a flexible and measurable approach where none currently exists.

They also recommend the development of specific guidelines for the computation of economic damages. These guidelines could be defined by statute and/or could be established by the agency (board) responsible for the administration of these reforms using life expectancy tables, work-like expectancy tables, etc. to compute damages.

The AMA/Specialty Society recommends that the collateral source rule be adopted. It is their feeling that a patient should not be compensated twice for the same injury because this rule creates a problem of uncertainty and inefficiency. Indirect cost of the collateral source payments could be allowed at the discretion of the hearing officer.

Finally, it is recommended that the rule of joint and several liability be abolished, allowing claimants to seek and obtain compensation from each defendant only in proportion to his own liability.

The PIAA proposal apparently will contain a fixed schedule of benefits. Medical costs will be paid without limitation. Lost wages will be computed as a function of actual wage loss with a cap. These costs will be paid as they occur and would be subject to collateral source offset. Pain and suffering will be included, but with a cap.

Non-economic damages will be paid according to a fixed schedule of benefits. There will be a set amount for total permanent disability.

Summary: In the AHA proposal, again the measure of compensation would be defined in the contract. It appears at this point that the AMA and PIAA proposals are similar in their handling of compensation for economic damages, in that there would be guidelines and a cap. Both proposals also provide for a measurable approach for the payment of non-economic damages, with the AMA proposing payment based on annual wages and life expectancy and PIAA proposing a fixed schedule of benefits. Both proposals also subject payments to the collateral offset rule.

PAYMENT MECHANISM

In the contract approach suggested by the AHA Task Force, the method of payment can be specified, however, they specifically endorse the exploration of a Medical Indemnity Fund as the method of compensating medical malpractice victims for future medical expenses.

The medical indemnity fund is modeled after the New York Medical Indemnity Bill (S.B. 6770) and is designed to compensate plaintiffs and at the same time protect from awards that exceed actual provable damages. It is specifically designed for awards in excess of \$100,000 and is financed by assessments or surcharges levied on medical malpractice insurers and the self-insured.

Another feature of this proposal is that the attorney's fee is taken from the first \$100,000. With this feature, attorneys would have less incentive to inflate a case and its damages, thereby reducing the potential for an excessive award.

There are many advantages to this proposal, two of which are especially significant. 1.) Complainants are not limited or denied a right to trial because of a perceived award size. 2.) It provides an incentive to settle a case, because the attorney's fee is limited.

Of the disadvantages to this proposal, that there is no data to ascertain that there would be a savings, is paramount. It is difficult to project the number of cases which would warrant compensation and which might come to trial, that under the present system would not.

The AMA/Specialty Society propose one modification to the current lump sum payment mechanism and recommends consideration of a second. They propose that damage awards greater than \$250,000 should be made on a yearly payment schedule. In addition, they feel that consideration should be given to a system for modification of awards for future damages if there is substantial change in economic requirements. Both the health care provider and the patient would be able to petition for these award modifications. To finance award modifications, a fund could be created to insulate insurers from uncertainty.

It is not known at this time what payment mechanism is proposed by PIAA, however, there would be restrictions on attorney contingency fees. In addition, there would be partial payment to attorneys losing cases, which would be based on actual time spent on the case.

Summary: The AHA proposed indemnity Fund is specifically designed for awards in excess of \$100,000 and which have not been settled out of court. It is similar to the AMA proposal in that it is felt that it will decrease liability costs relative to the traditional lump sum payment mechanism. The AMA proposes to make yearly payments on awards over \$250,000, with consideration given to modification of awards. All three proposals provide for features to limit attorney fees. The PIAA proposal might provide an incentive to plaintiff attorneys to encourage their clients to utilize the system by providing them some compensation whether they win or lose.

FORUM FOR RESOLUTION OF DISPUTES

The method for resolution of medical malpractice claims proposed by the AHA is arbitration. The use of arbitration could be stipulated for in the private contract or an arbitration agreement can be made between a physician and his patient or a hospital and patient separately. If a separate arbitration agreement is used, this agreement is a contract, is controlled by the law of contracts, and must contain "ordinary elements of a valid contract."

There are four types of arbitration described in the AHA proposal: binding vs. non-binding, voluntary vs. mandatory, prospective vs. retrospective, and administered vs. non-administered. These types can be combined to provide variety in the specifics of arbitration, however, the AHA advocates arbitration which is 1.) *voluntary* (i.e., made freely and knowingly, with full explanation, and with a specified time for revocation for the patient) and 2.) *binding* (i.e., subject to judicial review only on narrow grounds).

To safeguard arbitration agreements from court challenge it is further suggested that the agreements have the arbitration provision in large bold print, be written in language easily understood by lay persons, and when the patient signs the agreement the arbitration provision should be specifically brought to the attention of the patient. Especially important is that the patient knows that the issue of alleged malpractice is to be decided by neutral arbitration and not by a judge and jury.

The arbitration panel is usually made up of three members and its composition is usually defined by statute or by the arbitration agreement. Selection of arbitrators is variable. In Alaska, each party selects one panel member and mutually agree on the third member. If agreement cannot be reached, the courts provide for selection of the third member.

The AMA/Specialty Society report gives states the choice to decide whether they wish to have a separate administrative agency to handle malpractice issues or use existing medical boards. The use of existing medical boards would mean that physician quality control (medical discipline) and resolution of malpractice issues would be combined. They feel that use of existing medical boards, 1.) could "provide significant leadership" and 2.) would be more amenable to adoption by legislators for this "experimental undertaking."

A restructuring of the existing medical board, however, would be necessary. Seven experienced and neutral members, with a minimum of two and a maximum of three physicians, would be appointed by the governor to full time positions for terms of five years. The jurisdiction of this board would have to be broadened to include nurses and other health care personnel, as well as hospitals, to resolve all medical liability claims. However, this board would not have jurisdiction over "claims not alleging medical negligence," such as product liability cases.

This proposal divides the "administrative adjudicatory process" into three parts. The initial hearing process would provide for claims review where there would be an evaluation of the basis for the charge, all potentially negligent health care providers could be joined in a single claim proceeding, the health care provider(s) or insurance company could offer a settlement, which would be evaluated for reasonableness by the board, or the board could dismiss the claim administratively if it was without merit.

If the claim was not dismissed, then there would be a peer review of the claimant's file, conducted by experts in the health provider's field of practice. To administratively dismiss a claim at this level would require the consensus of two such experts acting independently.

For a patient to renew a claim after dismissal it would be required that the plaintiff retain private counsel and supply the board with the statement of a qualified expert stating that the patient's injury was the fault of the "health care provider under the appropriate standards of care."

The next action by the board would be the arrangement of a hearing, which would be conducted by a hearing examiner. This hearing could be based entirely on the "basis of documentary proof" and would not require an oral hearing, but if an oral hearing was required, the examiner would conduct the proceedings. The medical board would then review the decision and decide if it represented the board's view. This would allow the hearing examiner's opinion to "become binding precedent in future cases."

