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## Abandoning an "Unethical" System of Legal Ethics

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# ABANDONING AN “UNETHICAL” SYSTEM OF LEGAL ETHICS

*David Barnhizer\**

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#### INTRODUCTION: ARE LAWYERS A PRINCIPLED "ARISTOCRACY" OR "BLOOD-SUCKING LEECHES"?

We lawyers like to think of ourselves as principled people defending the spirit and institutions of the Rule of Law. De Tocqueville, in his classic *Democracy in America*, described lawyers as the American aristocracy.<sup>1</sup> Unfortunately, to the extent it exists, that aristocracy has become much like the corrupt and abusive French version of the species, one that led to the French Revolution and the overthrow of the *Ancien Regime*.<sup>2</sup>

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1. I ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 278 (Alfred A. Knopf ed., 1945) ("In America there are no nobles or literary men, and the people are apt to mistrust the wealthy; lawyers consequently form the highest political class and the most cultivated portion of society . . . . If I were asked where I place the American aristocracy, I should reply without hesitation that it is not among the rich, who are united by no common tie, but that it occupies the judicial bench and the bar.").

2. The most prestigious lawyers in the largest and most elite law firms arguably fit into the category that French philosopher Jacques Ellul described as the "servants of technique" with the firms and their extremely powerful clients being the institutions through which Ellul's "technological society" operates. JACQUES ELLUL, *THE TECHNOLOGICAL SOCIETY* 349 (1964). In such a system we see the institution in control of the individual ra-

At this point in American history, lawyers seem to be the only ones who think well of their profession. At least in terms of the public's perception, lawyers are greedy, "asset sucking" parasites feeding off clients rather than serving them with diligence and faithfulness. In one cartoon, for example, a patient is sitting on the edge of a doctor's examining table with the physician standing thoughtfully behind him. On the patient's back is an ugly gnome-like creature—complete with miniature suit and briefcase. Its teeth and claws are dug into the patient's back. The doctor offers the following diagnosis: "I can see what's causing the problem—you've got a lawyer on your back."<sup>3</sup> In another cartoon two women are sharing coffee, and one remarks: "It's finally over—Frank's lawyer got the apartment, and my lawyer got our two cars and the beach house."<sup>4</sup>

Although I am arguing that the situation involving poor and unethical professional service is becoming worse due to economic pressures and an oversupply of lawyers relative to paying clients, it would be naïve to suggest there ever was a golden age in which the bar was uniformly comprised of highly principled lawyers.<sup>5</sup> We need only think back to Dickens' *Bleak House* with its dismaying ending after years of hearings and litigation in the Court of Chancery over a rich potential inheritance.<sup>6</sup> The case of *Jarndyce and Jarndyce* came to its final anticlimactic end with the "good news/bad news" ruling by the court proclaiming that a long time claimant had in fact won. Unfortunately this was followed by the pronouncement that there was no corpus left in the estate because it had been eaten up by costs and legal fees. The court had received its portion of the fees over years of protracted litigation. Hordes of lawyers had sustained their law practices on the aspirations of potential heirs encouraged to overestimate the likelihood of their

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ther than an existentialist triumph of the principled person. Ellul observes that in a society dominated by large institutions: "The intelligentsia will no longer be a model, a conscience, or an animating intellectual spirit . . . They will be the servants, the most conformist imaginable, of the instruments of technique." *Id.*

3. LAWYERS! LAWYERS! LAWYERS!: A CARTOON COLLECTION 1 (Samuel Gross ed., 1994).

4. *Id.* at 11. We rationalize and deny the amoral nature of our behavior. ABRAHAM MASLOW, TOWARD A PSYCHOLOGY OF BEING 66 (2d ed. 1968). Maslow describes human self-deception as being a flight from knowledge that would otherwise cause us to face ourselves honestly. *Id.* He explains: "We tend to be afraid of any knowledge that could cause us to despise ourselves or to make us feel inferior, weak, worthless, evil, shameful." *Id.*

5. See Marc Galanter, *Lawyers in the Mist: The Golden Age of Legal Nostalgia*, 100 DICK. L. REV. 549 (1996), for the idea that we tend to overstate the historical virtues of lawyers. A leading American scholar on legal ethics and professionalism, Thomas Morgan, has described the trends and conditions affecting the U.S. legal profession and challenged its right to continue any claim to that privileged status. See THOMAS D. MORGAN, THE VANISHING AMERICAN LAWYER 19-70 (2010).

6. David Perdue, *David Perdue's Charles Dickens Page—Bleak House*, <http://charlesdickenspage.com/bleakhouse.html> (last visited Oct. 21, 2012) (citing CHARLES DICKENS, *BLEAK HOUSE* (1852-1853)).

chances. Those hopeful heirs had been in many instances rendered bankrupt as they exhausted their resources and borrowed money to finance the fees, and once the carcass had been stripped of all sustenance, the judge was somehow able to reach a decision after years of dithering and delay.

Private law practice has always been a business, but the rules of ethics and lawyers' espoused principles sought to add a special element that made what lawyers do something more than a business—something that Judge William Hoevelar described as a “sacred trust.”<sup>7</sup> The undeniable fact is that regardless of elevated rhetoric the private practice of law is a business and, for too many lawyers, nothing but a business.<sup>8</sup> There has been an almost complete commercialization of the private sector of the legal profession.<sup>9</sup> The primary aim of the private law business is to extract the maximum economic benefit from the available assets (clients) with the greatest efficiency and at the least cost to the business in terms of financial expenditure by the lawyer and efficient use of time to maximize earnings.<sup>10</sup> The problem with the reality of law practice is that it arrogates to itself the terms of ethical regulation and has erected barriers to civil liability that make it extremely difficult for wronged clients to identify their lawyers' deficiencies and recover compensation for unprofessional and incompetent representation.

At this point we need to abandon rhetoric about what we wish the legal profession to be and become realistic about what it actually is, who we are, and how we behave. The “bottom line” should be one understood and accepted by lawyers who run their law practices as a business. This means that lawyers are engaged in a business for profit and need to be regulated and treated as such. Yet many lawyers are caught in the confusion between idealized professionalism and the rigors of business. One consequence is that lawyers operate under assumptions that on the one hand allow them to disassociate the price of their services from the quality and degree of suc-

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7. “Men and women entering the practice of law undertake an important trust, a trust that involves the care of other people's lives, their money, their fortunes and their futures. That's why we are required to take an oath, because we are undertaking this sacred trust.” *Professionalism in Practice*, A.B.A. J., Aug. 1998, at 48, 50 (quoting Judge William M. Hoevelar).

8. See, e.g., Frederick L. Trilling, *The Strategic Application of Business Methods to the Practice of Law*, 38 WASHBURN L.J. 13, 17-18 (1998).

9. See David Barnhizer, *Profession Deleted: Using Market and Liability Forces to Regulate the Very Ordinary Business of Law Practice for Profit*, 17 GEO. J. LEGAL ETHICS 203 (2004). For some thoughts on the direct impact of economic trends on law practice see Alex M. Johnson, Jr., *Think Like a Lawyer, Work Like a Machine: The Dissonance Between Law School and Law Practice*, 64 S. CAL. L. REV. 1231 (1991); Vincent R. Johnson & Virginia Coyle, *On the Transformation of the Legal Profession: The Advent of Temporary Lawyering*, 66 NOTRE DAME L. REV. 359 (1990); F. Bentley Mooney, Jr., *How to Triple Your Effective Hourly Billing Rates*, 15 A.B.A. J. LEGAL ECON., Jan.-Feb. 1989, at 32; Marc Galanter & Thomas Palay, *The Many Futures of the Big Law Firm*, 45 S.C. L. REV. 905 (1994).

10. See *supra* notes 9-10 and accompanying text.

cess and on the other fail to comprehend important trends and technological changes that are altering dramatically the conditions of competition and the ways in which successful "law businesses" must work.<sup>11</sup> There is a need to create a comprehensive system of regulation through civil law rather than aspiration and voluntary pledges the violation of which is subject to few if any sanctions and virtually no actual accountability.<sup>12</sup> It is simply not useful to think of attorneys in private practice in any other way because when we do we perpetuate our stay in a non-existent dimension bordering on *The Twilight Zone*.

The state of the legal profession is embarrassing. The client has become an object for far too many lawyers, a monetizable asset to be used and

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11. William C. Cobb, *WCCI: The Toxic Ten Assumptions of the Legal Profession*, WCCI, INC., <http://www.cobb-consulting.com/doctoxic.htm> (last visited Aug. 18, 2003). Cobb, a management consultant to law firms, lists the "toxic ten" as follows:

1. Effort is equal to value. The number of billable hours is a primary driver of profitability.
2. Consumers will always need lawyers to interpret the law. Lawyers have a monopoly on the interpretation of the law.
3. The lawyer, as a supplier, determines what is value added service. Not the client.
4. Leverage of other lawyers is the key to law firm profitability.
5. Young lawyers want to work for law firms and become owners.
6. The practice of law is a profession and not a business.
7. The quality of legal services is based upon the experience and expertise of the lawyer.
8. The needs of the market have nothing to do with the strategy and structure for the delivery of legal services. The lawyers define the structure for the delivery of legal services.
9. What lawyers have done in the past is the practice of law.
10. The practice of law will always be regulated by the courts.

*Id.*

12. An interesting approach is found in HALT'S 2002 Lawyer Discipline Report Card. *Halt—Lawyer Accountability*, HALT, [http://www.halt.org/reform\\_projects/lawyer\\_accountability/report\\_card/summary\\_of\\_findings.php](http://www.halt.org/reform_projects/lawyer_accountability/report_card/summary_of_findings.php) (last visited Oct. 21, 2012). HALT's 2002 Lawyer Discipline Report Card:

reveals a system of self-regulation that is badly broken and in need of urgent reform. If an attorney discipline agency in this country imposes any discipline, more often than not it takes the form of a minor secretly dispensed reprimand. While some jurisdictions are beginning to make their disciplinary services better known to the public, many states remain hopelessly stranded in the dark ages, without websites or listings in local telephone directories. Agencies deprive consumers of basic information about their lawyer's discipline history. In many states, disciplinary hearings are held in secret and a few jurisdictions forbid even the person who filed the complaint to attend. Many consumers fear that if they submit grievances, their lawyers may sue them, and when individuals do have the courage to file a complaint, state "gag rules" punish them with fines and imprisonment if they speak about the grievance. State agencies delay filing formal charges against attorneys and if a hearing regarding a lawyer's ethical violations does occur, the judge and jury consists of fellow lawyers.

*Id.*

sucked dry of resources for the lawyers' ends for reasons having nothing to do with the duty of service to the client and the client's best interests.<sup>13</sup> Clients are fungible commodities from which lawyers extract as much revenue as possible regardless of client interests, needs, or welfare. This is an obvious violation of the oft-proclaimed values represented by the roles of counselor and advocate on which we ground ethical claims and proclaim our right to self-regulate. The point argued here is that lawyers have betrayed their clients, are incapable of self-regulation, and that an entirely new system of civil accountability needs to be put in place that is not wholly controlled by the bench and bar.<sup>14</sup>

#### PART I: TELLING THE STORY OF LAWYERS' "ETHICS" THROUGH EXAMPLES

My position about abandoning the system of legal ethics and substituting a new civil accountability system to better protect clients is not the result of a theoretical academic critique. Based on a diverse professional experience, years of teaching, consulting and research, it is clear that lawyers fail clients on a regular basis and that in most instances the client is unaware of what has occurred. Even if aware, the ordinary client has no real recourse against his or her former lawyer. One element of the failure is that in many instances clients never fully understand what the case is about, what it will cost over time, or what its positive or negative economic value will be. Nor are they educated about the outcome probabilities. They retain a lawyer, and in doing so have little choice but to trust in the lawyer's presumed professionalism. As suggested in the examples that follow, too often that trust is betrayed.<sup>15</sup>

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13. For wide-ranging analysis of the decline in the integrity of the legal profession, see RICHARD SUSSKIND, *THE END OF LAWYERS? RETHINKING THE NATURE OF LEGAL SERVICES* (2008); ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* (1993); SOL M. LINOWITZ & MARTIN MAYER, *THE BETRAYED PROFESSION: LAWYERING AT THE END OF THE TWENTIETH CENTURY* (1994); Carl T. Bogus, *The Death of an Honorable Profession*, 71 IND. L.J. 911 (1996).

14. A year 2000 report by the American Bar Association (ABA) analyzed the rates of lawyer discipline on a state-by-state basis. *STANDING COMM. ON LAWYER DISC., ABA, 2000 SURVEY ON LAWYER DISCIPLINE SYSTEMS* (2000). Arkansas imposed sanctions of some sort on slightly less than two percent of its lawyer population in 2000 while Ohio trailed the field with sanctions on only 0.13 percent of the practicing bar, a total of 50 sanctions on a lawyer population of 38,549. *Id.* at 10-34. Other examples are Pennsylvania 0.26 percent, Washington, D.C. 0.19 percent, and California 0.45 percent. *Id.*

15. Many lawyers are attempting to insulate themselves from client lawsuits against them for unsatisfactory performance. See *Lawyers Hide From Lawsuits*, NEWSMAX.COM, December 1, 2000, <http://www.newsmax.com/archives/articles/2000/11/30/205206.shtml>. The article states:

Lawyers are quick to sue almost anyone except other lawyers, a lawyers' publication says.

With these considerations in mind, the following examples are offered to provide a sense of just how brutal and unprofessional the private practice of law can be. Among lawyers' main assets are their time, quality of experience, and knowledge. The problem is that time is finite and can be made elastic only to a limited extent by legitimate means. The ideal of high quality client representation assumes, however, that lawyers will be able to devote the necessary energy and time to the client's needs required to produce the best outcomes. The reality is considerably different. Far too often lawyers lack the skills, values, and principles to actually fulfill their professional and ethical responsibilities. This means that such lawyers "muddle through" cases and transactions with failures to do needed things due to lack of experience or knowledge as well as billing for unnecessary or shoddy work for which clients are charged while receiving no benefit.

But while lack of skills and knowledge cause professional shortcomings, even when lawyers possess the skills and knowledge essential for competent representation, they often fail to apply them to the dispute or transaction due to time conflicts, costs, and the demands of cases being handled for other clients. While for clients the dispute or transaction for which they seek representation is of paramount importance, for the lawyer it is only one item in a bundle of legal matters for which he or she has accepted responsibility. Considerations of cost, available time, competing demands, and the like will often mean that the lawyer fails to properly or fully evaluate the case or take action of a kind that increases the probability of a positive outcome for the client.

While incompetence and neglect therefore present one set of issues, in an unfortunate number of instances even skilled lawyers act in ways that disserve their clients by incurring needless costs that work to the attorney's financial benefit through higher fees. The tension is caused by the fact that lawyers are in business and need the fees provided by clients to operate that business. This requires that the lawyer be able to "sell" prospective clients

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Lawyers Weekly USA reported Thursday that a growing number of lawyers are putting fine print in fee agreements shielding them from being sued by a client if they botch a case.

The national newspaper for small law firms said lawyers instead prefer that such disputes go to private arbitration because arbitration is faster and cheaper, decisions are often made by other lawyers rather than juries, and there's no public record.

Such "arbitration clauses" have raised questions of ethics and have themselves become the subject of litigation in some states.

"The growing practice of lawyers of preventing themselves from being sued by a client for negligence raises some serious ethical questions," said Thomas F. Harrison, publisher of the weekly newspaper and its Web site.

....

"It is certainly ironic that some would take away this right from their clients."

*Id.*



on the services to be provided. As in any sale of products or services, there is a clear difference between the lawyer's persuasion of the potential consumer of legal services to agree to buy the services and the actual provision of the promised services. At the stage in which the lawyer is attempting to persuade the potential consumer of legal services to enter into an agreement to buy the services, the lawyer is operating as a seller, just as is so with any other purveyor of goods or services.

If a lawyer feels there is a reasonably viable case, he or she becomes a "sales person." This includes seeking to close the deal so that the potential "asset" does not walk out the door to work out a deal with another lawyer. This will cause lawyers at the initial "sales" phase of the client-acquisition interaction to overstate the potential outcomes that can be achieved and understate the costs and risks of achieving the clients' goals. Many lawyers inevitably fall prey to the human tendency to paint a rosier picture than might be justified.

Fees and expenses are a critical part of evaluating the realistic outcome potential of a case, as opposed to abstract possibilities of what might be obtained under a best-case scenario. The reality should be explained to clients in clear and down-to-earth language, but lawyers who are attempting to convince a client to sign up with them understandably do not want to scare off clients who represent thousands of dollars in billable hours or potentially lucrative contingent fees. Many lawyers therefore have a tendency to be vague or misleading about the real costs of their services or the probability of a favorable outcome.

