

Legal Fees and Legal Audits

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Macklin Fleming, *Lawyers, Money, and Success: The Consequences of Dollar Obsession* (Westport, Connecticut: Quorum Books, 1998) 156 pp. \$55.00.

As everyone knows, lawyers are a despised class. People hate them nearly as much as they hate insurance companies. The question is whether this is a social phenomenon produced by wariness and distrust inherent in the structure of society, or whether lawyers have brought the problems on themselves. I have always subscribed to a modified Structural Distrust Theory. We live in a society in which justice is regarded as a right and the protection of fundamental rights is regarded as something that should be free. Automatically, therefore, resentment accompanies having to pay lawyers; perhaps that is a collateral explanation for the rise of liability insurance as we know it.

In recent years, the thesis of Structurally Generated Distrust has been undermined by the extent to which liability insurance companies have themselves become suspicious of the lawyers they hire. Insurance companies are, after all, experienced in dealing with lawyers. If there is any segment of the economy which should have had positive experiences with lawyers, in the aggregate, over the years, it is insurance companies.

And yet, recently, liability carriers have turned on the phalanxes of lawyers they employ. There may be more tension now between defense counsel and insurance companies than at any other time in the twentieth century. This situation results, in part, from the comparatively recent institution of routine standard audits of legal bills

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and the perceived rigidity of the standards and specifications pursuant to which those audits are conducted. Lawyers working on environmental cases are by no means exempt from these audits, and there is substantial—though itself problematic—resentment among those lawyers defending insurance companies from environmental claims over these audits. (“Does the insurance company think I am a *mere* defense lawyer? Does it not understand that this is a complex coverage matter and that it is the defendant, as opposed to simply some insured?” Yuck!)

Many believe that the legal profession has brought these problems on itself. Macklin Fleming agrees. Judge Fleming was, for many years, a justice on the intermediate-level California Court of Appeals. Since his retirement, he has been sitting by assignment as a trial judge in Los Angeles. He also practiced law all over the country, and wrote a couple of other books twenty or so years ago. It’s nice to have his public pen back. He writes simply and well. Judge Fleming has two large topics in this book. The first is the role of money in the legal profession. The second is the changing organization of the legal profession. They are related, and both bear on the burning issue of audits.

The practice of big-time law has involved an “increase of collectivization and centralization.” This development is a natural response to political changes in society and—perhaps—a necessary response to the growing complexity of the administrative and, therefore, advisory state. That explains, of course, the paradox that there are more lawyers now than ever before but also higher fees. One would expect that if the number of lawyers went up, then the gross amount of the total fees would go down. But, of course, that has not been true. What *is* true is that you can’t have an administrative state without a sophisticated legal profession of substantial size. Moreover, the administrative state has led to substantial specialization in the legal profession. One consequence of this situation is “cubicle vision” on the part of individual practitioners, and a lack of attention to cost effectiveness on the part of firms. (It is not necessary for every lawyer on a multilawyer team to write detailed memos on minor telephone conversations.)

At the higher reaches of the legal profession, observes Fleming, specialization simply does not work. Trial work demonstrates this pretty well. Small teams of dedicated and well-trained general trial lawyers can frequently quite undo “a six-pack system,” involving many lawyers conducting segmented activities. “In theory the six to eight lawyers function as a pack of trained Dobermans heading

straight for the jugular. In practice they often resemble an assemblage of beagles milling in all directions to pick up a scent—any scent worthy of noisy pursuit.” The same point applies to many fields of law—“employment relations, intellectual property, will contests,” and so forth—which is not reducible to “routinization or standardization.”

Of course, the six-pack system of practicing law contributes to the marvels of the billable hour system. Requiring clients to pay all firms by the hour is, according to Fleming, nothing but a cost-plus approach to pricing, and it creates “a classic instance of the operation of Parkinson’s Law: Work expands to meet the time available, time spent swells the importance of the work, and both escalate fees.”