Provision for appeal is two-fold after the decision of the hearing examiner. First the decision would be appealed to the Medical Board, with provisions to limit the number of appeals. Appeals of the board's decisions would go to the intermediate appellate court of the state, with further appeal to the state supreme court available as with any appeal.

The performance monitoring function of the board would allow the board to "detect physicians whose practices call for rehabilitative assistance from the board or, if necessary, discipline. Generation of information for this function would come not only from medical liability proceedings, but would also be required from insurance companies, hospitals and other institutional credentialing bodies, peer reviews, and reports by individual physicians.

PIAA proposed the use of a fault-based administrative system for the resolution of disputes. According to the Medical Liability Monitor, it would be modeled in some respects after the worker's compensation program. The commission would be made up of a judge, a physician, and a lay person, all of whom would be appointed by the governor. Rather than replace the civil justice system, this system would offer incentives to encourage resolution of claims through the administrative system rather than using the courts.

Summary: All three proposals suggest the removal of malpractice cases from the courts, at least initially. The AHA proposes the use of arbitration, the AMA proposes the use of an administrative agency or modifications of existing medical boards, and likewise, PIAA proposes the use of an administrative system. The AMA proposal differs from the AHA and PIAA proposals which are alternatives to the courts, in that it would be a mandatory system, but does allow for appeal through the courts.

METHOD OF IMPLEMENTING THE NEW RIGHTS AND RESPONSIBILITIES

As was earlier discussed, the AHA proposes that private contracts be used. It is their recommendation that private prospective "contractual arrangements can offer relief to medical malpractice litigation crisis by removing certain issues and situations from tort litigation." The AHA found that while tort reform offers promise in "making awards more predictable and consistent", it and other non-traditional changes are "compliments to, not substitutes for", existing tort reforms that are believed to be effective.

This recommendation contains the following qualifications: 1.) The contract should be a.) voluntary and b.) entered into with full understanding of the consequences. 2.) To avoid court challenge that a contract is one of adhesion, more than one choice of valid contract should be given. 3.) The contract should provide a *quid pro quo* to the health care provider, i.e., lower premiums or lower fees for those agreeing to the contract.

Private contractual agreements are favored because they will not provoke a constitutional challenge, and the above recommendations would help prevent challenges on "grounds of unconscionability". Private contracts also allow for individualized expectations and allocation of risks, but still, there might be real or imagined "inequality in the bargaining relationship."

In response to perceived unfairness to both plaintiff and defendant, inefficiency and cost of the civil jury system in resolving medical liability disputes, the AMA/Specialty Society proposes a new, experimental statute which would provide for a fault-based administrative system. In addition to the administrative change they also propose changes in legal standards which apply to medical malpractice actions that have developed under the tort system.

These changes are currently recommended only for a few states on an experimental basis, rather than as across the board changes. This will allow for testing of the alternative system, for a response from trial lawyers, and for evaluation of the risk management, peer review and management systems embodied in the proposals.

In defense of this proposal they cite three areas where they feel that the current system fails. First, it is felt that under the current system victims of medical negligence are not adequately compensated. According to a study by Dazon, only one in twenty-five incidents of malpractice received compensation.

The authors of this proposal also feel that juries are not "optimally" suited for dealing with the complicated issues that come up in medical liability cases. In addition, it has been noted that juries do not make their awards in a predictable manner. It was found by M. Peterson, that juries tend to award plaintiffs in medical malpractice cases awards that are two to four times awards for similar injuries and loss in other types of cases such as automobile accidents.

Finally, it is believed that this alternative system can resolve medical malpractice cases in a more timely manner and with less expense than the current civil justice system.

The proposal by PIAA also relies on change by statute. Their proposal, in some respects, is modeled after the worker's compensation program. The principal goal of their system is to establish uniformity in the process of resolving claims and establishing some predictability in the cost of claims.

Summary: Both the AMA and PIAA proposals require statutory change, however, the AHA proposal appears to rely on existing legal mechanisms, and except for the legislative establishment of the indemnity fund would require no change.

References:

1. Abraham, Kenneth S., Medical Liability Reform- A Conceptual Framework. *JAMA*, 1988; 260 (1): 86-72.
2. American Medical Association Specialty Society Medical Liability Project: *A Proposed Alternative to the Civil Justice System for Resolving Medical Liability Disputes: A Fault-Based System*. Chicago, American Medical Association, 1988.
3. *Medical Malpractice Task Force Report on Non-Traditional Approaches to the Medical Malpractice Crisis*, American Hospital Association, Date?.
4. Golin, CB (Publisher): *Physician Insurers Float New Proposal for Fault-Based Alternative System*, *Medical Liability Monitor*, 1988; 13 (6): 1-2, 8.
5. Pierce, M.: Unpublished notes from PLAA Convention, 1988.

Inside: Earthquake!
Kauai meeting beckons;
PIAA companies' score
high on disciplinary
actions; tail coverage
survey coming



The Physician Insurer

A quarterly publication of the Physician Insurers Association of America

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DEC 5 1989
MICA



Brad Cohn, MD

The President speaks

The day the earth shook

We had wrapped up our work early. After all, the Bay Area World Series was about to resume for game three at Candlestick Park. The day was beautiful, the city resplendent for the gala, business booming, hotels bulging, people ebullient—and then suddenly with no warning, EARTHQUAKE!

It shook like hell! There was tragedy with loss of life and extensive property damage. There were business and transportation interruptions, communications failures, and much personal discomfort for the population. There were untold heroisms, ample

(Cont. on page 2)

Delegates endorse optional state model bill but reject federal alternative version

At a special meeting of delegates from PIAA member-companies in Chicago on October 7 the association adopted an official policy on model legislation proposed by the Committee to Study Alternatives to the Present System.

The delegates endorsed the state alternative version of the Model Alternative Medical Liability Determination Act proposed by the committee but rejected the federal alternative version.

Turn-out for the special meeting was substantial. Twenty-three member-companies were present and 14 others were represented by proxy. Only four were not present, and of these, at least one was delayed in transit.

The meeting was called to order by PIAA President Brad Cohn, MD, San Francisco, at exactly 9 a.m. on October 7 at the O'Hare Hilton and was concluded within an hour.

(Cont. on page 2)



Dr. Richard V. Bradley, president, Missouri Medical Insurance Company, rises to thank PIAA's Alternatives Committee for its excellent work during the recent delegates' meeting in Chicago.

Earthquake KO's loss prevention meeting

When a devastating earthquake rumbled across the San Francisco area on October 17, a PIAA meeting was one of the "casualties."

Special from San Francisco:
In this issue are reports from west coast companies and from some PIAA people who came through the recent earthquake.