The other part of the sales pitch is that the lawyer's ability to help may be overstated to "hook" the client into buying legal services from the lawyer. Where a client has money to pay fees or the case is one in which it is highly probable that some money will be forthcoming because of insurance or some other source of revenue, lawyers have an unconscious incentive to overstate the beneficial outcomes they can achieve for their clients because there is a guaranteed source for their fee.

There are economies of scale depending on the size of the practice, the types and diversity of cases being handled, the lawyer's experience, the quality of support staff, and other demands made on the lawyer's time.<sup>16</sup> The economies of scale tend to be less available to solo practitioners and lawyers operating in micro-firm contexts, although even as the scale of the operation increases with firm size and resources, there is no guarantee that

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16. Technology and innovation are altering the economy of scale efficiencies for some newer "tech-savvy" graduates who are using technology and the Internet to drastically reduce the costs of running a law office even to the extent of establishing a "virtual office." See, e.g., the example presented in Anika Anand, *Law Grads Going Solo and Loving It*, MSNBC.COM, June 20, 2011, <http://www.msnbc.msn.com/id/43442917/ns/business-careers/t/law-grads-going-solo-loving-it/>.

the quality of service rendered to clients improves because in many instances the improvements in operating efficiency are directed more toward maximizing the firm's profits than to improving client service.<sup>17</sup>

A result of a lack of efficiencies due to inadequate scale and the need to spread finite services across as many paying clients as can be obtained is that each client's case receives less than optimal attention. This has a direct impact on how the lawyer treats the cases in terms of assessing the value of a positive resolution to the client contrasted with the value to the lawyer as represented by the need to spread professional time across a range of clients. The settlement value of cases being handled in such a milieu are more likely to be influenced by considerations that tend to protect the lawyer's business needs rather than achieving the best outcome for clients. Similarly, in many instances the intensity and thoroughness of case preparation for trial is considerably below what might be considered the best professional standard. For these reasons the ideal paradigm of how a client's case should be handled is an impossible dream for most cases and clients as well as lawyers.<sup>18</sup>

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17. Solo and small-scale law firm practitioners are disproportionately sanctioned for professional violations relative to their counterparts in larger firms. A study by the California State Bar, for example, revealed that ninety-five percent of the investigations opened by the Bar (and ninety-eight percent of completed cases) were aimed at solo and small firm (fewer than ten) lawyers even though lawyers in those categories were only fifty-six percent of the lawyer population. See STATE BAR OF CALIFORNIA, INVESTIGATION AND PROSECUTION OF DISCIPLINARY COMPLAINTS AGAINST ATTORNEYS IN SOLO PRACTICE, SMALL LAW FIRMS AND LARGE SIZE LAW FIRMS 7 (June 2001), available at <http://www.calbar.ca.gov/LinkClick.aspx?fileticket=OydXJk36ys4%3D&tabid=224&mid=1534>.

18. A brief but powerful description is offered in Matt Brown, *Managing Caseload*, Aug. 8, 2011, <http://brownandlittlaw.com/2011/08/08/managing-caseload/>. As a young lawyer Brown contacted a number of lawyers in order to determine what kind of caseload was optimal and consistent with reasonable earnings and professional quality. *Id.* He relates some frightening information:

I also spoke with lawyers who built their practices around court-appointed clients and only occasionally took a private client. For the most part, they blew the public defenders away as far as numbers go. One lady bragged to me about having 400 appointments in one year alone, some of which were capital cases. I was extremely disturbed, and believe it or not, that isn't the highest number I've heard. A month or two ago, I contacted a court-appointed lawyer before taking over a case from him. He was irked that I called and wasted his time, and he informed me that he had no clue who the client was anyway because he has 1200 different clients on his caseload.

Public defenders and turn-and-burn contract lawyers weren't the place to look, but the people who had my dream practice were no better as a guide. They had very few clients, but they were all bigger cases. If I'd have taken so few clients, I'd have starved with the types of cases I did in the beginning. On top of that, they handled the kinds of cases I had no business touching fresh out of law school. Without any perfect example to follow, I did my best to set limits on my caseload and hoped that one day I'd be busy enough to worry about that kind of thing.

*Id.*

The only situations in which something akin to total devotion and preparation is possible is with very deep pocket clients (generally large corporations) in high-stakes disputes, or government lawyers in a well staffed agency capable of devoting the necessary time, resources, and staff to the conflict. This still does not guarantee quality of service but increases the likelihood that it will occur.

A. Case # 1: "Playing" with a Dispute Until Fees Are Maximized

An example of the chasm between wishing how lawyers and clients behaved and their actual behavior is provided by a lawyer who sent me a note in response to an article I wrote about professionalism. He explained that in a case where he was co-lead counsel for plaintiffs in a bus accident in which twenty-two people died and twenty-one were injured that:

We tried early on to get the various defendants interested in settlements, but it quickly became clear that they were more interested in doing everything possible to avoid settlement, so they could milk the case for as much as they could. By the time my involvement ended, the three major defense firms involved had probably billed something in the neighborhood of \$2.0 million each [\$6 million total] to their clients.<sup>19</sup>

Such profit-seeking behavior dominates the examples provided here and takes many guises depending on the nature of the case and the available resources the client brings into the representation.

It is not uncommon for lawyers to drag out cases well beyond what is necessary in order to collect high fees through maximization of billable hours. This tendency is widespread.<sup>20</sup> I consulted on a federal court case in Wyoming against a prosecutor in which the State had allocated funds to pay the fees of the prosecutor's lawyers. While there were hints related to several low-ball offers during depositions, I suggested to the plaintiff's lawyers that nothing would be of much consequence until the prosecutor's attorneys had worked their way through the state's authorized fee for their work. When the point was reached where the lawyers would have to begin serious preparation for the twice rescheduled trial, an offer appeared that was two and a half times what had been suggested earlier. The case was promptly settled.

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19. Charles Colvin letter to author 1 (November 18, 2003) (on file with author).

20. For an exposure of abusive billing practices among some large corporate firms, see RALPH NADER & WESLEY J. SMITH, NO CONTEST: CORPORATE LAWYERS AND THE PERVERSION OF JUSTICE IN AMERICA 232-55 (1996) (Chapter 7, "The 'BUTS' Principle" [Bill Until They Squawk]). Nader & Smith indicate that typical abuses include billing unworked hours, senior partners billing at their high rate for the work of junior personnel, advising clients not to accept settlements that are reasonable so the firm can keep billing, taking unnecessary depositions, and failing to provide detailed bills so the clients can't accurately monitor what has been done. *Id.* at 239.

### B. Case # 2: "De-Legalizing" a Dispute and Considering the Human Costs

This approach is reflected in a situation where a trustee of a family foundation derived from the trustee's sister's estate found herself responsible for pursuing the deceased sister's former husband for embezzlement of approximately \$90,000 in estate assets. A court had approved a settlement and repayment plan, but the man was not honoring his agreement. A year and a half was taken up with hearings seeking enforcement and sanctions, broken promises, and lawyer fees. The trust's lawyer was quite willing to keep pursuing the derelict and alcoholic former husband, and the legalities of the situation were clear.

But the process was not only expensive from the perspective of the lawyer's fees that were being drawn from the trust's corpus, it was also causing the trustee, her sister's children, and family tremendous stress. The former brother-in-law was sinking into depression, could not hold a job and simply didn't care what effects his actions were having on his children or the family. Or he was so deep into his addiction that he couldn't alter his behavior. It was obvious that even if the funds were ultimately repaid it would take years of expensive legal action involving repeated return to court to enforce its orders. The trustee sought my counseling, and after a process in which we laid out the goals, costs, and full range of financial and human consequences, she decided to simply write off the remaining loss and save legal fees that were likely to become as high as the amount owed by the defendant. This removed the stresses on the children and family. In essence the decision was made to "de-legalize" the dispute and give greater weight to the human consequences of the conflict.

### C. Case # 3: Stirring the "Pot" to Keep Controversy Going

The spirit of ethics and duties owed to clients faces significant obstacles in a profession where unfounded litigation and questionable claims and assertions are supposed to be ethical violations. It takes an immoral person to deliberately accuse another of reprehensible conduct that the accuser knows the individual didn't do or about which the accuser has done no investigation in an effort to validate a client's claims against others. Such investigation in an effort to gain at least preliminary validation of the asserted behavior is essential because the stresses of conflict often produce a psychological mindset in which clients are willing to claim facts exist that work to their advantage. It is not enough for a lawyer to blindly accept whatever claims a client asserts.<sup>21</sup>

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21. See, e.g., *Ex parte Gregory*, 378 S.C. 430 (2008), in which an attorney filed suit for conversion based solely on his client's assertion. Even though it does not happen often, the case stands for the proposition that an attorney can possibly be sanctioned and required to

One lesson I try to provide law students is that clients cannot be trusted to tell the truth. This reflects a variety of client "sins." Some clients intentionally fabricate in order to improve their leverage against an opponent or to punish persons. Many exaggerate in order to strengthen their case. Others simply reconstruct whatever happened in a way that rationalizes their own behavior and puts it in a positive light while denigrating that of others. One lawyer raises the problem of vile allegations among the divorce bar, where there is a "popular perception that hot-button issues can drive a spouse into submission. Child abuse. Incest. Adultery. Claims for all these are on the rise, and they are often unfounded."<sup>22</sup>

Consider the likelihood that lawyers (and clients) who are willing to accuse others of such terrible behavior can be expected to engage in good faith negotiation and mediation in disputed contexts where there is little or no authority to keep them in check. Lawyers who make baseless charges knowingly, maliciously, or with reckless disregard of the truth of the allegations simply to gain an advantage are "scum" who should at least be suspended or disbarred in the most serious instances. While "all's fair in love and war," there are ethical limits to such behavior in the practice of law. Of course those "limits" appear highly ephemeral since there are surprisingly few instances where lawyers have been sanctioned for reckless or intentional distortions of fact involving false allegations for which the attorney has no factual basis or good faith reason to believe in the legitimacy of the assertions.<sup>23</sup>

Using such allegations imposes a heavy burden on those targeted and can ruin reputations and lives. If a client is in the position of the targeted person, how does he or she disprove an allegation of this sort that doesn't depend on a single specific episode for which the accused may or may not be fortunate enough to have an alibi? To the extent the assertions involve alleged behavior that would have taken place in private venues, how does

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pay legal fees and expenses for filing a frivolous claim if the attorney failed to conduct a reasonable investigation into the facts. *See also* Greycas, Inc. v. Proud, 826 F.2d 1560 (7th Cir. 1987), in which an attorney was held to be responsible to a third party who relied on an opinion letter based on factual claims the lawyer did not investigate but for which he accepted the client's word. Although the good faith duty to investigate facts exists, such cases are rare.

22. Kim Isaac Eisler, *The Truth About Divorce Lawyers: It's Hard to Find Lawyers Both Civilized and Fair to Clients Who Need a Divorce. Here's Why*, WASHINGTONIAN, Oct. 1995, at 128.

23. In describing Washington D.C.'s top divorce lawyers, Eisler identified forty lawyers considered to be the best at handling a divorce in an effective but civilized manner. *Id.* It also described ten others, ones labeled "bombers" regarded as the best at what they do and stating that: "What these ten others often do is torment the spouses of their clients. They sometimes are referred to as 'bombers' or 'sharks.'" *Id.* "Bombers" and "sharks" also get away with tormenting the opposing clients, in part because no one wants to take on the psychological stresses involved in dealing with these "legal terrorists."

one respond to such accusations? Obviously charges that someone has engaged in vile behavior have foreseeable negative consequences as well as operate as powerful sources of leverage for the accuser to the point that even baseless allegations can bring the person to his or her knees and lead to capitulation in negotiations.

Prior to a lawyer making assertions that an opposing party has engaged in reprehensible behavior, it is reasonable to ask what factual and evidentiary support exists that entitles the attorney to make the accusation. This raises the question of what are the threshold investigative responsibilities of a lawyer that should be required before making serious allegations of corrupt and/or criminal behavior against another person. One approach that might limit the behavior is to allow defamation and malicious prosecution suits for situations in which such allegations can be shown to be reckless, and to impose fines and civil liability on lawyers who assert ungrounded claims for which they cannot provide legitimate evidence.

#### D. Case # 4: Failing to Anticipate Potential Disputes in Negotiating the Sale of a Business

In designing transactions one of a lawyer's core responsibilities is figuring out how clients can achieve their personal and institutional objectives with the least avoidable risk, and through non-adversarial, forward-looking strategies. This approach can help to create a preventive strategy by designing a client's action plan together with identifying potential legal hot spots that can be avoided or minimized with careful planning. This involves avoiding risks by doing periodic legal checkups for on-going client situations in an effort to identify danger areas or uncover potential problems of which the client may not be aware. Preventive law approaches can be very important for clients.

Dispute resolution certainly involves the goals of dispute *anticipation* and *avoidance*. The obligation of the lawyer as drafter and counselor is to design transactions in ways that anticipate potential conflicts. This includes ensuring that terms are crafted in ways so that reasonably predictable matters of disagreement over realistic eventualities that could impact the agreement's functioning are taken into consideration in ways that avoid or minimize their impact if they do occur.

The key to what might be termed "anticipatory" and "avoidance" dispute resolution is to identify potential disputes upfront and draft the transaction in a way that avoids or minimizes their existence or impact. A core responsibility of lawyers is to ensure that there are not pitfalls and traps in the agreements they negotiate for clients. This means that inconsistent conditions that create confusion or that work against their clients must be avoided at all costs. In the sale of the business described below, there was a failure to do this on multiple levels by the seller's attorney. The reason

might have been that the negotiating lawyer lacked the experience or intelligence to understand how businesses function or know where there was a greater likelihood of breach or conflict.

Negotiating a complex business transaction requires a significant range of knowledge cutting across numerous areas of law. Many lawyers could be acting in complete good faith in terms of their intention to help the client but lack the experience to understand the processes sufficiently to know what is needed to protect their clients. It is not bad faith, but incompetence. Other lawyers, and this was most likely the situation in the sale of a business example described below, are working within a firm where there are sufficient resources and a mix of experience such that the knowledge does exist but for some reason was not applied to a particular transaction. In such situations the client, as here, pays tens of thousands of dollars only to receive poor service from the lawyers responsible for protecting his rights. This client paid the fees, was represented negligently and inadequately, and suffered significant financial loss including salary, additional legal fees, and loss of the value of the deal involving the sale of the business.

This is where the lawyer's job as counselor comes into play in the transactional realm. It should be clear from this example that the function of counselor involves a diverse array of knowledge. The knowledge is not only about the technical elements of law in a variety of complex areas including contracts, tax, non-compete provisions, financial recourse, and other matters, but the practical considerations and dynamics of the context within which one is operating. A lawyer negotiating agreements involving business relationships must have sufficient experience to understand the conditions and dynamics of the business world in the area in which the agreements are being negotiated. If a lawyer lacks that knowledge or fails to apply it in a specific transaction, then the client is put at risk because the terms of the agreement are being defined in a vacuum without context. If the other party's lawyer understands such nuances, then that person may be able to craft the transaction in a way that allows his lawyer to take advantage of the deficient or negligent lawyer's client—as occurred in this example.

An example of a failure to take this approach was brought to me in the context of an agreement involving the sale of a business, the conditions of continuing employment of the selling owner, and two incompatible non-compete clauses in the agreement to sell and the continuing employment contract. The seller's lawyer clearly didn't bother to understand or explain to his client the real import of the inconsistent provisions. Nor did the lawyer identify or counsel the client on the fact that the conditions of employment could be manipulated by the buyer to justify the seller's discharge based on factors completely outside the control of the seller as a continuing employee of the new owner.

The result was that after one year, the seller's employment was not only terminated without notice, but the buyer asserted the primacy of the non-

compete provision contained in the agreement of sale over the contract for employment. The seller's lawyers who had drafted and negotiated the agreements for sale of the business and continuing employment "stonewalled" their former client (seller) on the issue of their numerous oversights and sloppiness even though the agreements were replete with other examples of the lawyers' negligence and incompetence. These included a buyer's liability provision that placed liability for any breach solely in a newly created corporation whose assets were limited to only those of the purchased entity. It also subordinated the seller's right to continuing payments for the sale through a complicated mishmash of superficially ambiguous terms. Properly understood, it all meant that the seller faced the real possibility of never receiving full compensation for the sale of the business. In fact that is exactly what happened.

Ironically, if we analyze this situation from the perspective of the opposing client and its lawyers, there are several insights that can be obtained, and they do not bode well for the "moral" dimension of law practice or dispute resolution where lawyers are supposed to be pure of heart and not take advantage of others' ignorance or vulnerabilities—including that of the other party's incompetent lawyers. From the perspective of the buyer of the business in this example, the agreements that were signed basically obtained the business for almost nothing.

Any financial obligation was essentially being funded by a leveraged-buyout in which the revenues from the acquired business were used to meet any obligation to the seller. If those revenues for any reason became inadequate, including failures on the part of the buyer, the seller took the loss while the buyer (who re-allocated some of the business to another corporate entity) remained whole. Not only was the buyer's financial risk limited to the revenues of the acquired business, the agreement contained language subordinating the seller's right to payment for the sale to complex financial arrangements the buyer negotiated separately with a bank.