Fleming describes the legal billing system as a Count Dracula, which neither the clients nor the courts can kill. “To epitomize the heretofore prevailing status of controls over lawyers fees: Clients can’t, lawyers won’t, and courts don’t.” Fleming even quotes the president of a very significant real-estate firm as describing “fee abuse as an incurable disease.” Fees and money in tandem are *the* fundamental problem: “[t]he primary cause of th[e] pervasive] distrust of lawyers is money. The pervasive lack of candor over fees and charges in matters great and small sows the dragon’s teeth of distrust between lawyers and clients, who now feel that they must keep one eye on their opponent’s lawyer and the other on their own, [because] both need watching.”

As distrust between client and lawyer has grown, independent lawyers are playing a less and less significant role in counseling clients. Some clients hire insiders. Others do without. Counseling, after all, requires trust. Distrust also gives rise to distance in a certain degree of incivility. No wonder so many lawyers are unhappy in their jobs. Nevertheless, “until the present laissez-faire attitude of the bar towards picking a client’s pockets through overcharges is superseded by the more realistic view that overcharging is the first cousin of theft, public distrust of lawyers will remain at its present barometric low.”

Insurance companies are in the forefront of attempting to control legal fees. This is nearly as true in the environmental area as it is in insurance defense. Task-based billing, restrictions on how many lawyers can be used, restrictions on the number of lawyers at a deposition, insistence upon joint defense agreements, rate structures, and the use of legal auditors are all part of this program. The longer-range strategy of many insurance companies is to insist upon price competition. According to Fleming, such programs are eliminating “bloated overhead and chronic extravagance,” removing waste, and

inserting quality-control programs into delivery systems. "Two centuries ago James Watt identified his goal as that of 'making engines *cheap*, as well as *good*.' To prosper, the large law firm must adopt the same objective, must change its primary goal from maximizing revenues and profit margins to one of maximizing client satisfaction through delivery of quality services that are cost-effective."

Fleming speculates that if large law firms discard the phalanx system of legal representation and put squads on cases rather than platoons, companies, or battalions, there would be less restlessness in the legal profession. Lawyers would, after all, learn by doing, rather than by shuffling paper. He paraphrases an observation of Thucydides: "Experience is learned in the school of danger and in those sudden crises which admitted little or no deliberation." Unfortunately, many law firms try to see to it that there are no such events. "Play it safe," they tell themselves.

Fleming ends his book with predictions. Professional management is coming. (In fact, its already here, inchoately.) There may be new patterns of law-firm ownership. Many lawyers now work for accounting firms, and it may come about that nonlawyers can own law firms. (Hell will freeze over, I hear my brothers and sisters saying. It is well to remember what happened to doctors.) In the future, there will be integrity control and quality control. (Is *integrity control* a nice euphemism for *intrusive audit*?) There will also be genuine competition and various sorts of new forms of alliances, and possibly—just possibly—increased job satisfaction. Large law firms will persist, but they will be different: "Once the large law firm gets its house in order by adjusting its operation to today's competitive markets, by creating working conditions for its lawyers that reconcile collaborative efforts with professional recognition and collegiality, and by putting the importance of money into proper perspective, the bulk of the legal profession will follow suit." So things will be dandy, just around the corner, and the "new order" will be imposed upon the legal profession by capitalistically organized competitive markets. Lawyers make way. Welcome the happy morning.

Fleming's book is surely encouraging in several ways. Large numbers of lawyers are unhappy, frustrated, disappointed, and critical of the profession. Money is too important. Lawyer billings are frequently deliberately overstated and, hence, fraudulent. On the other hand, Fleming has some things wrong. There are lots of generalists, and discerning business people use them. The idea that "cubicle vision" is nigh unto universal is simply not true. Every observant

lawyer knows senior generalists, and most acknowledge how crucial they are to the large firm.