PIAA's Loss Prevention Interim Workshop, which was scheduled to begin at the Park Hyatt at the Embarcadero Center the following morning had to be postponed. Efforts are being

made to reschedule the meeting in February of 1990.

Section chairman Adam Wilczek, Medical Inter-Insurance Exchange of New Jersey, who had arrived in San Francisco early to handle preliminary arrangements, was able to get word to the 85 anticipated registrants by telephone in the hours immediately following the earthquake. Some began calling him at 1 and 2 a.m. to check on the status of the meeting.

Wilczek learned that the hotel in which the meeting was to be held would not register any guests until power was restored and that the San Francisco airport had been closed to all flights.

(Cont. on page 6)

President

(Cont. from page 1)

evidence of people's concern for people, and there was no panic. Everyone seemed to be following the old axiom, "when the going gets tough, the tough get going." It was truly marvelous!

There is much to be learned from such experiences. Our cities, no newcomers to earthquakes, saw relatively little loss of life and property damage, due to preparedness. Our businesses were up and running promptly because of disaster planning. Our population was minimally distressed because of the community spirit and will to overcome adversity. And worldwide help was proffered in the fraternal spirit from others who felt a kinship to our adversity.

Within hours after the quake, I had made and received calls to and from other PIAA companies. The first call was from Bob Crawford, president of MICA in Arizona, wanting reassurance that our personnel were uninjured, and offering unlimited help if need be to restore our company (MIEC) to an operational status. Multiple offers of aid followed, even among competitors, and it was crystal clear to me that there was a caring among PIAA members that is an important ingredient of our organization that must not be overlooked. That caring along with the lessons of this disaster prompted me to reflect upon the strengths of PIAA and how we must marshal them to meet successfully the challenges in our future.

Any or many of our 41 companies may unexpectedly experience some sort of catastrophe. Each should now review its plan for such dreaded events, update it, and

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PIAA delegates vote on alternatives; accept state

(Cont. from page 1)



Delegates from PIAA companies listened intently as they gathered in Chicago on October 7 for a special meeting to consider alternative solutions to medical malpractice claims resolution.

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Delegates came to vote

"Delegates were well prepared when they arrived in Chicago for the special meeting. Although ample time was provided for debate, things moved along very swiftly to a conclusion. It was obvious that the delegates came to vote, not to talk," said Dr. Cohn. "We were impressed that the meeting was marked by statesmanship, rather than politics."

The Alternatives Committee, after several years of study, had proposed a fault-based administrative system keyed to a set schedule of benefits as an alternative to the present system for resolving medical liability claims. The concepts in the proposal initially were incorporated into a model federal bill. That bill included exemptions for states that already have substantial tort reform on the books or have less severe professional liability problems.

Fears about tort reform erosion

At the PIAA Annual Meeting in Boston last May, some delegates expressed concern that enactment of a federal bill might weaken or even wipe out existing tort reforms in their states. As a result, a resolution was adopted deferring preparation of a model federal bill. Instead, the committee was directed to prepare model state legislation which might be introduced on a voluntary basis in selected states on a trial basis.

The resolution also specified that no plan be adopted by the PIAA board until regional meetings could be held around the nation at which member-companies could further analyze and comment on the proposal. The resolution

directed that another meeting of PIAA delegates be held after the regional meetings were concluded to take final definitive action on the proposed alternative plan legislation.

Immediately following the Boston meeting a series of regional meetings were scheduled and conducted in five cities. Sessions focused on the model state bill with some discussion of federal issues.

A number of constructive suggestions for refining the state model version were offered at the regional meetings and subsequently incorporated into the final draft, Peter Sweetland, President, Medical Inter-Insurance Exchange of New Jersey, who chairs the Alternatives Committee, told delegates to the special session.

Flawed system needs alteration

"The committee found near universal support for the principle that the tort system as it operates in most states is seriously flawed and that bold initiatives are warranted to address this issue. The committee also found strong support, except on the west coast, for the view that its model state proposal was a promising initiative which should be pursued at least on an experimental basis in some states," Sweetland said.

Sweetland introduced the first resolution which proposed that the delegates endorse the Model Alternative Medical Liability Determination Act in its state alternative version. The resolution also encouraged PIAA members and friends of legislative reform to seek adoption of the model state bill in one or more states and authorized the board of trustees and such PIAA

model, but reject federal legislation version



PIAA President Brad Cohn, MD, chairs the special delegates' meeting. Seated left to right are Joyce Harbourt, PIAA administrative manager, Alternatives Committee Chairman Peter Sweetland, NJ; W. Maurice Lawson, MD, secretary-treasurer, and J. Anthony Manger, PIAA counsel, and Alternatives Committee member.

committees as it may designate to take such actions as they deem appropriate in their discretion to carry out the purposes and intent of this resolution.

Delegates from three states rose to express favor for the state model resolution. Victor Adamo, President, Physicians Insurance Company of Michigan, said his company wants to take the PIAA model bill to a governor's fact-finding body interested in medical liability reform.

Dr. Charles Hollis, Jr., chairman and CEO of MAG Mutual of Georgia, said Georgia was interested in a model state bill and had proposed something similar to that legislature, but recommended incorporation of a sunset provision in any version of a state-level PIAA model bill.

However, Dr. Cohn cautioned that a sunset provision is "a two-way street" which could provide the leverage for those opposed to tort reform to strike past legislation from the books and block further reform.

Dr. Loren Winterscheid, chairman, Washington State Physicians Insurance Exchange and Association, said his state supports the model state bill and has already met with its lobbyists to incorporate the bill as part of its legislative program, using the ERISA statutes as the vehicle.

When a vote was called on endorsement of an optional state alternative model bill, 18 delegates voted yes and 14 no, with five abstentions.

Little support for federal bill

The second resolution proposed that the

membership endorse the Model Alternative Liability Determination Act in the federal alternative version, subject to the proviso that any proposed act be modified by permitting the state legislature of any state to elect to exempt that state from the provisions of the act.

Delegates overwhelmingly rejected this resolution. The tally was nine for and 28 against with no absentions.

One other motion was put before the special delegates' meeting. Dr. Ivan Neubauer, NORCAL, moved to appoint Dr. Brad Cohn, as the formally designated PIAA liaison to the federal government during his term as PIAA president. The motion further proposed that Dr. Cohn be given discretion to obtain input from the membership at large on any issues. The motion was seconded and unanimously approved.

Tax reform update

Donald J. Fager, Esq., Medical Liability Insurance Company of New York, chairman of the PIAA Oversight Committee, presented a report on efforts to achieve reform of the 1986 tax legislation which is impacting heavily, particularly upon claims-made companies and newer PIAA companies.

Fager said vigorous efforts were underway to achieve needed reforms and that PIAA is making every effort to coordinate its activities with those of other member-companies seeking change through other routes.