One of the most indefensible aspects of the "deal" was that even if the seller was terminated as an employee *for no fault of his own*, the inconsistent non-compete clauses created an uncertain situation in which the buyer appeared to have the power to prevent the seller from working in the same industry for a period of three years even though terminated *and* even though payments for purchase of the business had been suspended. Putting aside the morality of the situation, the buyer essentially obtained a functioning business for free even though on paper the sale was for something above \$3 million.

Following his employment termination the seller attempted to meet with the buyer without success, sought a waiver of the non-compete agreement, had difficulty obtaining employment in the industry due to the non-compete provision, and received no further payments for sale of the business due to alleged revenue shortfalls that appear to have been caused by



asset transfers by the buyer to another of its corporate identities. Ultimately, after research on the various issues the buyer was provided with an analysis concerning the weakness of its non-compete provision under relevant state law and the questionable and possibly bad faith actions it appears to have taken to manipulate the businesses' revenues in ways that arguably violated the sales and employment agreements. It backed off the non-compete provision and the seller gained other employment in the industry shortly thereafter.

E. Case # 5: Negotiating Oil and Gas Leases with the Clients' Interests at Heart and for a Fair Fee

In Ohio, the state is encouraging the expansion of oil and gas well drilling, including in state parks. There is also significant attention being paid to leases for drilling in smaller farms in Southern Ohio since that area has long demonstrated ample reserves. In several counties in Southeast Ohio, lawyers are representing and seeking to represent small farmers in the oil and gas leases of their farms. They are recruiting clients and recommending that they sign extremely complex long-term leases created by an industry that is famous for one-sided dealing. There are several problems with this, but among the most important are the lease price and the legal import of the agreements, including tax and asset planning aimed at creating maximum benefit for the farmers.

Added to this is the fact that at least some of the lawyers are charging a two percent fee on the total lease amount rather than a reasonable hourly rate that more accurately reflects the five or ten hours they may have put into the transaction. Since the lawyers are not drafting the agreements supplied by the oil companies' lawyers and are mainly just recommending to the lessors that they accept the contracts while spending relatively little time on a matter that does not involve the risk of no return that underlies the justification for contingent fees, the use of a percentage fee arrangement appears unreasonable. If the lease amount spread over five years is \$500,000 and the lawyer receives two percent, then the fee is \$10,000 for five or ten hours of no-risk work. This raises issues of whether the fee is reasonable when looking at the time involved as well as the comparative results achieved.

There are other questions raised by the fact that some lawyers appear to be accepting a lease price per acre that is considerably lower than can be obtained through actual negotiation with the potential lessee. One small farmer with roughly 200 acres to lease was referred to a lawyer located out of the county who specialized in oil and gas leases and agreed to handle the matter for an hourly fee of \$175. He negotiated a price per acre of \$5,000, 150 percent higher than the norm of \$2,000 per acre being recommended by the local lawyers, along with a twenty percent royalty fee on production. He

also offered recommendations on financial planning and income protection for the lease payments and adjusted some terms of the proposed lease. This demonstrates not only the effect of expertise in an area of specialized transactional law, but a sense of putting the client's interests at the heart of the representation. Unfortunately one or both of these considerations is not always present in lawyers' representation of their clients.

#### F. Case # 6: Client Expectations and a Less Than Productive Mediation

Clients often do not understand how mediation works. In a case where after twenty years of employment a college faculty member's renewable three-year teaching contract was not renewed due to what he considered a violation of his federal statutory rights relating to a physical disorder and a failure by the college charged with the education of Roman Catholic priests and the governing Catholic Diocese to make reasonable accommodations, the dispute was submitted to the Equal Employment Opportunity Commission (EEOC). The agency referred it to mediation. My role was mainly to serve as a counselor since I was out of state. A local law firm was retained to provide direct representation. The client was excited about the prospect of mediation and the possibility of the year-old dispute finally being resolved since he had been reduced to doing odd jobs to earn money. An important concern was the client's expectation about the probability of what would occur through mediation.

In attempting to bring the client "down to earth" about the likelihood of a satisfactory mediation outcome, I communicated that he should not get excited about the fact that the Diocese agreed to participate in the EEOC mediation. I explained that this did not mean the Diocese was beginning to take his claim seriously in the sense that the mediation would produce an outcome of the kind he wanted. In many instances a party agrees to participate in mediation for reasons having nothing to do with an interest in settlement and that can in fact even be contrary to any desire to resolve the dispute through mediation. These reasons include not wanting to seem unreasonable and to avoid alienating the authoritative decision maker (the EEOC in this instance) because such an attitude could make the agency decide the Diocese needs to be taught a lesson. Mediation can also be seen as a time-consuming process that a party (usually the defendant) uses to drive up the plaintiff's legal fees.<sup>24</sup> They are counting on the fact that the plaintiff isn't working full time at this point and likely needs money. It is all part of a classic defense "siege" strategy of "softening up" the opposition by

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24. On how these factors operate in strategic contexts involving the processes of trial, negotiation, mediation, and arbitration, see DAVID BARNHIZER, *THE WARRIOR LAWYER: POWERFUL STRATEGIES FOR WINNING LEGAL BATTLES* (1997).

imposing greater costs and doing everything to drag out the case while the claimant suffers more expenditures and losses.

The reasons opponents agree to participate in mediations also include using the pretense of being interested in a possible settlement in order to draw out the critical points of the opponent's case, and using the interaction to send messages to the opponent about how they intend to approach the case. Mediation can be used to send false messages to opponents about the strengths or weaknesses of a case and can help to focus the opponent's lawyers on the key points they will have to deal with in arbitration or trial if things reach that point. Mediation can be used to assess the opposing party to determine how they might come across to subsequent fact finders.<sup>25</sup>

The point is that agreeing to mediation does not at all mean a party has any interest in settling the case, certainly not at that point and perhaps not at all. In this case the Diocese had some reason to reach a resolution. This includes protection of what is called the Ministerial Exception Doctrine because the factual situation involved is one in which they could fear that the increasingly challenged Doctrine granting religious institutions a protected status in hiring and firing decisions otherwise subject to federal and state employment protection law could be narrowed further by courts.

In fact the application of the Ministerial Exception Doctrine has recently been acknowledged by the United States Supreme Court.<sup>26</sup> The Supreme Court recognized the application of the Doctrine on a relatively narrow set of facts in which the employee clearly held herself out as having ministerial responsibilities and even received tax breaks based on that status, led prayer sessions, received lengthy instruction in ministerial duties, and was "called" by the congregation. Those facts do not appear related to this situation, and this leaves open the extent to which the Doctrine applies in this particular case. Even with the Court upholding the Doctrine as it now stands in a narrow sense, there is a significant factual dispute in this case about whether the client had any employment duties of the kind that brings him within the Doctrine's scope. Settling relatively early also includes the avoidance of significant legal fees and costs that would have to be paid if the case goes to court. This potentially includes its own expenses and the plaintiff's fees if the Diocese were found to have violated the law on reasonable accommodation. While no one can know precisely what the costs and fees would be in total, the Diocese should be thinking of an exposure as high as \$250,000 to \$500,000 if this case were actually played out all the way to the end through litigation.

The college's admission that the claimant was a fine teacher and that his problems were related to infrequent tardiness on some administrative

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25. *Id.*

26. *Hosanna-Tabor Evangelical Lutheran Church and Sch. v. EEOC*, 132 S. Ct. 694 (2012).

details undermines the defendant Diocese's position because an easy accommodation would have been to eliminate the administrative responsibilities as department chair and assign that role to another faculty member. Also, the timing of their actions creates a risk on their part that their actions will be seen as bad faith and malicious, as is the offer to only provide the claimant with a "neutral" letter of recommendation after two decades of what they admitted in writing was excellent teaching. A "neutral" letter is an obvious red flag and "kiss of death" for your possible future employment as a teacher. This signifies a troubling type of malicious behavior that, after I was made aware of it as their lawyer, I would have to tell them is pretty creepy and capable of alienating a jury if it comes to that.

One of the reasons I cautioned the client about expecting any positive resolution through mediation was that the lawyer for the Diocese had a reputation as being uncooperative and hard-nosed while "low-balling" cases and seeing any concession on her part as weakness. She was also a staff lawyer for the defendant Diocese and as such did not incur hourly fee costs for her representation. In such a situation it appeared likely that her settlement authority was capped and that she took great pride in achieving relatively minimal settlements.

After several hours of presentation of positions and back and forth discussions with the mediator, he indicated that he would support a \$100,000 settlement and that he would write his report to the parties and EEOC within the next few days. He failed to do so and the Diocese's staff lawyer indicated she would never go above \$50,000. The troubling thing was that the mediation program was based at a Catholic law school and, oddly, no other mediators submitted an indication of interest prior to the agency's choice of mediator. While the EEOC seemed to agree that there might be a potential conflict of interest in this case, it took almost a year to issue a finding that the situation involved the Ministerial Exception Doctrine in which an employee of a church whose duties were "ministerial" rather than secular was not protected by federal statutes relating to discrimination in employment. Since the plaintiff simply taught a course in church history at a Catholic seminary, this opinion appears pretty close to invalid on its face. In any event, the general issue of the Ministerial Exception Doctrine's scope and application was resolved by the U.S. Supreme Court albeit in a narrow context, and this inserts an intriguing consideration into the ongoing controversy that is now in federal district court.<sup>27</sup>

This indicates there is clearly no magic in mediation. It can be productive when used well and in good faith but only in certain cases. In many instances it simply increases attorney fees and costs to the disadvantage of

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27. *Id.*

plaintiffs who have limited resources. In the above situation the Diocese relied on a staff attorney while the claimant who no longer had a teaching job paid an hourly fee to his lawyer that by the end of the mediation process was \$35,000 and quickly grew to more than \$40,000. I had suggested strongly from the beginning of the process that it would be necessary to file suit in federal court because it was the only way to shift the handling of the dispute away from staff counsel to expensive lawyers who would impose considerably higher costs on the Diocese while bringing in an authoritative source of decision making not under its control or influence in the form of the judge and potentially the jury if the case were for some reason not settled prior to trial.

This brings into play the hard reality of legal disputes for clients. In this situation I had already done a great deal of *pro bono* research and analysis on the case, including demonstrating that factually and legally a major element of the probable defense that would be raised by the Diocese, the ministerial exception to governmental oversight of its hiring and firing decisions, would not apply in this case. The law firm was also provided with a factual analysis that indicated the official who terminated the claimant's contract did so with full knowledge of his disability and accelerated the termination shortly after he was reminded of the federally-protected disability.

Even with a major part of the factual and legal analysis already prepared, the claimant's law firm ran up a \$40,000 bill. At \$200 per hour this represents 200 hours or five full weeks of billable time at eight hours per day. There was no legitimate reason to spend that kind of time when much of the factual and legal research work had already been done. Somehow, reviewing research and conducting a half-day mediation session generated extensive billings that appear to involve a surprising amount of work of some kind that produced no positive results. Nor is it obvious why a substantial proportion of the time was necessary. But at the point where they are operating on the "first blush" of a substantial client retainer, lawyers are quite adept at filling up time sheets and running up bills through unnecessary duplication of work, use of more lawyers than necessary even in a case where the limited ability to pay a fee was made obvious from the beginning, and using billing "multipliers" in which fifteen or twenty minute billing increments were applied even if only five or ten minutes were devoted to the dispute. In that situation it is possible for an hour of "real time" to result in billings for three or four hours of alleged case work. A client who has been informed he is paying for an associate at \$200 per hour is unaware the effective hourly fee is actually \$600 to \$800 per hour depending on the billing sophistication of the lawyer and the law firm's billing increment practices.

A result in this case was that the claimant fired the law firm and is in the process of seeking new counsel who will accept the case on a contin-

gency basis. He was assisted by a new firm that, even though it was still deciding whether to accept the case, drafted a *pro se* complaint for the claimant and advised him about the procedures involved in filing in federal court, which he was able to do one day before the statute of limitations ran. He had asked the original firm to draft the *pro se* complaint for him two weeks earlier and received a response only a few days before the deadline that they would do so only if he paid a \$10,000 retainer *prior to* receiving the service.

This means that after more than a year of representation that produced no positive results and drained the client's resources of more than \$40,000, the original firm was fully willing to let his claim be rendered moot by the running of the statute. The lawyer who had been responsible in the case also, for the first time, admitted that he had never actually taken a case like this to litigation, even though we had engaged in discussions from the beginning about the probable need for a court filing, and he indicated that there was no problem with that. The new firm, even though it had not yet made a final decision concerning representation, contributed several days of attorney time drafting the *pro se* complaint in order to protect the claimant, demonstrating that there are still some admirable professionals out there.

#### G. Case # 7: "Churning" for the Lawyer's Profit

Wasting client resources under the guise of providing an aggressive representation is called "churning." One critic states the "hourly fee system is a devilish creature that rewards inefficiency and paralyzes productivity."<sup>28</sup> Typical abuses include billing unworked hours, senior partners billing at their high rate for the work of junior personnel, advising clients not to accept settlements that are reasonable so the firm can keep billing, taking unnecessary depositions, and failing to provide detailed bills so the clients can't accurately monitor what has been done.<sup>29</sup>

As Lisa Lerman suggests, too many lawyers "churn" cases to maximize their own earnings rather than to advance their clients' interests.<sup>30</sup> This can occur even to the point of convincing clients to turn down reasonable settlement offers through disparaging the proposed deal and overestimating the probability of a positive outcome to persuade clients to take a chance on a significantly greater outcome than may be realistic but represents the lawyer's "crap shoot" aimed at maximizing a return to himself. In examining the behavior of the divorce bar in Washington, D.C., Kim Eisler concludes:

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28. Dianne K. Dailey et al., *Alternative Billing Systems: Abandoning Time as a Measurable of Value*, 27 SPG BRIEF 44 (1998); see also NADER & SMITH, *supra* note 20.

29. NADER & SMITH, *supra* note 20.

30. Such issues are discussed at length in Lisa G. Lerman, *Blue-Chip Bilking: Regulation of Billing and Expense Fraud by Lawyers*, 12 GEO. J. LEGAL ETHICS 205 (1999).

“The beauty of it, from the unscrupulous lawyer’s point of view, is that although the client is being fleeced, he or she thinks the lawyer is a fierce fighter for the cause.”<sup>31</sup> It is unethical and substandard professional behavior for a lawyer to churn a case for personal profit by engaging in unnecessary activity that magnifies a client’s bill for the lawyer’s benefit. The same can be said for negotiating a deal with an opposing lawyer that looks good to an unsophisticated client forced to rely on the lawyer’s “expertise” but which the lawyer knows is considerably less than could have reasonably been obtained for the client or considerably more than the client should have had to pay to settle a dispute. Not responding to client needs, not being professional in the preparation of a case, not keeping accurate track of work actually done, and overbilling all represent unprofessional lawyering.

Divorce cases are among the worst examples of churning, although in my experience bankruptcy is not far behind if there is a remaining asset in the bankruptcy estate with value from which fees can be extracted. A few months after first retaining a lawyer, clients can be overwhelmed when the legal fees in their divorce proceeding have somehow escalated to twenty or thirty thousand dollars, plus rapidly ballooning litigation expenses. Too many divorce lawyers fight viciously until there are no assets left. Then it is time to settle or to sue the clients for unpaid fees incurred “on their behalf.” Most lawyers are not like this, but too many are. One of the most frustrating aspects of law practice that allows this to happen is that the “negotiation dance” takes two to do it right. Even if you are trying to settle a case in good faith, if you find yourself opposed by a lawyer who is churning the case to run up fees, virtually nothing you can do will work because the lawyer is working in his or her own interest, not the client’s.

#### H. Case # 8: Billing for Work Not Done

Churning a case is bad enough. Billing for work not done is reprehensible, fraudulent, and criminal. One of the most brazen examples I have encountered involves a business bankruptcy case in which I was involved. The lawyer who in theory was representing an opponent but who had actually been supplanted by that client with a different lawyer the client had used in other cases, ended up filing a request for \$450,000 in fees in the final part of the case. This represented 1,500 hours (or the equivalent of 37.5 weeks of forty hours of work per week) spent on the case at \$300 per hour. This lawyer had rarely met with his supposed client, was not involved in any of the negotiations, and played no role in agreements reached to settle the case. We opposed the request and the court reduced the fee claim to \$70,000, which is still pretty good pay for doing nothing. The point is that

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31. Eisler, *supra* note 22.

the audacity of submitting such a preposterous fee claim should in itself have been considered a shocking *prima facie* breach of professional ethics sufficient to result in significant sanctions. Yet no sanctions were forthcoming even though the Bankruptcy judge was aware of what had occurred but chose not to investigate further.