Moreover, large corporations frequently ask their lawyers to put more people—not fewer—on significant projects. The idea that business clients are skeptical, across the board, at law firms' overdoing it is simply wrong. Insurance companies are certainly inclined in that direction. Indeed, they are famous for it. Often, the representation they receive is at least marginally inferior to the representation large business insureds receive, precisely because insurance companies use a simple-minded, meat-cleaver approach to the control of legal fees. Business entities frequently ask for a battalion approach when many fewer lawyers would suffice. Of course, law firms and lawyers should discourage unnecessarily heavy staffing. Then again, we are in the business of satisfying client desires. If a client ("By God!") wants more lawyers on a case, once suitable advice has been given and rejected, the client's desire should rule.

Moreover, while junior associates should not memorialize meaningless telephone conversations in ridiculous memos, in litigation—sometimes—very large things hang on quite small ones. For example, if a lawyer who has the metaphorical rank of "light-colonel" is charged with answering discovery and makes a complex decision as to how to answer a controversial request for admission, the meaning of that decision should be made clear in a number of places, so that other lawyers, who present witnesses for depositions, will know how to handle certain deposition questions. Similarly, information must be posted around the file in various ways, so that the lawyers who try the case will understand what was done and be able to deal with onslaughts based on discovery decisions. This point is no less trenchant if the person handling written discovery is also handling depositions and, in the end, handling the trial. Litigation is long; memories are weak. Written memorializations of decisions made long ago are really quite necessary in order to remind oneself of what one has done, what one is doing, and, therefore, what one should do next.

Lawyers are beginning to strike back at legal auditing. Not long ago, John Tollefson, a Dallas-Fort Worth lawyer and the editor-in-chief of *Coverage*, a significant publication of the American Bar Association, raised serious questions about the use of auditors. He did this at an insurance-law seminar sponsored by the South Texas College of Law (which is now, somehow or other, affiliated with Texas A&M University). He posed seven striking issues. First, the rules of

legal ethics prohibit third-party payors from directing or regulating professional judgment. Might not the specifications given legal auditors do just that? What if the specifications given legal auditors by insurers are irrational from the point of view of conducting a given client's case? Second, might not the use of legal auditors involve defense counsel in becoming witnesses against the insurance company in a bad-faith case? Third, might not good defense lawyers be driven out of this sort of work by subjecting their revenues to irrational delays and increasing administrative costs? Fourth, will not very conservative specifications given to legal auditors help create inadequate defenses? Fifth, might not the use of legal auditors create a new kind of lawsuit—say, for tortious interference? Sixth, following the insurer's billing guidelines may constitute a breach of the insurance policy and applicable insurance codes. It may also constitute legal malpractice. Seventh, when the defense attorney submits bills to legal auditors, he may be waiving the attorney-client privilege. Is the insurer pleased with this?

The important observation here is that Fleming's policy-oriented and quite general critique of legal billings sounds good, but does not come to grips with the details about how to come up with a new system. Talk about quality control and integrity reviews is all very nice, in the abstract, but until detail programs are thought through, what we have is just talk.

Now is not the time in history to be negative about lawyers' discussions of legal ethics. This is especially true when the discussion is informed with knowledge of the economics of the legal profession, sociology of the legal profession, and the psychology of lawyers. Legal ethics, up until recently, has been a dreary domain. Recently, writers on the subject have begun finding better voices and deeper insights. Just this year, William H. Simon, a law professor at Stanford, has written a normative treatise on theories of legal ethics, *The Practice of Justice*. Earlier this year, Stephen Carter, a law professor at Yale, published *Civility*, a semipopular book on ethics, which obliquely approaches legal ethics. Last year, Mark Perlmutter, a lawyer in Austin, Texas, published an extremely interesting book on the psychology of lawyering, entitled *Why Lawyers Lie*. In it, he argued that several behaviors of lawyers that many find repugnant are the product of a single cause, namely, fear. Now, there's a stimulating idea.

Hopefully, Fleming's book will join the distinguished company of these, and a few other volumes, in confronting these issues. While flawed, the book is substantial and significant. It places the issues of fees and firm organization center stage, where they belong.