"There was general agreement after meetings in Washington that we should proceed shoulder to shoulder on these ventures," Fager said. He expressed optimism that something

Special delegates' meeting

These companies attended the October 7 special meeting of PIAA delegates in Chicago:

Mutual Assurance, Inc., AL
Medical Insurance Exchange of California
NORCAL Mutual Insurance Company, CA
Southern California Physicians Insurance Exchange
The Doctors' Company, CA
COPIC Insurance Company, CO
National Capital Reciprocal Insurance Company, DC
Florida Physicians Insurance Company
MAG Mutual Insurance Company, GA
Iowa Physicians Mutual Insurance Trust
Louisiana Medical Mutual Insurance Company
Medical Mutual Insurance Company of Maine
Medical Mutual Liability Insurance Society of Maryland
Michigan Physicians Mutual Liability Company
Physicians Insurance Company of Michigan
Missouri Medical Insurance Company
Medical Inter-Insurance Exchange of New Jersey
Medical Liability Mutual Insurance Company of New York
Medical Mutual Insurance Company of North Carolina
Physicians Liability Insurance Company, OK
Pennsylvania Medical Society Liability Insurance Company
Washington State Physicians Insurance Exchange & Association
American Medical Assurance Company, IL
These companies were represented by proxy:

Mutual Insurance Company of Arizona
Connecticut Medical Insurance Company
Florida Physicians Insurance Trust
Illinois State Medical Inter-Insurance Exchange
Kentucky Medical Insurance Company
Midwest Medical Insurance Company, MN
Medical Defense Associates, MO
Risk Control Associates, Inc., MO
New Mexico Physicians Mutual Insurance Company
Northwest Physicians Mutual Insurance Company of Oregon
American Physicians Insurance Exchange, TX
Texas Medical Liability Trust
Utah Medical Insurance Association
Physicians Insurance Company of Wisconsin
These companies were not present in person or by proxy:
Medical Assurance Company of Mississippi
Physicians Insurance Company of Ohio
State Volunteer Mutual Insurance Company, TN
Florida Physicians Protective Trust

* Some individuals' flights were delayed and at least one proxy was held up in the mails.

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Tail coverage

(Cont. from page 4)

surance and hopefully with the PIAA leadership, Ms. Miller said.

"AMA's concern is to identify any problems in this area and eventually to suggest ways of dealing with them," the AMA attorney said.

Ms. Miller said that very preliminary review of the survey data suggests that nine companies of the 36 responding offer some form of occurrence coverage as well as claims-made policies. An overwhelming majority said that they had special underwriting or pricing policies for applicants applying for protection with previous claims coverage.

About one-third of the respondents said they are considering or have already begun offering prepaid tail coverage to their insureds.

The questionnaires sought quite in-depth information on tail coverage arrangements. The data will be useful to PIAA companies and to policymakers. Results are being tabulated in aggregate form and no company-specific data will be revealed.

Tax burden heightens

As a result of the 1986 Tax Reform Act, the 1987-1990 federal income tax bill for the property/casualty insurance industry is expected to be \$12.2 billion, or \$7.8 billion more than under the prior law, according to a report from the Insurance Services Office. The study notes that faster use of prior net operating losses and slower creation of new ones during these years leave less NOLs available to reduce future taxes.

Institute of Medicine recommends actions to solve obstetrical crisis

Recommendations to resolve a crisis in obstetrical care precipitated by severe liability problems were issued by a special Institute of Medicine committee in October.

The committee, in introducing its proposals, said "problems created by the medical liability issue in obstetrics represent a serious threat to the delivery of obstetrical care in this nation."

Short and long-term solutions were suggested, including extension of the Federal Tort Claims Act coverage or its equivalent to obstetricians serving government-financed community and migrant worker health centers.

On a temporary basis, states should contribute to professional liability coverage for Medicaid providers, as is being done in such states as Missouri, Hawaii and Montgomery County, MD.

Additionally, the committee said the National Health Services Corps, whose ranks have been depleted because of congressional cutbacks, should be expanded.

States should investigate alternatives to the tort system. Particularly promising in the view of the committee are no-fault designated compensable events schemes, fault-based administrative systems like that proposed by the AMA and a number of medical special societies, and contractual arrangements for resolution of potential liability disputes between providers and patients.

Also proposed were support for demonstration projects through the Department of Health and Human Services "for various solutions and studies of proposed state legislation," development of a national data base on malpractice claims beyond the scope of the National Practitioner Data Bank now being geared up for operation, and systematic technology assessment to "establish appropriateness, reliability and effectiveness of new medical procedures before they are widely disseminated and become the accepted standard of care."

A preliminary review of the committee's report was "a statesmanlike approach to identifying the problems and from that point of view, to address some potential solutions," suggested PIAA President Brad Cohn, MD. "We will watch with interest and a fair degree of caution the progress of these proposals."

The two-volume report, *Medical Professional Liability and the Delivery of Obstetrical Care*, is available from the National Academy Press, 2101 Constitution Avenue, N.W., Washington, DC 200417 for \$54.95 for the set. Telephone 202-334-3313 or 800-624-6242.

Settle Texas antitrust suit

In a surprise move last month, St. Paul Fire and Marine Insurance Co. of St. Paul, MN, and the Travelers Insurance Co. of Hartford, CT, agreed to out-of-court settlements in the massive Texas antitrust suit Attorney General Jim Mattox filed last year against eight insurers, the Insurance Services Office and a group of insurance executives.

Mattox intends to continue legal action against the other defendants.

Board

(Cont. from page 4)

Committee.

- Agreed to seek PIAA representation on the National Practitioner Data Bank Advisory Committee and technical group.
- Planned to meet November 30 and December 1 in Hawaii during AMA's Interim Meeting. PIAA will again host a luncheon for AMA delegates on December 3.

Cohn gets out PIAA message

PIAA President Brad Cohn, MD, San Francisco, despite the earthquake that hit his hometown in October, has been speaking, talking with reporters and attending a number of meetings around the country on behalf of the association.

In late October, Dr. Cohn participated in a panel on medical liability at the meeting of the American Academy of Pediatrics meeting in Chicago. In an unusual kind of presentation, he explained from the physician's standpoint what happens when a claim is filed, discussing the contractual relationship with an insurer and each one's responsibility.

He spoke with editors of Barron's for a comprehensive article published October 2. (See page 12) and was pictured and contributed comments to an American Medical News story published October 20 on the use of videos in medical liability cases. ("My guess is that it inflates the settlement along the way," he said. Calls for radio, TV and print interviews now regularly flow to PIAA as the spokesman for the physician-insurance industry.

MM&W
Draft of 7/21/89

MODEL ALTERNATIVE MEDICAL
LIABILITY DETERMINATION ACT
(State Alternative Version)

Submitted by:

Physician Insurers
Association of America
Committee on Alternatives

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SECTION 1. SHORT TITLE; PURPOSE

(a) This Act may be cited as the "Model Alternative Medical Liability Determination Act."