#### I. Case # 9: Totally Failing the Client

Assume a case in which several individuals insisted they were entitled to what my client considered to be fraud-derived payments of approximately \$50,000 each. It should be pointed out that as board members of the company involved in the dispute, the two defendants as officers and directors had already paid themselves over \$200,000 each prior to leaving the company. We weren't even trying to have them return the clearly questionable and self-dealing funds they had diverted. I researched the situation, wrote an extensive memorandum detailing why there was no obligation and explaining that the opponents were in fact potentially liable for damages flowing from a wide range of business torts, statutory violations, and fiduciary breaches.

This memorandum was shared with the opposing lawyer who had been initially retained, and to his credit, promptly withdrew from the case. But the potential defendant promptly obtained another lawyer who simply ignored the facts and issues and demanded payment of the alleged obligation and announced a two-week deadline or they would file suit. Not wanting to be in a defensive position, we filed suit in arbitration a week later based on the opponent's threat. The next year was spent running up fees and expenses even though it was a situation that could and should have been resolved by the opponents walking away from their initial demands.

During the ensuing year we could not persuade the opposing lawyers to engage in any serious settlement discussions. A consequence was that I was forced to spend significant time in further investigation and discovery. This ironically resulted in the discovery of facts that not only further supported our claim of fraud, but identified other significant breaches by the opposing clients involving the potential for substantial damages related not only to the questioned payments they had given themselves, but stock manipulation. The information came from electronic records provided by the opponents and even suggested the possibility of criminal violations. Given the substantial amount of time I spent reviewing the electronic records and e-mails they provided, I consider it unlikely that the opposing lawyers even knew what they contained or what they indicated about their clients' behavior. We remain convinced to this day that the opponents' lawyers were unaware of how bad their clients' behavior had been and the extent of their potential exposure even though we had provided them with a detailed legal and factual brief and other clear signals.



By the time of the scheduled arbitration, the opponents' position was dire. On the day of the final arbitration hearing, a settlement was reached that, valued today, is worth something in the vicinity of [at least] \$7.5 million in favor of our client. The initial potential offer we offered the opponents for a walk away low-cost surrender of their bogus \$95,000 claim, to which it was clear they were not really entitled, ended up as a massive and entirely unnecessary loss to those clients. It could have been avoided if their lawyers had been operating in their clients' best interests. But it seemed clear during the final settlement discussions that they did not understand what the case was about even though we had supplied them with detailed facts and analysis. They had, on the other hand, almost certainly collected hundreds of thousands of dollars in legal fees from their clients while rendering entirely substandard representation. Their clients were of course entirely unaware of how badly they had been treated by their "trusted" representatives. It was our clear impression that the opposing lawyers had never actually read the briefs and key materials we had provided and chose instead to rely on a strategy of bluster, threat, and stonewall. It served the lawyers' financial interests but damaged their clients severely.

Nor was the law firm we engaged as local counsel in this dispute free from fee abuse. It assigned a completely inexperienced new lawyer to the case. This individual, a young associate with very limited practical experience but who possessed legal research skills she was pleased to apply far beyond what was necessary because it was what she knew how to do, proceeded to replicate extensive research that we had already provided the firm and produce lengthy duplicative memos on that material. The researching lawyer's lack of litigation experience resulted in serious and expensive errors that quickly ate up a \$15,000 retainer and ended up costing more than \$60,000 in fees before the case was settled. The more senior lawyer supposedly managing the out-of-state case was apparently "burned out" after several decades of practice and made questionable decisions and agreements with opponents without discussing them with us. Ultimately both lawyers were removed from the case and then from the law firm. The senior partner of the firm acknowledged that mistakes had been made and the fee request was discounted significantly.

#### J. Case # 10: The Irresistible \$18,000,000 "Pot of Gold"

I experienced overbilling and churning conduct by a wide array of lawyers when I was appointed a member of a client committee in a bankruptcy case in California. From the clients' perspective the problem was not that there was \$18,000,000 cash sitting in a bank account, but that all the lawyers in Southern California knew about it, including those representing the various parties in the case. None of the lawyers could resist the temptation to "churn" the dispute and process in ways that generated significantly

higher fees and delayed the outcome. This was, for example, a case where the investors' committee was told initially by its lawyers that everything should be resolved in no more than a year to a year and a half. Unfortunately the four different law firms that were billing against the bankruptcy estate dragged things out for more than three years and drained over \$4 million from the bankruptcy estate before the case was resolved. I went over the billing records from the law firms and found them replete with senior lawyers who otherwise had no connection with the case holding regular "case review" sessions, apparently to remind themselves every week or two what the dispute was about. These chummy hour-long get-togethers were billed at group rates of \$2000 per hour and more.

As suggested in the final paragraph of the immediately preceding example, the dismal fact is that it is not only opposing lawyers who are the "bad guys." The client committee's own lawyers kept telling us that the case was "almost done" and that they had largely completed their work. We later found out that the agreements they drafted were incomplete in numerous ways. After exiting bankruptcy it was discovered they had neglected to deal with several important matters that ended up costing the reconstituted company a minimum of several hundred thousand dollars. When the issue of failing to structure the reorganization in a way that would have allowed the new corporate entity to avoid SEC reporting requirements is taken into account, the cost of the lawyers' omissions after the new company exited bankruptcy grew to over \$2 million due to added business costs and staffing requirements directly related to the public reporting, securities, and auditing rules associated with SEC reporting companies.

The overall essence of the experience from the point of view of those who served on the client committee was the exposure to lies, misrepresentations, false promises, incompetence and massive "churning," and bill padding. This was not conduct by a single unethical lawyer but conduct that occurred across the board on the part of four different law firms whose "business" practices conveniently maximized their own return at their clients' expense. The business model of bankruptcy practice encouraged the behavior. In the final billing by the firms prior to finalizing the reorganization plan, the client committee independently raised an objection to the gross over-billing. Rather than attempt to justify their behaviour, the law firms involved quickly agreed to reduce their legal bills by ten percent across the board. Given all the variables and risks involved in other approaches, this approach was accepted. What this reveals about lawyers' ethical behavior when there is money to be made is, however, both dismal and profound.

After exiting bankruptcy and discovering just how poor a job the lawyers had done, the restructured company considered pursuing a remedy through malpractice, but such litigation would have been time consuming, expensive, taken years, and been a diversion of energy and focus from the

business at a critical point in its “new life.” The decision was made to “play the hand” that had been dealt and get on with the business.

#### K. Case # 11: A Classic “Day of Trial” Settlement

The system of litigation-based dispute resolution relies heavily on last minute settlements. One of the primary reasons for this is that generally both sides have engaged in less than ideal case evaluation and preparation but have made it seem as if they are representing the client aggressively while maximizing available fees. Clients don’t actually know what their lawyers have done to prepare a case, and it doesn’t require a great deal of last minute “flash” to make it seem that a lawyer has been diligent.

Even when there are authoritative dispute resolution procedures such as are represented by binding arbitration and trial, the timing of any negotiated resolution still tends to occur at or near the moment of the formal event in which the dispute is to be submitted to the authority of the independent decision maker. In some instances this can be justified because in many instances it is only when a party understands that the game of “chicken” has reached its endpoint that reality comes into play and leverage is maximized. It is also true that for many clients who are in the position of the defendant party, the lengthy “stretch-out” strategy so often employed in reaching agreement at the point of the trial or arbitration hearing is aimed at holding onto assets and benefits for as long as possible.

Delay also involves trying to wear down plaintiffs in order to exhaust their assets and to impose psychological and other costs that enhance the likelihood of a settlement on the defendants’ terms. In some instances assets that were sufficient to satisfy all or part of a substantial judgment will have been diminished significantly prior to final settlement, trial, or arbitration, at best limiting settlement options or generating another costly round of litigation in an effort to pursue recovery. Those assets may also have gone to pay the lawyers’ increasing legal fees generated due to the delaying strategies.

Behavior involving delay or failure to prepare a case adequately or evaluate the probable outcome of the dispute is not uncommon. One of the most recent examples involved the far too typical “day of trial” settlement by two opposing defendants we sued for breach of their duties on a corporate board involving the diversion of company funds for inappropriate purposes. A year earlier we had given the two individuals and their lawyers a chance to walk away from their claim that they were owed a substantial amount of money as their final share of the contested payments.

All we received in return was bluster and threats to sue, so we preempted the situation and filed first. Our strategy included a full and transparent sharing of information and claims against the defendants, which we discovered later their lawyers had either not read or understood. After a year of contentious interaction, on the day when the trial was to begin the de-

fendants ended up agreeing to a settlement that cost their clients between \$8-10 million in surrendered stock and options when they could have walked away a year earlier simply by abandoning the bogus claim.

It is difficult to understand what was going on in the minds of the defendants' lawyers other than the desire to obtain a steady flow of legal fees. The fees generated for them almost surely added up to somewhere between \$150,000-\$200,000, increasing their clients' out-of-pocket cash losses dramatically. They had been provided a full and detailed factual and legal explanation of their clients' exposure to a variety of serious claims that went well beyond the immediate dispute and of our intention to pursue them aggressively if they failed to settle. This included evidence of wrongdoing that was irrefutable and that came from files produced from their own clients. The result was that rather than obtaining the demanded final payments, the defendants lost total value in the vicinity of \$10 million.

The line between legal and illegal conduct was obviously blurred for one of the opposing lawyers because it was clear from his statements during settlement negotiations that he had delayed settlement because he was convinced that our client was planning to engage in the same kind of fraudulent stock-price manipulation scheme that his client had done, and that he hoped to gain from stock appreciation. His expectation that we would engage in fraud and illegal behavior of the kind that we had argued was done by his client shaped his unethical settlement strategy. The fact that we had informed him that we were preparing to file a civil RICO action was somehow ignored.

But even that was not the end. While one defendant signed the agreement shortly after the "day-of-trial" settlement was reached, the other lawyer spent another four months dragging his feet after settlement while disagreeing and nitpicking until we resubmitted the case for an enforcement order and costs. At that point he immediately folded and paid. But the lawyer made fees during that period. Our local in-state lawyers who were representing us in the jurisdiction refused to submit the part of our demand that sought fees and sanctions from the opposing lawyer for his bad faith even though they admitted the opposing lawyer had behaved unethically.

This raises another serious flaw in the current system of representation, one that undermines the ability to achieve effective service to clients. Because our local law firm feared that a request for sanctions and fees would offend other lawyers in the area of their practice, the lawyers did not want to pursue a remedy to which our client was clearly entitled. This position was taken even though they admitted there was improper delay and bad faith on the part of the opposing lawyer. They took this position even while they attempted to charge my client for the additional legal fees caused by the lawyer's unreasonable delays rather than seek penalties against him.

We did not pay the extra fees. We did not pay, but many clients would have done so without knowing their lawyers had disserved them.<sup>32</sup>

L. Case # 12: Delaying Execution of a Settlement in an Effort to Gain the Corpus of a Client's Recovery

A particularly egregious situation was one in which an opposing lawyer dragged his feet on finalizing a settlement that had been agreed to in court because he wanted us to have seventy percent of the 200,000 company shares that represented the corpus of the agreement issued to his law firm and only thirty percent to his client. He never responded to our request to have his client provide written instructions signifying his agreement to such a fee arrangement. After more than six months of protracted delay, his client contacted the company's CEO and complained about the fact that he had not received his shares. It turned out his lawyer had never communicated to him about the request to have the bulk of the shares issued to his law firm or said anything about our insistence that we receive clear written instructions from the client authorizing the action.

When the opposing client reiterated this to his attorney, the lawyer apparently insisted that he receive the shares and threatened the client with a lawsuit for fees if he did not do what the lawyer demanded. The opposing client then fired his lawyer and retained another attorney, and the settlement was finalized. Given that the shares were restricted securities that had to be held a minimum of one year before they could be traded freely, the eventual nine month delay inhibited the opposing client's ability to trade the shares at his option during a period of rapidly rising value.

If this were a settlement for \$200,000 and a lawyer said to the opposing side's lawyer, "*I demand that you make out three separate checks, one for \$120,000 to my firm, another for \$20,000 to a firm I used, and the third for \$60,000 to the client on whose behalf I have been working,*" that opposing lawyer would say: "You have to be kidding!" We told the lawyer: "This is something we will not do. If you do not have a valid written fee agreement with your client Mr. Smith to provide us authorizing the nearly seventy percent fee you are trying to have our client deliver directly to you then that is your problem. In any event, as an ethical matter we will not be party to such an excessive fee arrangement."

This was not enough to convince the lawyer to move ahead on what had been agreed. The amazing thing was that it turned out he had not ever discussed the actual settlement document with his client that we sent shortly after the in-court settlement. Nor had he been authorized to instruct us to split the shares in the way he demanded. It turned out he had not discussed

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32. There are many other examples. See Barnhizer, *supra* note 9, at 228-32.

the facially unreasonable fee arrangement with his client. When his client refused to do what was demanded, he threatened to sue his client for fees even while continuing to "represent" the client and demand that he agree to the seventy percent legal fee. Given that the value of the developing company's shares increased dramatically during this period of controversy and delay, it seemed clear that the lawyer wanted to "ride the wave" and receive a return approximately 800 percent greater than he would have received in relation to the financial value of the shares on the day the initial agreement was reached.

## PART II

### A. How Do Lawyers Get Away with Unprofessional Behavior?

The analysis offered here concludes that the system of lawyer regulation is—at least as applied to clients—broken and not capable of being "fixed" through traditional means based on prevailing assumptions about such things as self-regulation and the shaping effects on lawyers' behavior of "good" inherent values and principles.<sup>33</sup> The system is such an obvious sham that it is best described as "unethical" in the sense that it has not ever actually worked as a serious deterrent of corrupt professional behavior, and it is getting worse rather than better. The recommendation is that the bur-

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33. The ABA's Model Rules of Professional Conduct sets out the claim to self-regulation in three paragraphs of its Preamble. If the facts demonstrate that lawyers and judges are not doing what the rhetoric and assumptions claim they must do in order to be legitimate regulators, then the clear conclusion is that they cannot be trusted with the responsibility and a different system should be created. The provisions on which the existing system rests are:

[10] The legal profession is largely self-governing. Although other professions also have been granted powers of self-government, the legal profession is unique in this respect because of the close relationship between the profession and the processes of government and law enforcement. This connection is manifested in the fact that ultimate authority over the legal profession is vested largely in the courts.

[11] *To the extent that lawyers meet the obligations of their professional calling, the occasion for government regulation is obviated.* Self-regulation also helps maintain the legal profession's independence from government domination. An independent legal profession is an important force in preserving government under law, for abuse of legal authority is more readily challenged by a profession whose members are not dependent on government for the right to practice.

[12] *The legal profession's relative autonomy carries with it special responsibilities of self-government. The profession has a responsibility to assure that its regulations are conceived in the public interest and not in furtherance of parochial or self-interested concerns of the bar.* Every lawyer is responsible for observance of the Rules of Professional Conduct. A lawyer should also aid in securing their observance by other lawyers. Neglect of these responsibilities compromises the independence of the profession and the public interest which it serves.

MODEL RULES OF PROFESSIONAL CONDUCT PREAMBLE (2011) (emphasis added).

geoning “cottage industry” involving legal ethics as designed by the American Bar Association, adopted in various forms by state supreme courts and taught as a mandated subject by law schools, should be rejected and abandoned. In its place should be a civil liability system in which wronged clients can hold their lawyers to account based on a clear set of rules, audits, cost, and outcome estimates. It should also allow for statutory damages in situations where clear wrongs have occurred, but damages are relatively small or speculative.

Instead of continuing to tinker on the margins with the pretense of trying to improve a system that has consistently been demonstrated not to work effectively, there should be a statutory system designed to regulate the delivery of legal services to consumers.<sup>34</sup> This consumer-oriented system would be aimed at setting effective standards for legal services, including honest pricing, estimates, record keeping, audits, warranties, negligence, license removal, and suspension for major violations and so forth. It should contain clear damage provisions, including devices such as minimum penalties if breach of duty is established and treble damages for major violations.

The reasons for these recommendations are varied. One of the most damning is that the existing system comprised of the ethics rules and judicial oversight of lawyers in disputed cases is not only ineffective, but if we are honest, is of a character where it is designed to fail in any self-interested and competitive context in which the actors are empowered as the arbiters of the quality of their own conduct. Nor is the problem simply one of questionable enforcement of the formal rules of legal ethics through bar associations and grievance committees overseen by state courts. The doctrines of the existing lawyer malpractice system make it an ineffective means for holding lawyers to account other than in the most rare instances where well-funded clients can afford to pursue their former lawyers for compensation.

The challenge for reform is that the systems by which lawyers are purportedly regulated are not simply imperfect. They are unworkable. The system is a sham and dishonest gimmick that offers the pretense of profes-

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34. James C. Turner & Suzanne M. Mishkin, *Attorney Discipline: System Must Weed Out Unethical Lawyers Who Damage Profession's Reputation*, L.A. DAILY J., Dec. 16, 2002, at 6. It states: “In 1970, a blue ribbon panel led by U.S. Supreme Court Justice Tom Clark conducted a groundbreaking review of the attorney discipline system, and found a ‘scandalous situation’ that required ‘the immediate attention of the profession.’” *Id.* Given the great expansion in the number of lawyers competing for their slice of the “pie,” heavy debt loads, and loss of core values that might have at least mitigated the decline in professionalism, the situation has actually worsened since Justice Clark’s committee issued this warning. The remedy does not lie in any of the traditional approaches in which lawyers and courts are in charge of the disciplinary system. A new approach is required and no variation of “business as usual” will work. See ABA SPECIAL COMMITTEE ON EVALUATION OF DISCIPLINARY ENFORCEMENT, PROBLEMS AND RECOMMENDATIONS IN DISCIPLINARY ENFORCEMENT (1970), available at <http://apps.americanbar.org/dch/committee.cfm?com=SC133000&new> (“The Clark Report”).

sional regulation with only the slightest substance. It aims to project the image of self-regulation by lawyers and judges when in fact it may well have the opposite effect given the widespread awareness by lawyers that it has little to do with what they do in their practices. Not only is the system of ethics largely tangential to what lawyers do, it is controlled and ruled over by the very people it purports to regulate—a "fox-in-the-henhouse" formula that guarantees a lowest common denominator orientation since the judicial and lawyer authorities are in essence regulating themselves.

Legal ethicist Thomas Shaffer offers a useful perspective, quoting G.K. Chesterton: "The horrible thing about all legal officials, even the best, [including] . . . all judges, . . . is not that they are wicked (some of them are good), not that they are stupid (some of them are quite intelligent), it is simply that they have got used to it."<sup>35</sup> If "familiarity breeds contempt," lawyers who are responsible for holding themselves and other lawyers to a high standard have contempt for the system according to which they are supposed to operate in providing services to their clients. A result is that they continually overlook and rationalize unprofessional behavior both by others and themselves.

Another cause of the ineffective system that allows lawyers to be largely unaccountable for the quality of representation rendered to clients is that the clients who feel they have been betrayed by their lawyers have to obtain other legal counsel, and that is itself a problem. Legal malpractice cases are often complicated and other lawyers generally do not want to handle a case against another member of the lawyer "guild." It is seldom that lawyers to whom wronged clients go to pursue redress against a former lawyer are willing to take cases on a contingency fee basis. This is due to the amount of damages in controversy, the problems with proof in some disputes, and the fact that it is obvious that the opponent is a lawyer and will be able to assume some of the costs by their own work in contrast to ordinary opponents who need to pay lawyer fees.

When it comes to legal malpractice actions, the existing legal and equitable remedies that are available in theory apply almost exclusively to very well-financed clients and large corporations who can pay for the cost of the remedy to which they are entitled. For ordinary clients, even reasonably well-off upper middle class clients, the costs of pursuing remedies are

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35. THOMAS L. SHAFFER & ROBERT S. REDMOUNT, *LAWYERS, LAW STUDENTS AND PEOPLE* 10 (1977). Shaffer continues:

People in institutions have a way of acting, an official tendency to turn other people into commodities, and to excuse themselves with grand, official phrases such as health, justice, equality, due process, privacy, democracy, and the rule of law. But behind the phrases are hidden patterns of behavior that show, when brought into the light, that people in institutions usually do not have values strong enough for community life.

THOMAS L. SHAFFER, *FAITH AND THE PROFESSIONS* 109 (1987).



prohibitive. It is often the case that the wronged clients have exhausted their resources with the first lawyer and can't afford to pay another lawyer either at all or without exacerbating an already difficult situation by sinking deeper into debt.

It is useful to gain an understanding that a legal malpractice case is more complex, and therefore expensive, than many other forms of litigation. Legal malpractice involves what is referred to as a "suit within a suit" in that the merit of the underlying case (the one the first lawyer is alleged to have messed up) is a critical element of the malpractice claim. This obviously raises the bar and the costs of the litigation and, along with the fact that it clearly will involve another lawyer as an opponent capable of fighting aggressively with delaying tactics and motions, adds another layer of expense and complexity.<sup>36</sup>

The result is that there are remedies on paper that are unworkable for virtually all clients failed by their lawyers. Consequently, incompetent, neglectful, and venal lawyers get a free ride for unprofessional behavior. This unfairly costs their unfortunate clients either unnecessary legal fees and expenses or inappropriate settlements or other recoveries or payments, and it is a form of corruption.<sup>37</sup>

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36. For a description of the legal basics of a malpractice claim against a lawyer see John P. Blumberg, *Pitfalls of the Legal Malpractice Lawsuit*, BLUMBERG LAW OFFICES, <http://www.blumberglaw.com/article-pitfalls.htm> (last visited Jan. 7, 2012). Blumberg writes:

A legal malpractice case is viable only if there is underlying causation. That is to say, "no harm—no foul." The inquiry begins with the former case, also known as the "underlying" case. For example, in *Harris v. Smith* (1984) 157 Cal.App.3d 100, the previous attorney had not filed the complaint before the expiration of the one-year statute of limitations. However, the subsequent legal malpractice case resulted in a non-suit because the plaintiff was unable to prove that the underlying action was meritorious. Similarly, in *Sukoff v. Lemkin* (1988) 202 Cal.App.3d 740, the previous attorney did not investigate the assets of his client's husband in a dissolution of marriage case, but the plaintiff lost her legal malpractice case because she did not prove that the attorney's failure to investigate the assets would have actually led to a higher award.

These legal malpractice cases were unsuccessful because the plaintiffs could not prove that their underlying cases had merit or that the result would have been different. It is not enough that the prior lawyer was negligent; his or her error must have caused damage. There are, in reality, two cases which must be proven in legal malpractice litigation. After it is proven that the prior lawyer was negligent, the plaintiff must essentially try (or re-try) the underlying case. This is called "the case-within-the-case." The evaluation of the underlying case must be the starting point of the lawyer considering whether to accept a legal malpractice case.

*Id.*

37. Robert Klitgaard writes:  
[C]orruption may be represented as . . . a formula:  $C = M + D - A$ . Corruption equals monopoly *plus* discretion *minus* accountability. Whether the activity is public, private, or nonprofit, . . . one will tend to find corruption when an organization

One area that should be mentioned, however, relates to the conduct of lawyers involved in litigation and the already existing inherent powers of judges to regulate the attorneys' behavior. Judges, for example, already have extensive inherent power to sanction lawyers for their misconduct, negligence, or sloth. Although judges have the authority to shape and sanction lawyers, it is rare that they exercise that power.<sup>38</sup> The fact that few sanctions are imposed by judges in the face of frequent abuses or delays demonstrates the failure of the judge-controlled system in which the participants are in essence judging themselves as members of the professional guild as much as anything. Even here there are alternative regulatory strategies that are more capable of shaping the behavior of lawyers.

Certainly this reluctance is understandable. Part of the problem goes to the complexity, intrusiveness, and resource intensity of what judges would have to do in order to provide effective oversight. It would also require intrusion into what is supposed to be a secret process and create an expensive bureaucracy that would take on a life of its own. While convinced the existing system too often fails clients, we need to think carefully about how best to design and implement a better way of regulating lawyers. Part of the difficulty is caused by the allocation of who bears the burden of going forward with investigations and sanctions.

In theory, lawyers are required to report unprofessional and unethical behavior by other lawyers. This is a central element of a self-regulating profession. But lawyers rarely report delinquent behavior, and if they do it is generally to gain a tactical advantage rather than concern for improving the legal profession. There is very little chance that this culture of law practice will change unless legal actions on behalf of allegedly wronged clients are made more profitable for a specialized niche of lawyers who gain financially by suing or seeking pre-litigation settlements from other lawyers who allegedly rendered substandard service. The disciplinary process will not do this because it reacts to complaints rather than seeks them out. If clients don't file grievances the disciplinary system will not take action.

The failure of judges to use their power to improve the quality of the lawyers who appear before them has several less admirable causes. These

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or person has monopoly power over a good or service, has the discretion to decide who will receive it and how much that person will get, and is not accountable.

Robert Klitgaard, *International Cooperation Against Corruption*, 35 FIN. & DEV., at 3, 4 (1998); see also ROBERT KLITGAARD, *CONTROLLING CORRUPTION* (1988). It is hard to deny that the "fit" between the legal profession's terms of operation and Klitgaard's categories is uncomfortably tight. Lawyers and judges possess a monopoly over legal services and the institutions of law. They possess the discretion to assess the quality of services and to determine when lawyers and judges are held accountable for their behavior.

38. See Susan P. Koniak, *The Law Between the Bar and the State*, 70 N.C. L. REV. 1389, 1461-78 (1992), for the proposition that courts are hesitant to deal with lawyers' conduct outside litigation.

include not wanting to offend the people who contribute to their campaign funds. They involve desiring to not anger lawyers who will be providing responses for public indicators of support for the judicial candidate.<sup>39</sup> The probability that the judge behaved the same way prior to elevation to the bench must be considered along with the “understanding” that “lawyers will be lawyers.”

It is also the fact that confrontation with lawyers is unpleasant, and fact-finding is time-consuming and complex. Few people eagerly seek out conflict they can avoid. There is an expectation that the lawyers are supposed to work out their disagreements, although this is increasingly unlikely without strong judicial intervention. But some of the problem with judges can be attributed to the fact that a percentage of the bench is just plain lazy and doesn't want to be bothered.<sup>40</sup> The bottom line is that in cases before them, while judges actually possess extensive power of the kind required to regulate lawyers they just don't do it. How you convince judges to use their inherent powers is beyond me, but it begins with the nature of the particular judge. Unfortunately we seem to be putting a fair number of less-than-qualified people on the bench.

#### B. The “Invisibility” of What Lawyers Do

In addition to lawyers' self-interest in not having a system of real accountability, one of the reasons there is an almost total lack of effective regulation is that most of what lawyers do is invisible—to their clients, to opposing lawyers, and to judges. When the lawyer's behavior is concealed and there are no external monitors, the likelihood of initial detection of unprofessional behavior or of being held accountable and suffering sanctions in any but the most dramatic situations is virtually nil.<sup>41</sup> In such a context, if a system is one in which there are no sufficient external mechanisms to inhibit unprincipled behavior and create incentives for principled conduct, there must be a powerful and relevant internal code operating within the individual. Those moral codes have mostly disappeared both because our culture has become increasingly unprincipled and corrupt and because lawyers employed by law firms are controlled by the profit-seeking and survival strategies of those entities.<sup>42</sup>

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39. On these issues see David Barnhizer, *“On The Make”: Campaign Funding and the Corrupting of the American Judiciary*, 50 CATH. U. L. REV. 361 (2001).

40. *Id.*

41. Klitgaard, CONTROLLING CORRUPTION, *supra* note 37, at 52-55.

42. Walter Lippmann remarks that men have become dissolved into “‘an anonymous mass’ because they are ‘without an authentic world, without provenance or roots,’” without a belief system and faith by which to live. WALTER LIPPMANN, *THE PUBLIC PHILOSOPHY* 87 (1956) (quoting KARL JASPERS, *THE ORIGIN AND GOAL OF HISTORY* 127-28 (Michael Bullock trans., London, Routledge & Kegan Paul, Ltd., 1953) (1949)).

The task invisibility of much of law practice means that clients are at the mercy of their lawyers concerning claims to activities made by the same lawyers who keep the records. Nor are there means available to judge the quality of what has occurred in critical areas of representation such as counseling, research, investigation, case analysis and evaluation, strategy, and negotiation. Virtually all of what lawyers do takes place behind the closed doors of their offices and through legal processes where the lawyers are the only ones who know what has actually been done versus what is claimed. This is made even easier by the fact that lawyers' opponents are behaving according to the same self-interested norms. The "foxes" prance around their own client territory and may "snarl" at each other to keep up the show but always operate according to the sacred commandment, "There but for the grace of God go I," and are cowed by the knowledge that accusations of a lack of professionalism and loyalty to clients is a two-edged sword.

#### C. "Survival" Economics and an "Infestation" of Lawyers

The increased numbers of lawyers admitted to the legal profession over the past few decades who are pursuing a finite pot of client fees caused one Ohio judge to describe lawyers as "fleas." In sentencing an attorney for dipping into client funds, the judge described the problem as one where there was not enough legal work to go around but that law schools kept churning out lawyers regardless of the legal profession's or society's need or demand.<sup>43</sup> In equating lawyers with "fleas" the judge said the lawyer he was sentencing was obviously desperate for money and that: "'It's difficult to earn a living.'" <sup>44</sup> He concluded: "'I'm not excusing you. I'm blaming the entire legal profession.'" <sup>45</sup>

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43. The intense competition for clients can lead to a state of professional "burnout." Susan Davis tells us of the consequences of burnout of the kind many lawyers are experiencing. A state of anxiety, fatigue, and depression makes the individual lawyer subject to negative values and behaviors. Susan Davis, *Burnout*, AM. HEALTH, Dec. 1994, at 48; see also MICHAEL J. KELLY, LIVES OF LAWYERS: JOURNEYS IN THE ORGANIZATIONS OF PRACTICE 4 (1994) (citing AM. BAR ASS'N, THE REPORT OF AT THE BREAKING POINT: THE EMERGING CRISIS IN THE QUALITY OF LAWYERS' HEALTH AND LIVES—ITS IMPACT ON LAW FIRMS AND CLIENT SERVICES (1991)); Stephanie B. Goldberg, *Lawyer Impairment: More Common Than You Might Think, Denver Survey Suggests*, A.B.A. J., Feb. 1990, at 32. A 1989 survey of thirty-four managing partners of Denver-based law firms suggests that the problem of lawyer impairment—one that firms of all sizes are slow to acknowledge and even slower at doing something about—is far from unusual. "The causes of impairment were most often alcoholism and marital problems, and the areas of performance most often affected were billable hours (seventy-nine percent), the ability to withstand pressure (seventy-nine percent) and the quality of work (seventy-five percent)." Goldberg, *supra*, at 32.

44. Dan Horn, *Judge Decries Lawyers as "Fleas,"* CINCINNATI ENQUIRER, Apr. 13, 2000, at 3B.

45. *Id.*; see generally *Most Law Graduates Dissatisfied [sic]: Few Jobs, Low Salaries, High Stress*, L. STUDENT (Nov. 23, 2007), <http://www.lawstudent.tv/2007/11/23/>

The problem with the “business” of private law practice is that few lawyers find a queue of eager clients lining up outside the office door begging for the lawyer’s services. The private practice of law on all levels, but particularly on the tier of solo and small firm practice, involves a constant hustle to identify and recruit clients willing and able to pay your fees. In the United States there are many lawyers and fewer potential clients willing to pay the costs of legal representation. Nor do many potential clients know anything about the lawyers they retain regarding quality because there is no way other than by talking to people who may have used that person’s services and are satisfied with the results to even begin to obtain a sense of ability and competence.

The explosive growth in the competing population of lawyers in private practice has produced a “survival of the fittest” reality in which clients receive short shrift. From the standpoint of failure to protect client interests through efficient and dedicated service, the lawyer’s survival often means having to milk maximum fees out of a case and spreading oneself too thin. A result is that cases are poorly understood, badly investigated and researched, and inappropriately evaluated as to realistic outcome potential. A consequence is that disputes are handled mainly with threats and bluster rather than real professionalism.

The increasingly harsh competitive context faced by lawyers in private practice is best understood by looking at the gross population of lawyers that have flooded into the profession over the past twenty years or so. There are more than 1.1 million lawyers licensed to practice in the US.<sup>46</sup> This includes 400,000 who have entered the profession just in the past ten years, representing nearly forty percent of the total number of lawyers engaged in private practice.<sup>47</sup> Fifty percent of the lawyers in private practice are in solo

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most-law-graduates-dissappointed-few-jobs-low-salaries-high-stress/ (“There seems to be a growing problem among law school graduates and new attorneys. They can’t find law jobs, the jobs they find don’t pay enough to repay law school loans, and the jobs require unhealthy amounts of hours doing the type of work that many lawyers find unsatisfying, or worse. The number of law school graduates continues to increase must [sic] faster than the number of law jobs available. The supply of law graduates is high, but the demand has not kept pace. As a result, law school graduates who did not graduate in the top 10% of a Tier 1 law school are having great difficulty getting a job in law that pays enough to pay off their law school loans. Further, even those law graduates who find jobs are often unhappy with the practice of law and the high number of hours they must spend at the firm.”).