(b) The interests of injured persons, health care providers and the public are being undermined by the cost, unpredictability and inequities resulting from the civil justice system's administration of medical malpractice disputes. It is the intent of this Act to provide an efficient and equitable alternative mechanism for the resolution of medical malpractice disputes.

SECTION 2. DEFINITIONS

When used in this Act:

(1) The term "Board" means the Medical Liability Determination Board.

(2) The term "Claimant" means any person who files a Verified Complaint with the Medical Liability Determination Board, including any person who files such a complaint as a successor in interest, guardian, or legal representative.

(3) The term "Collateral Benefits" means all benefits and advantages received or entitled to be received by an individual as a result of a Treatment Related Injury or by his dependents or estate pursuant to any State or Federal income disability, worker's compensation or health benefits act, any health, sickness, life, or income disability insurance, accident insurance, or any contract or agreement of any group, organization, partnership, or corporation to provide, pay for or reimburse retirement benefits or the cost of medical, hospital, dental or other health care services.

(4) The term "Health Care Provider" or "Provider" means any person, clinic, hospital, health dispensary, health maintenance organization, or health care facility, licensed, certified or authorized in this State to provide health care services. For purposes of this Paragraph, a "Health Care Provider" shall include, but not be limited to: any institution described in Subsection (e), (f), (g), (j), (o), (dd), and any health care professional described in Subsection (r) of Section 1861 of Title XVIII of the Federal Social Security Act.

(5) The term "Health Care Services" means the undertaking by a Health Care Provider of health maintenance, diagnosis, or treatment of human disease, pain, injury, disability, deformity or physical or mental condition, but excluding a service that is limited to the formulating and/or dispensing of drugs or medications.

(6) The term "Non-Provider" means a person, entity, or association that is not a Health Care Provider.

(7) The term "Respondent", unless specifically stated otherwise, means any Health Care Provider or Non-Provider named in a complaint or subsequently joined to the action.

(8) The term "Treatment Related Injury" means sickness, disease, injury or bodily harm caused by a Health Care Provider who fails to provide Health Care Services in accordance with the standards required under applicable law.

(9) The term "Panel" means a Medical Liability Determination Panel appointed by the Board.

SECTION 3. REMEDIES; JURISDICTION; REMOVAL

(a) Any person claiming to have a Treatment Related Injury may, by himself, or by his attorney-at-law, make, sign and file a Verified

Complaint with the Board, or may institute a civil action in the Superior Court. A Claimant shall be barred from instituting a civil action in any court of this State relating to the same incident or Treatment Related Injury or on facts related to those alleged before the Board. A Claimant shall similarly be barred from instituting an action before the Board relating to the same incident, Treatment Related Injury or facts alleged before any State court.

(b) The Respondent named in the Verified Complaint or a Respondent that is subsequently joined may remove a claim filed with the Board to the Superior Court, provided however, that if judgment is entered by the court against any Health Care Provider Respondent, a Health Care Provider Respondent removing the matter to the Superior Court shall be required to pay Claimant the greater of the total damages attributable to that Health Care Provider Respondent's action or inaction or fifty (50%) percent of the total damages.

SECTION 4. ESTABLISHMENT OF THE MEDICAL LIABILITY
DETERMINATION BOARD

(a) There is hereby established a Medical Liability Determination Board which shall be composed of nine (9) members. In addition to the Chairman of the Board, membership on the Board shall include two (2) representatives from the following: health care facilities; physicians; insurers of Health Care Providers; and attorneys licensed to practice in this State. Members of the Board, including the Chairman of Board, shall be appointed by the Governor consistent with the procedure for appointments to executive agencies. Members of the Board shall serve at the pleasure of the Governor. Each member of the Board, other than the Chairman, shall receive a salary of \$_____ per year. The Chairman shall receive a salary of \$_____ per year.

(b) The Board shall promulgate such rules and regulations pursuant to the administrative procedure act as may be necessary to achieve the effective and efficient operation of the Board. The Board shall also review exceptions from the decision of a Panel and render a final determination pursuant to Section 5(j)(1) of this Act. The Board shall file a report with the Governor as required by the Governor from time to time.

SECTION 5. HEARING PROCEDURE

(a) Creation of Panels

(1) The Board shall establish an adequate number of Medical Liability Determination Panels to consider claims coming before the Board. The Panels shall conduct hearings and determine matters of fact and law pursuant to this Act and the rules and regulations promulgated by the Board.

(2) Each Panel shall be composed of three (3) members including a practicing physician, a judge of the Superior Court, and a public member. The public member shall be a person who is neither an attorney nor a physician, who has no financial interest in any Health Care Provider, and whose occupation, experience and prior activities indicate no evidence of bias or partiality toward or against Health Care Providers in professional liability matters. The Board shall appoint all members to the Panel other than the judge serving on the Panel who shall be appointed by the Chief Justice of the Supreme Court. The Board shall select the physician member from among those physicians recommended by the State Medical Society. The judge sitting on the Panel shall serve as chairman. The terms and conditions of membership on the Panel shall be determined by the Board, provided, however, that Panel members shall serve a minimum term of three (3) years.

(b): Pleadings; Assignment to a Panel

(1) Any person seeking to institute an action before the Board shall file a Verified Complaint which describes the nature of the claim. The Board shall prescribe a form for the filing of a claim, provided, however, that the form shall require information relating to the date and place of Treatment Related Injury, the names of all Health Care Providers against whom damages are sought, the nature of the alleged Treatment Related Injury, and a description of the damages. The institution of an action before the Board constitutes a waiver of any patient-physician privilege and authorization for the disclosure of all relevant information from any source as to those matters before the Board.

(2) All Respondents shall file an Answer within thirty (30) days of their receipt of the Verified Complaint in the manner and form prescribed by the Board. An Answer shall set forth a Respondent's defenses to each claim asserted and shall include every known counterclaim, cross-claim, claim for contribution or indemnity and claim against any person not a party to the action.

(3) The Board shall adopt rules providing for the mandatory joinder of parties and claims to ensure that all aspects of the claim are adjudicated concurrently. Failure to comply with the rules adopted under this Paragraph shall bar all future actions or claims against any party, whether or not such party has been joined in the action, before the Board or in the Superior Court.

(4) Upon receipt by the Board of Respondents' Answers, the Board shall assign the matter to a Panel. The Chairman of the Panel shall preside over and decide all disputes or issues arising prior to the hearing.

(5) The Board shall prescribe rules regarding the circumstances under which the amendment of Verified Complaints, Answers and other pleadings may be permitted.

(c): Discovery

Discovery in matters before the Board shall be limited as follows:

(1) Within ninety (90) days of the filing of Respondents' Answers, the parties shall file the following information with the Board and shall serve the same on all parties: (A) all relevant medical records; (B) any existing medical report from a Health Care Provider who has treated the Claimant for any condition related to the alleged Treatment Related Injury; (C) an affidavit describing the facts and circumstances of the claim and the nature of alleged damages; and (D) answers to a uniform set of interrogatories propounded by the Board. This ninety (90) day period shall be known as the Initial Discovery Period.