46. AM. BAR ASS’N MARKET RESEARCH DEP’T, ABA LAWYER DEMOGRAPHICS, (2009), available at [http://new.abanet.org/marketresearch/PublicDocuments/Lawyer\\_Demographics.pdf](http://new.abanet.org/marketresearch/PublicDocuments/Lawyer_Demographics.pdf) [hereinafter LAWYER DEMOGRAPHICS]; see *United States Population Growth*, CENSUSSCOPE, [http://www.censuscope.org/us/chart\\_popl.html](http://www.censuscope.org/us/chart_popl.html) (last visited Jan. 17, 2011). The data place the 1980 population at 226,545,805, the 1990 population at 248,709,873, and the 2000 population at 281,421,906. The 1970 population was 203,302,031. *Id.*

47. LAWYER DEMOGRAPHICS, *supra* note 47 (stating that 48% of U.S. lawyers were in solo practice in 2000 and another 15% in 2-5 lawyer firms, resulting in 63% in those forms

situations with another fifteen percent in very small law firms with 2-5 lawyers.<sup>48</sup> The Chicago II study of solo practitioners concluded that in constant dollars the annual earnings had declined in real value over a twenty-year period from \$99,000 to \$55,000.<sup>49</sup>

In the twenty-year period between 1980 and 2000, there was an almost 100 percent increase in the number of solo practitioners (an additional 246,257 added to 1980's 265,580) and another 40,000 lawyers in the 2-5 lawyer firms.<sup>50</sup> Given the fact that 400,000 new graduates have entered the legal profession since 2000 and that the number of stable well-paying law jobs with law firms has been under great pressure, it is reasonable to conclude that the majority of the more recent graduates have gone into solo practices.<sup>51</sup> Unfortunately, given the nature of American legal education that pays no attention to the dynamics and needs of the tiers of law practice represented by solo practitioners and small firms, those graduates are quite ill-

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of law practice); *see also* CLARA N. CARSON, AM. BAR FOUND., THE LAWYER STATISTICAL REPORT: THE U.S. LEGAL PROFESSION IN 2000 (2004) [hereinafter LEGAL PROFESSION IN 2000]; CLARA N. CARSON, AM. BAR FOUND., THE LAWYER STATISTICAL REPORT: THE U.S. LEGAL PROFESSION IN 1995 (1999); BARBRA A. CURRAN, AM. BAR FOUND., THE LAWYER STATISTICAL REPORT: A STATISTICAL PROFILE OF THE U.S. LEGAL PROFESSION IN THE 1980'S (1985); G.M. FILISKO, *Turn-around: Solos Seek Advice to Survive a Struggling Economy*, 96 A.B.A. J., Mar. 2010, at 51, 51-55; LAWYER DEMOGRAPHICS, *supra* note 47. These numbers are based on the total number of lawyers in 1980 versus 2000 multiplied by the percentage of lawyers in solo practice 49% in 1980 and 48% in 2000, and by 22% in 2-5 person firms in 1980 and 15% in those "micro-firms" in 2000. *Id.* The differences do not stem from the percentages themselves but from the growth in the absolute number of lawyers. For example, *see* Barbara A. Curran, *American Lawyers in the 1980s: A Profession in Transition*, 20 LAW & SOC'Y REV. 19-54 (1986), who places the U.S. lawyer population at 542,000 at the beginning of 1980. *See also* LEGAL PROFESSION IN 2000, *supra*, which reports 1,066,328 lawyers in 2000. Applying the percentages in each practice format (2-5 lawyer firms and solo practice) results in 119,240 lawyers in the 2-5 person firms in 1980 versus 159,949 in 2000, and 265,580 solo practitioners in 1980 versus 511,837 in 2000.

48. LAWYER DEMOGRAPHICS, *supra* note 47.

49. JOHN P. HEINZ ET AL., URBAN LAWYERS: THE NEW SOCIAL STRUCTURE OF THE BAR 163, tbl. 7.1 (2005) (comparing mean and median lawyer incomes over the stated period).

50. LAWYER DEMOGRAPHICS, *supra* note 47.

51. *See, e.g.*, NAT'L ASS'N FOR LAW PLACEMENT, PERSPECTIVES ON FALL 2009 LAW STUDENT RECRUITING 1 (2010), *available at* <http://www.nalp.org/uploads/PerspectivesonFallRec09.pdf> ("As the U.S. and global economies were battered by 'the Great Recession' in the third quarter of 2009, recruiting volumes by U.S. legal employers on the campuses of U.S. law schools nose-dived. In fact, the data provided by NALP members about fall 2009 recruiting reveal that most of the trends and patterns that the industry had come to rely upon were upended, dramatically so in some cases. All of the markers that measure the strength of the legal employment market for new lawyers, such as law firm recruiting levels for summer programs and summer program outcomes, fell in 2009, continuing and accelerating the general downward trend in recruiting volumes that was measured in 2008."); Karen Sloan, *Summer Associate Offers Hit 17-Year Low*, NAT'L L. J., Mar. 3, 2010, <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202445314748>.

prepared for what they face.<sup>52</sup> Some form relationships with others unfortunate enough to be similarly situated to spread operating costs, or become vulnerable junior associates in small firms that are themselves operating on the margin.

The competitive pressures result in several kinds of malfeasance, including overbilling and billing for work not done by the lawyer. Lisa Lerman analyzed law firm practices involving hourly fees and found that:

Survey data . . . suggests that a majority of lawyers who bill by the hour at least occasionally inflate their hours, and that a smaller percentage of them anonymously admit to larger-scale inflation of hours or fabrication of time records. Most lawyers report that other lawyers engage in billing fraud more often than they themselves do.<sup>53</sup>

In this same vein, Ralph Nader and Wesley Smith relate the use of the "BUTS Principle" for large law firms. The BUTS acronym stands for "Bill Until They Squawk."<sup>54</sup> Such action is obviously unprincipled and unethical. It also is civil fraud and even criminal theft that is considerably more widespread in the legal profession.

The system has become one where many lawyers struggle to exist on the fringes of the legal profession and have no realistic expectation of being able to practice law as they had been led to believe was possible. The high degree of professional skill and job satisfaction they anticipate, as well as a reasonable income of the kind associated with professional status and the expenditure of \$100,000 or more they invested for law school are simply out of reach.<sup>55</sup> This produces a situation in which lawyers face almost insurmountable obstacles to professionalism both in terms of ethics and the quality of professional performance. Their law practices are undercapitalized, they lack the skills and knowledge required for real professionalism, have little or no access to mentoring relationships with more senior practi-

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52. *The Layoff List: Employment Shifts at The Am Law 200, Global 100, and other Firms of Note*, AM. L., May 19, 2010, <http://www.law.com/jsp/tal/PubArticleTAL.jsp?id=1202425647706>; see Nate Raymond, *Job Losses in Legal Sector Continue*, AMLAW DAILY, Apr. 3, 2009, <http://amlawdaily.typepad.com/amlawdaily/2009/04/job-losses-in-legal-sector-continue.html>.

53. Lerman, *supra* note 30, at 228.

54. NADER & SMITH, *supra* note 20, at 233.

55. See *Law School Educational Debt Has a Manageable Solution*, ABA DIV. FOR MEDIA RELATIONS & COMM'N SERV., <http://www.abanow.org/2009/11/law-school-educational-debt-has-a-manageable-solution/> (last visited Jan. 17, 2011) ("Every year, law students embark on a three-year course of study that will prepare them for a rewarding profession, but will also likely leave many of them with more than \$80,000 of debt. It is increasingly common for law graduates to owe \$100,000 or \$150,000 and even more.") A recent report concluded that a significant number of law students were graduating with at least \$120,000 in educational debt. See Paul L. Caron, *46%-60% of Law School Class of 2013 Will Graduate with \$120k Debt*, TAXPROF BLOG (Jan. 15, 2009), [http://taxprof.typepad.com/taxprof\\_blog/2010/01/4660-of-law-.html](http://taxprof.typepad.com/taxprof_blog/2010/01/4660-of-law-.html).

tioners, scramble for clients in a cut-throat world of practice, and are constantly at risk from an ethical perspective due to inadequate fees and clients.

As indicated in the comments concerning the "task invisibility" of law practice, lawyers can get away with such abuses because they operate in what can be described as a non-transparent system in which the bulk of what they do is obscured. In a non-transparent system where clients have little knowledge of what their lawyers are actually doing and almost no ability to evaluate the quality of representation, typical abuses of clients include not only billing unworked hours, but multiplying the billable hour through the use of minimum time segments. This is achieved by billing twenty percent of an hour (using twelve minute billing increments as a minimum) even if it is represented only by attempting a phone call and leaving a message on voicemail. The lawyer may spend three or four minutes talking with a client or another lawyer on a case but bill .20 hours for the interaction.

Done strategically, ten such contacts in a single "real" hour covering sixty minutes could be transformed into 2.0 billable hours (10 x .20 minimum billing increments). Methods also include senior partners billing at their higher rates for the work of junior personnel, firms billing lawyer rates for paralegals and secretaries, advising clients not to accept settlements that are reasonable so the firm can keep billing, taking unnecessary depositions, and failing to provide detailed bills so the clients can't accurately monitor what has been done.<sup>56</sup> All represent techniques through which bad lawyers cheat clients.<sup>57</sup>

An added problem is that even though law firms tell clients they are saving them money by assigning associates who bill fees at lesser rates to do the work, in many instances the associates lack sufficient knowledge and experience about the specific type of situation. The result is that the client ends up paying for the associate's development of "intellectual capital" in the area involved in the dispute. This can mean that clients are effectively paying \$400 or \$500 per hour in terms of the associate's actual efficiency because of the "getting up to speed" aspect of the situation and the need for a senior attorney to review the associate's work.

The clients are in effect also paying for the lawyer's opportunity to develop intellectual capital and experience in an area of which they were unfamiliar, a situation where it would seem fair that the lawyer or firm "eat" some of the developmental expenses involved in bringing the associate or

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56. See NADER & SMITH, *supra* note 20.

57. See Lerman, *supra* note 30; Lisa G. Lerman, *The Slippery Slope from Ambition to Greed to Dishonesty: Lawyers, Money, and Professional Integrity*, 30 HOFSTRA L. REV. 879 (2002). Hourly billing has been described as "a devilish creature that rewards inefficiency and penalizes productivity." Kenneth Roberts, *The Hourly Fee System is a "Devilish Creature,"* in BEYOND THE BILLABLE HOUR: AN ANTHOLOGY OF ALTERNATIVE BILLING METHODS 35 (Richard C. Reed ed., 1989).



otherwise inexperienced lawyer up to a reasonable level of knowledge to be of actual use to the client. Clients should not have to pay for lawyers' on-the-job training time. Even here the reality can be worse because associates are under pressure to maximize billable hours and can be doing needless or redundant work under the rubric of paying the greatest attention to the client's needs. Nor is there any guarantee that the associate understands the procedures and strategic context of the case sufficiently to make intelligent decisions about priorities and focus.

Another typical condition is that if the client can pay a relatively limited fee, a lawyer often takes actions that consume that fee quickly to the surprise of the client. Then the case is resolved at a relatively low level of possible outcomes because the client is unable to pay the costs of continuing the case. The case may lie dormant with no effort going into it because the lawyer is insisting on payment of additional accrued fees. Rather than carefully understanding the resource limits and conserving them strategically, the situation is approached at the beginning as if there were no such limits. This results in a kind of "grinding" of a client's limited assets. All available funds are extracted from accounts intended for other needs, credit cards are "maxed," second mortgages are taken out, or lines of credit drawn down to pay legal costs and fees that have ballooned far beyond original expectations that were either never discussed with the client, soft-pedaled, or given "low-ball" estimates.

As discussed in several of the Examples in Part I, some lawyers "churn" cases to maximize fees by doing unnecessary work or overbilling in ways that exhaust the client's ability to pay relatively early in the process of representation. This may be deliberate, in which case it borders on fraud, or it may be that the lawyer feels that he or she is providing the highest possible quality of service by "covering all bases." It also has the effect of hooking the client into the process due to the large expenditures that have been made so that they feel compelled to max out credit cards or deplete savings or take out second mortgages because they become convinced it is the only way to protect the significant investment that has already been made.

In that sense the behavior of many lawyers is a sort of low-level Ponzi scheme in which the clients whose assets are being drained are the hopeless and unwitting victims who keep investing because, like the bankrupted *Jarndyce* heirs-apparent, they hope that there is a potential return that will be to their benefit or at least make them whole. Once a client has been drawn into the "fee web" far enough, the "sunk capital" produces a psychology of hope and resignation such that the client is caught in the web of

poor legal service but continues to hope for a positive outcome.<sup>58</sup> Seldom does this work out.

If another fee arrangement such as a contingency fee is involved, the ultimate outcome and degree of work done by the lawyer relates to how many other cases the lawyer is involved in, the potential for a substantial outcome relative to other cases and the amount of work involved, and other demands on the lawyer's time.<sup>59</sup> Even in the contingency situation where fees do not seem to be the main issue in terms of initial fee charge to the client, the need to expend scarce client funds on filing costs, expensive depositions, and expert witnesses also strains the ability of clients to sustain the momentum in a dispute in which the client is required to cover litigation expenses. In other contingency fee situations where the lawyer is advancing the costs and deferring the receipt of fees anticipated from completion of the dispute, the increasing out-of-pocket expenditures by the lawyer can also work against the contingent fee client due to financial outlays the lawyer desires or needs to recoup from a possible settlement. Lawyers, like other businesses, have cash flow requirements for employee expenses, rent, utilities, taxes, and numerous other necessities that must be dealt with. A result can be that the lawyer in need of money pushes for a settlement that is in his interests rather than the client's.<sup>60</sup>

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58. On this quite important issue, see BMA Editorial Team A, *Making the Psychology of Sunk Costs Work for You*, <http://economics.bestmanagementarticles.com/a-36696-making-the-psychology-of-sunk-costs-work-for-you.aspx> (last visited Jan. 3, 2012).

When making a decision, one of the worst errors is that of sunk costs; continually investing time, energy, and money into a project or course of action that is not meeting its performance expectations or goals. Sunk cost errors are rooted in the human psychological need to persevere and succeed regardless of insurmountable obstacles. This need is emotionally compounded as more and more resources are invested into attaining an outcome that is logically implausible.

From a purely economic perspective, sunk costs refer to costs that have "already been committed and cannot be recovered." These costs should be ignored when making future decisions because there is no course of action that would be able to recover these resources, especially the time that has already been lost. Although this concept is easy to understand, people do not always make decisions rationally. Instead many allow feelings of regret to cloud their better judgment, and continue on a failing path instead of admitting defeat, letting go, and avoiding future losses.

*Id.* (citations omitted). I argue from experience that this psychology has an enormous influence on clients who are dissatisfied with their lawyers but cannot let go because they hope against hope that things will turn out well in the end. But in many instances they have already exhausted their resources and are caught in the mystery, ambiguity, and uncertainty of the legal system which they simply do not understand.

59. On the problems with contingency fees, see, for example, Lester Brickman and Lawrence A. Cunningham, *Nonrefundable Retainers: A Response to Critics of the Absolute Ban*, 64 U. CIN. L. REV. 11 (1995), available at SSRN: <http://ssrn.com/abstract=1002943>.

60. See generally the discussion of billing pressures in Lerman, *supra* note 30, at 225-27.

These problems are exacerbated because in areas where disputes are involved as opposed to transactional and counseling matters, the law business-driven behaviors of opposing lawyers play a significant part in determining the volume of costs and fees. Even if one lawyer is acting ethically on behalf of his client, if the other lawyer has not properly prepared and evaluated his client's case due to other business demands, laziness or has given in to the desire to maximize fees, there is very little that can be done to change the situation. Sorry about the cliché, but for principled outcomes to occur it "takes two to tango," and if one lawyer isn't "dancing" because that lawyer is self-dealing, there is not a great deal that can be done about it under current rules.

### PART III: FACTORS INVOLVED IN PERFORMING A CASE EVALUATION

Behaviors such as those discussed in Part I's Examples are clearly ones that betray one's client and call for accountability through a system of low-cost and accessible civil liability. Whether we are speaking of a corrupt lawyer who is cheating his client, an incompetent or negligent lawyer, or a lawyer overwhelmed by the competitive demands of law practice, most clients are unsophisticated consumers of legal services who lack the background or ability to understand what is or is not being done on their behalf. As a general rule unsophisticated clients with little or no prior contact with law and lawyers lack the ability to see what is or is not being done on their behalf. They are at the mercy of their lawyers and are easily manipulated and kept in the dark about what is being done. Nor do they have the ability to judge the quality of the services they receive.

This state of ignorance is due to the "mystery" of the law and its processes and to the lack of task transparency in the relationship. Research, telephone calls and investigation, strategic planning, and contacts with opponents and courts are activities that the clients generally do not see, assuming they are occurring at all. Clients consequently have to take the word of their lawyers about the necessity, quality, and fact of the activities. This includes not only taking the lawyer's word that tasks were actually done, but that they needed to be done, that they were done at a substantial level of quality, and that the time and effort claimed by the lawyer was not only accurate but necessary. Clients are therefore at their lawyer's mercy, and too many lawyers do not deserve their clients' trust.