(2) Except in unusual circumstances approved by the Panel, depositions shall not be permitted during the Initial Discovery Period. Depositions may be otherwise scheduled at the settlement conference (as provided for in Subsection 5(e)).

(3) Each party may serve upon any other party interrogatories or requests for admissions within twenty (20) days of the beginning of the Initial Discovery Period, provided that such interrogatories or requests for admissions shall not exceed thirty (30) questions. Responses to interrogatories or requests for admissions under this Subparagraph shall be served upon the propounding party prior to the conclusion of the Initial Discovery Period.

(d): Experts

(1) During the Initial Discovery Period, the Panel shall consider the appointment of one or more impartial qualified experts whose opinions would materially aid the Panel in its determination of the claim. The Board shall maintain a list of qualified medical, vocational and actuarial experts. For purposes of this Paragraph, a "qualified expert" shall be actively engaged at least fifty (50%) percent of his time in clinical practice or teaching, or in a combination of clinical practice and teaching, in the area or specialty at issue in the matter before the Board.

(2) The parties shall be notified of the qualified expert or experts appointed by the Panel and shall have a reasonable opportunity to object to the appointment of such qualified expert or experts for good cause. For purposes of this paragraph "good cause" shall include, but not be limited to, qualification of the expert or conflict of interest.

(3) The qualified expert or experts appointed by the Panel shall be provided by the Panel with copies of all pleadings and discovery. A qualified expert may request additional information from a party or require the Claimant to submit to a physical examination.

(4) Each qualified expert shall submit a written report to the Panel setting forth his findings and opinions within thirty (30) days of his appointment. This report shall be admissible into evidence at the hearing. The findings and conclusions contained in the report shall not be binding upon the Panel, but shall be accorded such weight as the Panel, sitting as the trier of facts, chooses to ascribe to them in view

of all the relevant evidence introduced at the hearing. A copy of the qualified expert's report shall be forwarded to each party by the Panel. The Board shall reasonably compensate the qualified expert for his time in conducting an examination, if any, and preparing a report. A qualified expert appointed by the Panel may be deposed or required to testify by a party as to the findings and opinions stated in his report. The party taking the qualified expert's deposition or requiring his attendance at the hearing shall pay the qualified expert a reasonable fee, which fee shall be determined by the Panel if the qualified expert and party involved cannot agree on reasonable compensation.

(5) A party may submit a report or testimony of its own expert to the Panel in support of a claim. The qualifications of the expert do not have to meet the standards of a qualified expert (as defined in Paragraph (1)), provided however, that the Panel can, in its discretion, disregard or ascribe limited weight to the findings and conclusions of such an expert. A copy of such expert's report shall be submitted to the expert or experts appointed by the Panel, who may, within thirty (30) days thereafter, submit a supplemental report with respect to the qualifications of the party's expert and such expert's findings and conclusions.

(e): Settlement Conference; Additional Discovery

Within one hundred and eighty (180) days of the filing of Respondents' Answers, a member of the Panel appointed by the Chairman shall hold a settlement conference with the parties. If the parties are unable to completely resolve their dispute, a hearing date shall be scheduled for no later than two hundred and twenty five (225) days after

the filing of Respondents' Answers. At the settlement conference, the parties shall advise the member of the Panel of the need, if any, for further discovery prior to the hearing. The Panel member may grant reasonable discovery requests and shall fix the scope and time deadlines for any further discovery.

(f): Motion for Summary Decision

At any time subsequent to the conclusion of the Initial Discovery Period, a party may move before the Panel for a summary decision upon all or any part of a claim or as to any defense. A summary decision shall be granted if the pleadings and discovery, together with the affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to prevail as a matter of law.

(g): Hearings

Hearings shall be conducted so as to be consistent with the rules of procedure and evidence promulgated by the Board. The Panel may, in the interests of efficiency or encouraging settlement of a claim, conduct separate hearings on liability, damages and allocation of negligence among multiple Respondents.

(h): Joint Respondents

(1) In a matter involving multiple Respondents, the Panel shall determine the extent, if any, of each Respondent's liability for damages and shall fix a percentage of negligence attributable to each Respondent.

(2) No Health Care Provider Respondent shall be jointly and severally liable for the damages attributable to another Respondent. Non-Provider Respondents shall be jointly and severally liable for the damages attributable to all Non-Provider Respondents.

(1): Mixed Actions

(1) For purposes of this Subsection, a "mixed action" means an action in which claims against Health Care Providers for Treatment Related Injuries are asserted with claims against Non-Providers.

(2) Except as otherwise provided in this Subsection, the terms and provisions of this Act shall apply to mixed actions, provided however, that a Non-Provider removing a mixed action shall not be subject to the provisions of Section 3(b). A mixed action before the Board shall be transferred to the Superior Court if all claims against Health Care Providers are dismissed or settled, or the Panel, on its own motion or on motion of any party, determines that the claims against the Health Care Providers were asserted solely for the purpose of invoking the Board's jurisdiction. A party shall be barred from instituting claims before the Board that were either dismissed, settled or transferred to the Superior Court.

(3) In any mixed action before the Board or the Superior Court, the trier of fact shall divide the total damages into amounts compensable under this Act (as defined in Subsection 6(a)(1)) and amounts that are not recoverable under this Act, such as noneconomic loss in excess of the amounts defined in Paragraph 6(a)(2)(B) and exemplary or punitive damages. The trier of fact shall also determine the percentage of damages directly attributable to each party's negligence. Claimant's recovery in a mixed action shall be limited to:

- (A) from Health Care Providers, the percentage of damages attributable to the Health Care Providers and allowable under Subsection 6(a)(1); and
- (B) from Non-Providers, the percentage of damages recoverable under this Act and any other damages permitted applicable law. The limitation on

damages described in this Paragraph shall govern if a Non-Provider institutes an action against a Health Care Provider in the Superior Court to recover all or part of a judgment entered against the Non-Provider in a matter where the Health Care Provider provided Health Care Services.

(j): Appeals

(1) A party shall be afforded the opportunity to file exceptions to the decision of the Panel with the Board in a manner and subject to such rules as shall be prescribed by the Board. The record reviewed by the Board shall include the exceptions, replies, if any, transcript of the hearing, evidence introduced at the hearing, and may, in the Board's discretion, be enlarged to include additional documentary evidence or a supplemental hearing. Within the time prescribed by law, the Board shall enter an order adopting, rejecting or modifying the Panel's decision. The Board's order shall constitute a final decision.

(2) A party may appeal the final decision of the Board to the Superior Court, Appellate Division. The Appellate Division shall affirm the Board's decision unless the court determines that the Board's decision could not reasonably have been made or is not based upon sufficient credible evidence in the record as a whole and giving due regard to the Board's expertise.

(k): Modification of Decision

An application for modification of a decision granting future net economic and noneconomic loss (as defined in Paragraphs 6(a)(2)(A) and (B)) may be made to the Board, or to the Superior Court if it entered judgment in the matter, at any time by a Respondent. The application

shall be granted if the Respondent shows by clear and convincing evidence that there were facts in existence at the time of the original decision that were fraudulently concealed or that could not have been discovered by reasonable diligence, or that there have been changed circumstances such as the rehabilitation of the Claimant, or refusal of the Claimant to participate in rehabilitation, occupational training or education, that were not, and reasonably could not have been, anticipated at the time of the initial decision.

SECTION 6. DAMAGES

Except as hereinafter provided, the provisions of this Section shall be applicable to all actions in which a Health Care Provider is found liable for a Treatment Related Injury, whether such claim is adjudicated before the Board or in a the Superior Court.

(a): Limitation of Recovery

(1) (A) The amount of damages payable to a Claimant for a Treatment Related Injury shall be equal to the sum of net economic loss (as defined in Paragraph (2) (A) of this Subsection), and net noneconomic loss (as defined in Paragraph (2) (B) of this Subsection), reduced by all Collateral Benefits. Damages awarded by the Board may also include attorney's fees (as described under Paragraph (2) (C) of this Subsection).

(B) The amount of damages payable to a deceased Claimant's estate or Dependents (as defined in Paragraph (2) (D) (i) of this Subsection) shall be the amount of death benefits (as defined in Paragraphs 2(D) (ii)) and 2(D) (iii) of this Subsection), reduced by all Collateral Benefits. Damages awarded by the Board may also include attorney's fees (as described under Paragraph (2) (C) of this Subsection).

(2) For purposes of this Subsection:

(A) The term "net economic loss" means (I) lost income (as defined in Paragraphs (2)(A)(i)(a), (2)(A)(i)(b) and (2)(A)(iii) of this Subsection), plus (II) compensable dependent care (as defined in Paragraphs (2)(A)(ii) and (2)(A)(iii) of this Subsection), plus (III) reasonable and necessary medical expenses (as defined in Paragraph (2)(A)(iv) of this Subsection), plus (iv) rehabilitation and occupational training expenses (as described in Paragraph (2)(A)(v) of this Subsection), reduced by the amount of Collateral Benefits.

(i)(a) The term "lost income" for a Claimant that was employed prior to the Treatment Related Injury shall mean 70% of the loss of income from work Claimant would have performed if he had not been injured, reduced by 70% of any income for substitute work actually performed or which the Claimant unreasonably failed to perform, provided however, that damages for lost income, less Collateral Benefits shall not exceed twice the State Average Weekly Wage (as defined in Paragraph (2)(A)(vi) of this Subsection) multiplied by the number of weeks of lost income.

(i)(b) The term "lost income" for a minor or an unemployed or nonworking Claimant shall mean the greater of 70% of the State Average Weekly Wage (as defined in Paragraph (2)(A)(vi) of this Subsection), or 70% of the average weekly wage as documented in Claimant's actual income history, less Collateral Benefits.

(ii) The term "compensable dependent care" shall mean reasonable expenses incurred to replace ordinary and necessary services Claimant would have performed for the benefit of himself or his family if he had not been injured, less Collateral Benefits.

(iii) Total damages for lost income and compensable dependent care (as provided for in Paragraphs (2)(A)(i)(a), (2)(A)(i)(b), and (2)(A)(ii) of this Subsection) shall not exceed three (3) times the State Average Weekly Wage (as defined in Paragraph (2)(A)(vi) of this Subsection) multiplied by the number of weeks of lost income, or number of weeks for which Claimant will receive damages for compensable dependent care.

(iv) Reasonable and necessary medical expenses shall include the cost of present and future medical care required to treat or cure Claimant's Treatment Related Injury, provided however, that such future medical expenses can be determined with reasonable certainty. Respondent shall pay future medical expenses as incurred under a procedure to be established by the Board. Modification of damages for future medical expenses shall be permitted in accordance with Subsection 5(k).

(v) Rehabilitation and occupational training expenses shall include expenses for a procedure or treatment for rehabilitation or occupational training if the procedure, treatment or training is reasonable and appropriate for Claimant's Treatment Related Injury, the expenses are reasonable in relation to the probable rehabilitative effects, and such procedure, treatment or training is likely to contribute substantially to rehabilitation or reduce Claimant's net economic loss. In the event the Panel cannot conclusively determine if such procedure, treatment or training will contribute substantially to Claimant's rehabilitation or reduce net economic loss, it may award temporary rehabilitation and occupational training expenses and shall reevaluate the effect of the procedure, treatment or training within a reasonable period of time not to exceed five (5) years.

(vi) The State Average Weekly Wage shall be determined by reference to the report on Employment and Earnings, Average Weekly Earnings for Production Workers on Manufacturing Payrolls, as published by the United States Bureau of Labor Statistics, or by reference to such other comparable index or record maintained by the United States Bureau of Labor Statistics or the State Department of Labor.

(B) The term "net noneconomic loss" shall be limited to damages for permanent impairment (as defined in Paragraph (2)(B)(i) of this Subsection) and severe temporary impairment (as defined in Paragraph (2)(B)(ii) of this Subsection), reduced by the amount of Collateral Benefits. Net noneconomic loss shall not include damages for other pain, suffering, inconvenience, mental anguish, punitive or exemplary damages, or any other general damages arising from the loss to another individual, including but not limited to loss of consortium, companionship, marital care, guidance and education.

(i) The term "Permanent Impairment" means a medically determinable injury or impairment caused by a Treatment Related Injury which results in dismemberment, significant disfigurement or substantial limitation of a bodily function, which will last throughout the life of the Claimant.

(ii) The term "Severe Temporary Impairment" means a medically determinable injury or impairment caused by a Treatment Related Injury which prevents Claimant from actively engaging in his usual and customary employment, or impairs Claimant's ability to perform all or a substantial amount of ordinary and necessary functions for himself and his family, for at least one hundred and eighty (180) days.

(iii) The Board shall establish a schedule setting the maximum noneconomic damages to be awarded for different categories of Permanent Impairment and Severe Temporary Impairment. The schedule of damages shall account for variables such as Claimant's age and partial impairment, provided however, that the maximum amount of damages that may be awarded for a Permanent Impairment or Severe Temporary Impairment shall not exceed one-half ($\frac{1}{2}$) the State Average Weekly Wage multiplied by the number of weeks of Claimant's actual life expectancy, provided however, the Claimant's actual life expectancy shall be calculated based upon the existence of the Permanent Impairment or Severe Temporary Impairment, and further provided that no category of noneconomic loss shall be compensated by an amount in excess of the maximum amount payable for a Permanent Impairment.