For this part of the analysis the only principle is that of providing the client with the best outcome that can be reasonably achieved through whatever mode of dispute resolution provides the most effective approach based on the probabilities involved in the dispute or transaction. This might be something as simple as not joining in or exacerbating a dispute because the financial, time, energy, and emotional costs are such that even a "success-

ful" outcome is a loss or "Pyrrhic Victory" that costs more than it is worth when judged according to parameters critical to the client.

Lawyers owe clients pragmatic and detailed evaluations about what approaches are possible and preferable. This includes the outcome probabilities for each path of action, the strengths and weaknesses of each side of the dispute, the timing and conditions of how the interactions are likely to play out, and the costs of the dispute depending on how the parties proceed. This also requires that the lawyer assist the client in identifying clear, pragmatic, and realistic goals for the representation. The problem is that while objective evaluative counseling is one of the most difficult aspects of a lawyer's provision of quality professional services to a client, for various reasons it is an area in which lawyers often fail their clients.

Learning how to perform early and effective strategic analyses is at the heart of the responsibility lawyers owe clients even though such analyses sometimes works against the self-interest of lawyers if they mainly want to "milk" a case in order to extract substantial monetary returns from clients without having to spend a great deal of time on the matter. Although the specific method and source of the evaluative analysis in which lawyers should engage varies depending on the type and complexity of the case—including whether litigation or transactional issues are involved, the amount in controversy, available resources, and client-type—the core assumption is that too many clients are spending too much on cases and still not receiving the kinds of resolutions to which they may be entitled.

As discussed in relation to the commodification of clients, at the heart of the dilemma is that their lawyers have converted the dispute or transaction (the client) into a financial asset from which they are seeking to extract maximum benefit for themselves or their firm rather than for the clients. In such a situation lawyers are not champions or effective advocates concentrating on protecting their clients' interests, but business actors focused on increasing their own return on the "asset" represented by the client's dispute or transactional need.

In an effort to introduce the idea of early comprehensive case evaluation, I have set out below some of what I consider essential elements of efficient strategic analysis a lawyer might go through in handling a client's matter and explaining key aspects. Some key principles of evaluation are discussed here in an effort to show what factors come into play in transactions and disputes of the kind that lawyers should develop in order to ensure that their clients better understand recommended courses of action and likely outcomes and costs. The idea is that lawyers are responsible for doing certain things when handling a dispute or transaction for their clients as a matter of contract, warranty, fiduciary duty, and agency law.

One reason lawyers get away with providing deficient representation, as indicated previously, is that much of what lawyers do, should do, or purport to have done for their clients is invisible, taking place, if at all, behind

closed doors. Another reason is that the costs of law practice and the earnings expectations and needs of lawyers have escalated to the point that many lawyers in private practice are leading “helter-skelter” existences just to make ends meet. Even for the best of lawyers operating on the solo and micro-firm scale of private practice, the undertaking is tough unless they are fortunate enough to have a substantial and dependable source of income from clients such as local government or an insurance company that can supply a steady and predictable flow of income.

Without that kind of sustainable and regular earnings base, many lawyers are engaged in a speculative business model whose core involves scrounging for clients. The result of this speculative and uncertain model of private law practice is that there is very little time to devote to the planning, preparation, and implementation of a single client’s dispute or transaction. This means that the “ideal” approach to client representation involving what should be done in the best-case scenario of representation is an impossibly optimistic dream for many lawyers. It also means that it is absolutely vital that a lawyer develop the skills of early case assessment so that intelligent and effective strategies can be identified at a point where honest and accurate advice can be provided to the client.

The answer is not found in the current structure and content of law school curricula. Law schools fail to deal with some of the most critical aspects of client representation in which most lawyers in private practice find themselves after graduation. One problem is that while clinical legal education does offer one way to provide a limited number of students with a controlled experience that introduces them to important aspects of law practice, the typical clinical experience has little to do with the demands and strategies of private law practice in which many of the most serious problems of client betrayal exist. Clinical education programs have mainly been designed as law reform and poverty law undertakings for admirable reasons. It has also been the case that private lawyers did not want law school subsidized “house” law firms siphoning paying clients from the private bar.

Given the origins and nature of clinical programs, to the extent courses in clinical education involve students in actual client representation, most of the disputes and transactions involve clients without resources who are receiving the clinics’ services free of charge. I am a strong supporter of clinical education, but the fact is that its focus on public interest concerns, social justice, and impoverished clients does little to prepare law students for entry into the competitive world of private practice. This is even more important on the solo and micro-firm levels that so many new graduates are now entering.

Evaluation of the numerous variables involved in disputes and transactions is complex and inherently judgmental. It is also fact-driven and influenced by the personalities and capabilities of clients, opposing clients, and attorneys. In other words, just as “beauty” is in the eye of the beholder, law-

yers will have quite different opinions about their clients' cases depending on the side they are representing. The gap between the competing evaluations may be completely reasonable. Or, unfortunately, it may be due to the fact that one lawyer has figured out the probable outcome accurately but the other is unprepared, inexperienced, unskilled, or unable to estimate probable outcomes, risks, and values properly. In deciding whether to try or settle a dispute, it is unfortunately too often the case that lawyers have not paid enough attention to the dispute and the claims being made to make intelligent evaluations of its worth, risks, and outcome probabilities.

Reaching a settlement based on lawyers' mutually high quality assessments of the best ways to proceed is very difficult when one or both sides have not done the hard work required. Ideally, the assessments should be done at an early enough point to allow the lawyer to develop realistic strategies that increase the probability of resolving the case when it should be resolved rather than wasting resources and time. Similarly, relatively early and realistic assessments of outcome probabilities can enable lawyers to identify situations where it is unlikely that a reasonable resolution can be achieved, whether due to legitimately different estimations of the likely outcome or "churning" and other forms of unprofessional behavior by the opposing lawyers.

But too many lawyers fail to do the diligent work required to assess the risks, costs, and probabilities of achieving a particular desired outcome. This is because too often they are evaluating the worth of the case in relation to the benefits that can be gained for their practice. This calculation is done in relation to the scale of retainers and fees the lawyer can achieve or by balancing the return on the individual case against the time required to deal with other matters for which they are responsible. This is a fully rational business judgment and an equally unethical professional choice.

#### A. Evaluation Principle # 1: Identify Your Client's Reasonably Achievable Goals and Available Resources

Winning is the ultimate purpose of legal representation. A lawyer's representation of the client should be goal-driven, and the primary object is to achieve a victory for the client, defined as the best and most pragmatic possible outcome that can realistically be achieved. The lawyer should begin the process of evaluation by asking what the outcome should be when it is finished. Another way of saying this is *what would be a victory or a win in the specific interaction?* In some instances winning is defined as avoiding losing or at least mitigating negative consequences. Being goal-driven seems simple, but it is amazing how many people never focus clearly on realistic goals aimed at achieving what I refer to as *pragmatic definitions of victory*.

Without a realistic and pragmatic definition of goals and the terms of victory, other strategic considerations are largely irrelevant. The lawyer must therefore ask at the beginning of the strategic process: *“What is it that we seek to achieve? What does our victory look like? Where do we want to be when this is done? What price will the process exact, and how much of that price are we willing to pay to achieve our ends?”* This combines the ideas of victories in specific tactical situations of a kind that advance a client’s interests and victory in the totality of the dispute or transaction. This is neither as easy nor as obvious as it sounds. Defining the specific terms of victory not only for you, but your allies and adversaries is important. This is because deception, false impressions, and hiding behind masks and illusions are key elements of strategy. Both you and your opponents construct false images of your positions and desires in an effort to achieve desired goals. Understanding the terms of your victory and being aware of the most likely terms of your opponent’s victory helps you to hold to your perspective against the illusions and the distorting pressures generated by the heat of conflict. Being anchored in this way gives you a secure place from which to perceive, evaluate, and choose paths of action. This helps you see through the illusions.

Most “wins” are something less than a maximum possible or hypothetical “best case” outcome. The ability to define goals and objectives therefore includes knowing not only the conditions of a complete victory, but the importance of the smaller and more intermediate wins that increase the probability of your ultimate success or lay the groundwork for future successes. “Going for it all” when the risks are high, financial or psychological costs significant, and the possibilities of achieving the desired outcome low is something that can backfire and bankrupt. While your goals need to be high, they must be reasonable and realistic. “Going for broke” is fine when that is the client’s stated goal after sound legal counseling, but is not acceptable unless the odds of success are in your favor.

The process of setting goals is difficult, opaque, shifting, and imperfect. Too often we get caught up in a conflict and forget that it is only a means to an end. While winning is at the heart of strategy, the real nature of victory in a specific interaction is a slippery phenomenon. Part of strategy is being able to know when you have won or lost. We all have seen grand masters in chess who are able to look at the board and tell whether they have won or lost five or six moves ahead of the actual endgame. Knowing whether you have won or lost requires, however, that you understand the meaning of victory or at least know when it is necessary and possible to cut your losses and save resources for another time, which is another form of victory.

**B. Evaluation Principle # 2: Determine the Path of Dispute Resolution that Offers the Best Chance to Achieve the Client's Goals**

The first question we should ask when faced with the possibility of trial is whether it represents the wisest choice from among the available options that include negotiation, mediation, binding and non-binding arbitration, some other alternative strategies such as a private "rental" judge or demonstrative "mini-trial" and trial. True victory is nearly always something less than optimal. This means that there is no single "best" outcome that can be known in the earliest phases of a dispute. Being able to evaluate a dispute as it unfolds depends on not only understanding your side of the dispute but obtaining critical intelligence information through research, fact investigation, records review and witness reports. Conducting this process of intelligence gathering and being able to assess the import of the results while weaving everything together as part of a strategic package are critical skills for the lawyer. It also means the lawyer must help the client see that what is desired may not be achievable or, if it is, that it can be won only at a cost the client cannot afford. This is among the most important aspects of trial strategy and other aspects of legal strategy.

Victory must be defined not in terms of what is wished for as a maximum outcome but in terms of what is realistically achievable within the conditions and dynamics of the available processes. Pragmatic decisions must be made that take into account the skills and resources available to you compared with those within the control of the opponent. There will be situations in which the absolute maximum and the pragmatic determination of the probable outcome are the same, but that occurs less than we might hope.

There are times when the "battle" must be fought and "war" is unavoidable. But given the potential "all or nothing" gambit that many trials represent, the lawyer will generally determine that while the threat or possibility of trial is a very important component of the arsenal, the uncertainty associated with trial continues to offer the impetus that ultimately results in compromise and settlement in nearly all legal disputes. This means, however, that "victory" is rarely the absolute "best" that might be accomplished if everything fell into place perfectly in the client's strategic path.

A result is that the lawyer can't afford to be deceived by the lure of ideal or even highly desirable goals. The desires of a lawyer's client to achieve a specific end must be taken into account in creating strategic goals, but the lawyer fails if the desired goals are not realistic. The possibility of trial is a substantial source of pressure because control over the outcome is taken away from the disputing parties. But doing a trial is a high risk and costly strategy. It should be used only when you have positioned your case for victory or are given no realistic alternative in terms of your honest evaluation of the case.



C. Evaluation Principle # 3: Educate Clients in the Fact that “Wars” Are Costly and People Get Hurt

Trial is quite often the wrong course of action, one that imposes unnecessary costs on both parties. Lawyers should never forget that trial is expensive, labor intensive, and emotionally draining for clients, families, witnesses, and employees. Trial is often destructive for clients on both sides, and ultimately uncertain in outcome. Trial outcomes are inherently uncertain because trial outcomes depend on the capabilities, qualities, perception, and values of other people, and on the skills and knowledge of lawyers, clients, and witnesses. There are no outcome guarantees at trial, only greater and lesser probabilities. Even this depends on accurate and honest assessments by the lawyer.

This is one of the places where the ideal of professional service and the economic reality of practice come into play. In terms of a fair case evaluation for a client in a disputed matter, few clients can afford to pay the full costs of litigation or even a substantial portion of the costs involved in fees, expenses, expert witnesses, costs, and the like. Along with this goes the fact that a lawyer's overall caseload can be too heavy to allow full preparation of the kind a case theoretically requires. In the finite universe of law practice, one bounded by the limited time a lawyer has to spend on all the matters represented in his or her caseload, few clients can afford to pay for the full costs of litigation. Regardless of lawyers' frequent rhetoric about going to trial, “something has to give” and that “something” almost inevitably represents trade-offs and short cuts on the various cases for which the lawyer is responsible. The result is that the idea of full and complete trial preparation is a myth except (perhaps) in the instances where the lawyers are funded by wealthy corporate clients or well-heeled and staffed public institutions.

D. Evaluation Principle # 4: Assess Whether the Situation Involves Siege Strategies by You or Your Opponent

The form of any possible settlement approach, as well as whether settlement is even possible, depends on a combination of factors. These include the stakes involved, the nature of the parties, and their relative resources and “staying power.” Some of the most troubling issues occur in the representation of large and powerful clients whose scale of operation and ability to withstand attacks by those arguably wronged result in a severe power imbalance to the extent that great harms can be imposed on helpless people without resources adequate to the task of obtaining even a semblance of justice. To the extent these powerful institutions rely on law and lawyers to protect them, a real issue emerges about the role of lawyers in working affirmatively both as counselors and guides that facilitate a client's ongoing activity in ways that help their clients to do things that predictably harm

large groups of people—and as advocates who serve their clients in dispute resolution.

Fear of the verdicts reached by juries made up of regular people is also why defensive strategies typically involve imposing significant costs and delay on an opponent who generally has limited resources. The defense is like a besieged fortified city protected by high stone walls. Degrading the attacker's resources and will to keep on fighting in the face of high costs and increasing casualties either results in a collapse of the siege or the willingness to agree to terms that are more favorable. A result is that many powerful defendants seek to avoid populist juries. They do so because they are often on the wrong side of the kinds of themes that trigger jury outrage. A defendant's bad faith, abuse of a trust relationship, severity or type of injuries caused by negligence or indifference, arrogance, greed, or callousness all represent themes that lead to substantial verdicts.

No lawyer can consistently predict the size of verdicts prior to trial. What causes compromises through negotiated settlements is that the lawyers cannot know for certain who will be on the jury. But they do know that jurors will tend to be regular people who will view what happened in terms of the *Golden Rule*. The jurors will think about how they would want the defendants to behave if they (the jurors) were, for example, on the operating table, helpless and forced to trust their well-being to doctors and hospitals. Similarly, almost any juror will have dealt with insurance companies and understand the tendency of many of the companies to try to get out from under their contractual obligations. When members of a jury decide a plaintiff with whom they can easily identify because he or she is an ordinary person like themselves has been harmed by greedy, malicious, or callous behavior on the part of a powerful actor in the case, they have a tendency to punish the large and powerful litigant who they decide has abused the "little guy." But although that risk is always present, there is no certainty that the jury will buy into the claimant's themes to the degree needed to achieve a high verdict. Certainly, a lawyer's skill and track record provides some sense of the probability, but each jury and trial is unique.

#### E. Evaluation Principle # 5: Evaluate the Risks, Costs, and Uncertainty of Trial or Other Available or Mandated Forms of Dispute Resolution

Many goals can be achieved through cooperation. There are what have been called "win-win" solutions to disputes. But even when there are not, it is possible to craft proposed solutions that make it appear that each interest in a dispute has obtained something of significant value. In order to resolve disputes that would otherwise never end short of trial, lawyers need to determine how to present proposed outcomes in language that indicates their clients are obtaining something they value highly, or that a client is saving a great deal by settling because if the dispute went to an alternative forum for

resolution, the client would lose a great deal more. As suggested above, in many instances lawyers have not fully evaluated, analyzed, or prepared their clients' cases.

This means that several dynamics are in play during settlement negotiations. One is that the lawyer really does not know what an optimal outcome should be—in essence is unaware of the worth of the case. Another dynamic is that while the lawyer does not know the value of the case, he does know that he has not done the necessary work to actually present the case effectively at trial. This results in a great deal of bluffing and posturing designed to generate the aura of substance and create a psychology of leverage, but in virtually all instances the façade disappears on the eve of trial when to go through with the litigation would reveal the inadequacies of preparation and understanding.

A trial is frequently the consequence of failed negotiations that ought to have resolved the dispute. But the problem is that it takes all sides to agree on a settlement, and there are various reasons, both good and bad, why agreement cannot be reached prior to trial. One quite common reason is that one side is pursuing an agenda that precludes peaceful resolution for reasons that may or may not be rational or well thought out. Another can be that reasonable outcome assessments relating to the value of a jury verdict relative to a settlement agreement are just too far apart.

The jury, judges, or arbitrators possess the power to interpret what is offered by the lawyers and to choose the proper interpretation and outcome. Even the best trial lawyers can only estimate the probabilities of what they will do. But our ability to influence those choices depends on the degree to which we can persuade the decision makers by projecting a reconstructed "virtual reality" of what occurred along with offering a clear pathway to what they should do based on our advocate's vision of the appropriate outcome. The virtual reality, however, is not the same as the "truth" of what actually occurred but the advocate's reconstruction of the original context into a frame of reference that projects the desired version of "reality." The assertion that trials are a search for truth is inaccurate. Trials are the pursuit of an outcome that is in your client's interest.