(C) Attorney's fees awarded under Paragraphs (1)(A) and (1)(B) shall be determined as follows:

(i) An amount equal to the attorney's reasonable hourly rate shall be payable to Claimants prevailing, in whole or in part, in a matter before the Panel, Board or the Superior Court, Appellate Division, provided that (I) the total amount of attorney's fees claimed does not exceed twenty-five (25%) percent of all damages payable to Claimant; (II) the Claimant submits sufficient documentation supporting the request for an award of attorney's fees; and (III) attorney's fees in excess of the amount provided in (I) above may be granted if the Panel determines that the novel issues or complexities of the claim support an award of additional attorney's fees.

(ii) An amount equal to one-third of the attorney's reasonable hourly rate may be awarded to Claimants that do not prevail on a claim before the Board if the Panel, or the Board in the case of an appeal, in its discretion, determines that Claimant had good cause to institute and pursue a claim. In the event a Claimant subsequently prevails on appeal, either before the Board or the Superior Court, Appellate Division, the Claimant shall be entitled to a retroactive award of attorney's fees consistent with the terms set forth in Paragraph (2)(C)(i) above.

(D) (i) The term "Dependent" shall mean a person related to the deceased Claimant by blood, adoption, or marriage who is entitled to bring a civil action under State law for damages arising from the Claimant's death.

(ii) Death benefits payable to a Dependent shall be equal to the lesser of (I) lost income (as defined in Paragraphs (2)(A)(i)(a), (2)(A)(i)(b) and limited by Paragraph (2)(A)(iii) of this Subsection), plus compensable dependent care (as defined in Paragraph (2)(A)(ii) and limited by Paragraph (2)(A)(iii) of this Subsection), or (II) five hundred times the State Average Weekly Wage (as defined in Paragraph (2)(A)(vi) of this Subsection) less Collateral Benefits, but only to the extent that such Collateral Benefits exceed \$50,000. In the event there are multiple Dependents, the total damages awarded under this Paragraph shall be divided among Dependents in such proportions as will result in a fair and equitable apportionment of the damages.

(iii) In the event the deceased Claimant has no Dependents (as defined in Paragraph (2)(D)(i) of this Subsection), death benefits payable to a deceased Claimant's estate shall be equal to the lesser of

(I) two hundred and fifty times the State Average Weekly Wage (as defined in Paragraph (2)(A)(vi) of this Subsection) less Collateral Benefits, but only to the extent that such Collateral Benefits exceed \$50,000, or (II) damages that would be payable under Paragraph (2)(D)(ii) of this Subsection if the deceased Claimant had Dependents.

(b): Payment of Damages

(1) Except as otherwise provided in this Subsection, damages for net economic loss incurred prior to the decision of the Panel or judgment by the Superior Court and death benefits to a deceased Claimant's estate (as provided in Subsection (a)(2)(D)(iii) of this Section) shall be payable within ten (10) days of the decision or judgment, unless a stay pending appeal has been granted by the Panel or the Superior Court, or within ten (10) days of the resolution of an appeal of the decision or judgment.

(2) Damages for future lost income and compensable dependent care whose present value exceeds \$50,000, net noneconomic loss (as defined in Subsection (a)(2)(B) of this Section) and death benefits to a Dependent (as provided in Subsection (a)(2)(D)(ii) of this Section) shall be paid in monthly installments over the expected duration of the loss, or Treatment Related Injury, or in the case of payment for death benefits, over the Claimant's life expectancy prior to the Treatment Related Injury. The payment of damages referred to in this Paragraph shall be adjusted to account for inflation based upon the annual percentage increase in the cost of living, as determined by reference to the Consumer Price Index for Urban Wage Earners and Clerical Workers (U.S. City Average), as published by the United States Bureau of Labor Statistics, or by reference to such other index of comparable

reliability as the Board may select. The Board may require the Respondent, at its sole cost and expense, to purchase an annuity to guarantee the periodic payment of future damages as described in this Paragraph.

(A) Subject to Paragraphs (A)(i) and (A)(ii) below, damages for future lost income (as defined in Paragraphs (a)(2)(A)(i)(a) and (a)(2)(A)(i)(b) of this Section) and compensable dependent care (as defined in Paragraph (a)(2)(A)(ii) of this Section) which would have been payable to the Claimant shall be payable to the Claimant's surviving spouse and qualified dependents. In the event a surviving spouse and multiple qualified dependents exist, the damages shall be divided among the surviving spouse and multiple qualified dependents in such proportions as will result in a fair and equitable apportionment of the damages.

(i) A surviving spouse shall be entitled to receive damages which would have been payable to the Claimant for future lost income and compensable dependent care until the earlier of the surviving spouse's remarriage, or seven (7) years from the Claimant's date of death.

(ii) The term "qualified dependent" shall mean a child of the deceased Claimant by blood or adoption that is no older than eighteen (18) years of age, provided however, that a child continuously enrolled as a full time student may be qualified dependent until the age of twenty-three (23).

(iii) Payments made to a surviving spouse and qualified dependents pursuant to this Paragraph shall be subject to the terms and conditions of the introductory section of this Paragraph (2).

(3) Payment of attorney's fees pursuant to Subsection (a) (2) (C) shall be payable within ten (10) days of the decision of the Panel or within ten (10) days of the resolution of an appeal of the decision.

SECTION 7. LIMITATIONS OF ACTIONS

(1) No action alleging a Treatment Related Injury shall be commenced more than two (2) years after the discovery of a Treatment Related Injury, provided however, that in no event shall an action be commenced more than four (4) years from the provision or omission of Health Care Service alleged to have caused the Treatment Related Injury.

(2) The disability, incapacitation or imprisonment of a Claimant shall toll the time period set forth in Paragraph (1) for one (1) year after the termination of the disability, incapacitation or imprisonment, provided however, that no action may be commenced more than four (4) years from the provision or omission of Health Care Services alleged to have caused the Treatment Related Injury. A disability shall be deemed terminated if a legal guardian is appointed with sufficient authority to institute a claim under the Act.

(3) A person shall not be considered to be under a legal disability because of his age if he has a competent guardian with legal authority to bring a claim or action for any Treatment Related Injury, provided that a claim which accrued prior to a minor's eighth birthday may be filed at any time through the minor's tenth birthday.

(4) Notwithstanding any of the provisions in this Subsection, the time periods described in Paragraphs (1) and (2) of this Section shall be tolled during the time in which the fact of injury was intentionally concealed by the Health Care Provider.

SECTION 8. EFFECTIVE DATE

The Effective Date of this Act shall be [date enacted].

**REFORMING THE CIVIL LITIGATION PROCESS:
HOW COURT ARBITRATION MAY HELP**

Deborah R. Hensler

August 1984

**THE
INSTITUTE FOR
CIVIL JUSTICE**