Resource expenditure or exhaustion of a client's finances is not the only negative aspect of attempting to resolve legal disputes through trial. Trials are battlefields comprised of probability, risks, and uncertainty. There are no guarantees of being able to achieve the desired outcome or being able to achieve it with efficiency in relation to costs and benefits. Uncertainty permeates all phases of a trial. One critical fact of trial uncertainty is that you cannot know in advance how your witnesses will actually come across on the stand, regardless of how well you have prepared them. Trial preparation is a form of strategic planning.

Of course you do everything possible prior to trial within the bounds of resources and time. But even the most thorough case preparation and

planning is only practice or simulation. As with any situation involving conflict, as soon as you move from the pre-trial planning phase to implementation before actual authoritative decision makers, there is the inevitability of surprise, decision-maker bias, and impression that shapes your presentation, evidentiary rulings, emotive nuances, positive or negative reactions to your client or key witnesses, and much more to which you must adapt almost instinctively—all while operating within the trial version of the “fog of war” and extreme tension.

You may, for example, not have anticipated the use of a particularly powerful theme by your opponent to which the jury is responding favorably. Or the thematic approach you thought would work well may be falling flat with the decision makers, requiring that you make judgments about an alternative path of action. Even though you may have used your powers of visualization to anticipate positive and negative possibilities occurring, the harder task is that even with such preparation you must possess the skills of recognition and balance to understand what is occurring and react in a positive way to the opportunity or potential harm.

Trials are risky because they are about how humans perceive the qualities, behaviors, and “likeability” of clients and witnesses far more than about legalities. It is far more a humanistic process than a legalistic one. Jurors, for example, are looking at you and your clients and assessing the people based on impressions derived from stereotypes and prejudices. They do not actually know the witnesses, clients, or lawyers or they would not be sitting on the jury. It may be that a juror’s judgment on a client is based not on evidence, but on whether subconsciously the client strikes the juror as someone in the juror’s experience about whom he or she holds a strongly positive or negative opinion. The idea that parties are entitled to have their case determined by a jury of their “peers” has little or nothing to do with the actual process. Or, alternatively, it may be that for some parties their peers are the last group of people they would want judging them.

Nor can you know how the jury will evaluate the validity and economic worth of a disputed claim. Even if a jury opts for liability on behalf of a suing litigant, that is only a “necessary” but “not sufficient” outcome for the party seeking damages. This is particularly so when a damages claim involves “soft” non-economic damages or economic damages that require the need to project future needs and consequences along with such things as inflation and interest rates, life spans or work-related pay increases projected years into the future. As demonstrated in the earlier case examples, these types of damages offer very risky scenarios in which juries’ choices can range from token damages even with a finding of liability to vastly multiplied financial levels that stun both lawyers and parties. Assessing, controlling, expanding, and contracting the risk and multiplier effects are key parts of the trial lawyer’s skill.

A difficulty faced by all trial lawyers is that their party and other witnesses will often seem calm, effective, and capable of testifying well when you are preparing them in your office but will be a surprisingly different person when in front of the judge and jury. When it happens it is a “Jeckyll and Hyde” experience in which your benign client becomes a monster. The problem is that a trial is a live performance. Unlike movies or television series, if mistakes are made at trial you do not get to stop the process, re-edit the script, and do it over again until you get it right. A trial is not only a live dramatic performance but one with *amateur actors* playing the key roles of jurors and witnesses.

You cannot ever be quite certain what will happen. In the early phases of my career, I had a client who tried to physically attack witnesses in the courtroom whose testimony she did not like. While it was a judge-only trial, I am certain the fact that he had her shackled after the second assault did not work in her favor. I also had a client who had just flown in from out-of-state the day of trial who told me during the preparation of testimony that her mother-in-law had chased her out of the house with a .38 caliber revolver, and that is why she left her husband. Several hours later at trial she responded to my question, “Did your mother-in-law do anything the day you left that caused you to leave the house,” with a flat, “No, there was no problem.” This does not even touch the situations in which a client collapsed during testimony due to a bleeding ulcer and was whisked away in an ambulance, or where an opposing husband in a divorce proceeding was grabbed by deputies as he tried to bring a sawed off shotgun from his briefcase.

Nor does it present the situation where a client admitted after I handed over the settlement check that the version of what had happened in a consumer dispute was not “quite” [not even close] what they had told me and that they just wanted to get out of the deal they had made. It also does not cover the case in which a client told me police had robbed him during a traffic stop. I met with the prosecutor, and he agreed to pay for a lie detector test and promised to file criminal charges against the police if the client passed. We observed the test from behind a one-way mirror, and the client was told at the end that there were questions about whether he was telling the truth. He then admitted that he was lying and had been angry with the police for stopping him and wanted to “get even.” I thank the God of lawyers that when asked whether I knew anything about the lie that he told the truth and said “no.”

It never ends. In a drug case my defendant client told me an idiotic story about what had occurred, and I responded by telling him it was stupid and unbelievable. He responded, “I thought I would try it out on you, and if you bought it I would run with that version.” Or consider a case where during an initial jail interview with a prospective client he denied having anything to do with the armed robbery in question. Then after speaking with the prosecutor, I went back to the client and told him the witness/victim had

said not only was the client the robber but that he had used a .38 caliber handgun during the robbery. The client's indignant response, "He's lying. It was a sawed-off." The point is that there is no substitute for experience, nor is experience enough in itself because many people never manage to learn from experience and keep making the same mistakes.

In the intense and high-stakes world of effective trial advocacy, skill helps, resources are useful, and evidence and law are important. But it all comes down to the lawyer's ability to influence, shape, and persuade the strange combination of individual and collective judgments made by jurors who are hearing this particular case involving these facts, parties, and witnesses for the first time. A lawyer can't tell for sure about a case until actually in the midst of the trial process and the members of the jury can be seen smiling or nodding in agreement when one witness is testifying, but not when your client or key witness is on the witness stand. Or your client might be a saint who has the misfortune of looking or sounding like somebody who tortures cuddly little animals. Even then, nothing is certain until it is done and the verdict has been returned.

There is an irrational element to jury decision making. Losing a case may be as simple as your key witness speaking in a way this specific jury does not like. *Voir dire* is a limited device for selecting jurors and in any event we tend to focus on jury selection as if it were an individualized process when in fact it depends on the interactive dynamics of small group decision making. Even though another jury might react differently, you have to deal with the values, prejudices, and attitudes of *this* jury. Depending on the side being represented, whether we are dealing with a civil or criminal case, and the allocation of the burden of proof, the focus is on evaluating the probability of being able to influence the vote of a specific number of jurors. Only if the advocate is representing the government in a criminal case is it necessary to achieve small group unanimity.

Even the best lawyers cannot guarantee their clients what a jury will do. With a jury all we can do is give our best guess or estimate, and quote percentages and probabilities. The ultimate uncertainty regarding what the jury's decision will be and the willingness to surrender control to the jury over what happens provides the force that drives the process of dispute resolution. Large institutions, for example, will do almost anything to avoid having a case decided by a jury because they know the jury will tend to come down against them.

This is why such institutions are increasingly writing binding arbitration clauses into employment contracts and consumer agreements. The arbitration provisions typically include the potential for being required to pay a

defendant's legal fees and costs if you press an unsuccessful claim.<sup>61</sup> This not only generates a chilling effect on the willingness to use arbitration, but given that arbitrators know parties have veto power over selection of arbitrators and that arbitral plaintiffs tend to be "one-shot" users while organizational defendants offer repeated users of arbitration services, the large institutional repeat users of arbitration are likely to be viewed more sympathetically from the perspective of the arbitrators if they want future appointments.

#### F. Evaluation Principle # 6: Be Realistic About Outcome Probabilities and Collectability

Part of knowing how you should proceed with a particular strategic path depends on the amount of risk the client is willing or able to accept. If a client with a legal problem was dealing with an investment counselor rather than a lawyer, the prospective investor should expect to be asked how much return is wanted or needed, and what degree of protection or safety the individual desires in the investment program. The range of investment options would vary from the most highly speculative and leveraged investments that would bring very significant returns if everything turned out right, to bank certificates of deposit insured by the federal government. There would be little risk of loss with the CDs, but the investment return would be relatively low. With the most speculative investments the investor runs the risk of losing the entire investment, plus, if the investments are heavily leveraged, might face disaster if forced to cover the losses. The upside is a big win, but the downside can be catastrophic.

Collectability is one of the most basic questions that must be asked in evaluating a dispute or potential transaction. Working out the paper value of a case or the probability of success on the merits is only a preliminary step. On paper a case could be worth \$30 million with a 100 percent probability of obtaining a verdict in that amount, but if the collectable assets of the opposing party (or limits of insurance coverage) are much lower or even non-

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61. JAMS CLAUSE WORKBOOK: A GUIDE TO DRAFTING DISPUTE RESOLUTION CLAUSES FOR COMMERCIAL CONTRACTS (2011), available at <http://www.jamsadr.com/clauses/>. In discussing the potentially negative side effects of mediation and arbitration the JAMS service notes:

It is common practice for a contract clause to provide for negotiation and/or mediation in advance of arbitration. There is much to recommend such clauses because they represent by far the most cost-effective means of resolving a dispute and since, in fact, they often lead to a cost-effective, early settlement. *Unless drafted with care, however, such clauses can also have negative side effects since they can be a vehicle for delay and can result in required but empty negotiations where one or all parties have no intention of moving toward a settlement.*

*Id.* at 2 (emphasis added).

existent, the paper represented by the verdict is worthless unless there is hope for the opposing client improving their financial situation and for the claim to be of a character not dischargeable in bankruptcy. The good lawyer seeks to understand the real resource conditions under which opposing clients are operating in order to know not only how hard and long they can afford to fight, but what resources exist to satisfy judgments. If you cannot collect the money, the paper value is little more than symbolic.

#### G. Evaluation Principle # 7: Risk/Benefit Analysis and Cost Assessment

Which path of strategic action is more expensive, and what do we mean by expense? There are various ways to look at the expense of a strategic path. How do you measure real cost versus apparent cost? The expense of taking a case to trial is generally much greater in terms of money expended and the time and energy consumed in the process than are the other strategic paths. The higher expenses are produced both by the added thoroughness and intensity of the preparatory phases required to try a case, and the effort involved in the trial and appeal.

Questions you need to ask include: How much can your client afford to pay? How much can your opponent afford to pay? Is the opponent's lawyer obtaining his money up front? If so, what will be left for you and your client after a long and hotly contested struggle? If the opposing lawyers are not receiving all their money up front, as opposed to periodic payments, and it is a non-contingency defense case without a deep-pocket client, then if you impose significant costs by forcing the action early and the defendant's attorney is a "hand to mouth" general practitioner, how long will they be able to carry that client? As the bills for legal fees and expenses mount up, when will the case's "sticker shock" hit the opposing client?

In determining the true costs of a case, we need to visualize a balance sheet, revenues on one side and expenses on the other. This requires identifying which path of strategic action creates the greatest outcome potential, as well as the risks involved in achieving that potential. Taking a case through trial may, for example, be twice as expensive as negotiation, say \$25,000 versus \$12,500. But what if you feel there is a ninety percent probability you can achieve a \$300,000 verdict at trial and that you have essentially reached the limits of the defendant's willingness to pay after a defense offer of \$100,000 only a week before trial? Even though the defense may increase their offer to \$125,000 at trial, the most desirable strategic path is likely to be to try the case because of the differential between your expectation of \$300,000 and the defendant's probable offer of \$125,000. Part of the decision turns on the quality of your evaluation of a ninety percent probability of a \$300,000 verdict, its collectability, the likelihood of appeal, and the significant gap between your expectation and the defendant's offer.



A lawyer is responsible for evaluating the case for the client in terms of its legal and financial viability, and the unavoidable costs that must be paid by the client. These costs, and the realistic outcome probability, nearly always reduce the "face value" or apparent worth of the case. If, for example, there is only a ten percent chance of winning a \$50,000 case but the lawyer will generate \$10,000-\$13,000 dollars worth of billable hours and the client must pay an additional \$7,000 in expenses, then the client deserves to be told the case is not worth pursuing unless he or she can afford the expense or it is a matter of principle for which the client is willing to pay. The equation the client needs to see is  $(.10 \times \$50,000 = \$5,000) - \$13,000 - \$7,000 = -\$15,000$  in probable outcome. The considerations also shift if you are handling the case on a contingent fee basis because, for the client at least, this reduces the amount they have to pay in attorney fees unless the case is successful. In our example if the \$10,000-\$13,000 in fees is converted to one-third of whatever is actually recovered, then the cost to the plaintiff may or may not shift in absolute terms, but the obligation to pay is contingent.

Provided with this information many clients would choose to not pursue their claim if an hourly fee was involved. But as the probability of recovery increases to a sixty or seventy percent level, the calculation shifts. Similarly, so does the probability of a lower, but less expensive, outcome through settlement. There are differences between the outcome potential of a negotiated settlement and the outcome potential of a trial. For a negotiator, the problem is how to keep the opponent uncertain concerning the low outcome probability of your case at trial, so that they will be willing to pay you \$20,000 to settle the case. This is why so much of legal strategy is about creating false impressions, reinforcing an opponent's expectations, and concealing the weaknesses of your case.

Of course there are numerous variables involved in many law cases, but civil cases can be looked at as investment vehicles with identifiable risks, characteristics, and costs of doing business. We need to do a better job of explaining these factors to our clients. An example of risk and opportunity assessment is provided by a jury verdict against Owens-Corning in which four plaintiffs sued Owens-Corning for disease caused by their long-term workplace exposure to asbestos. A New York jury returned a verdict of \$64.65 million.<sup>62</sup> Corporate monetization of others' lives leads to jury out-

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62. The case is summarized in a report in the National Law Journal. See *Verdicts: The Big Numbers of 1995: Four Asbestos Plaintiffs are Awarded \$64.65 Million for Personal Injury*, NAT'L L. J., Feb. 5, 1996, at 8. The report indicates: "On Dec. 6, 1995, a New York jury awarded the four plaintiffs one of the largest asbestos awards ever—a total of \$64.65 million. The largest share, \$22.4 million, went to Mr. Falloon. The other awards were: Mr. Karasik, \$16 million; Mr. DeBerardinis, \$15 million; Mr. Pankowitz, \$11.2 million." *Id.*

rage, and the jury, as representatives of the community of ordinary human beings, then says: "Now we will make you pay for what you did."

The problem with a case such as Owens-Corning and the issue of punitive damages that is frequently the largest element in such jury awards is that it would be virtually impossible to completely resolve the case short of trial. Regardless of what he might have hoped, there was no way the plaintiffs' lawyers could have guaranteed or even expected that the jury would buy into the compensatory and punitive damages themes and analysis. Nor, prior to the verdict, would the lawyers for Owens-Corning ever seriously fear that verdict would be rendered or be able to convince Owens-Corning that its exposure was on that scale.

The competing estimations of settlement ranges in such a case are simply so far apart there is no overlapping and no real chance of settlement. Each side is therefore taking an enormous speculative risk. Owens-Corning itself simply wouldn't be able to deal in those terms or believe a jury was likely to come back with such an enormous punitive verdict. Defense lawyers will not be able to believe in that possibility until it has not only happened several times at the trial level but been upheld on appeal. Ford Motors has been hit with a series of multi-million dollar jury verdicts for rollover defects in its SUVs.<sup>63</sup> Such judgments can be expected to eventually affect Ford's evaluation of its potential exposure in pending cases, as well as those of other plaintiffs in similar situations. This is because each side now has a different perspective on what is realistic and possible. Until the pattern of liability and scale of damages becomes clear, the outcome potentials and probabilities are seen by both sides in such disputes as being so radically different that pretrial settlement is very unlikely. In such situations, resort to trial is almost inevitable.

Although there are serious abuses by some lawyers that are committed both consciously and without deliberate intent, most lawyers are simply trying to do a good job for their clients. The problem is that a lawyer costs a considerable amount of money, and clients do not see what they do because much of a lawyer's work is invisible. Few clients understand how much time good lawyers spend on research, investigation, depositions, and other forms of discovery, case preparation, etc. in the effort to help solve their problems and disputes. Sometimes there is no solution to client resentment even when the lawyer has been completely honest and specific at all stages. People who themselves have no difficulty charging significant sums for their own services—mechanics, plumbers, doctors, contractors, business people—somehow feel entitled to extremely low cost legal representation. Knowing the likelihood of client resentment of legal fees and expenses, a

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63. See cases discussed in Howard Latin and Bobby Kasolas, *Bad Designs, Lethal Profits: The Duty to Protect Other Motorists Against SUV Collision Risks*, 82 B. U. L. REV. 1161 (2002).

lawyer should take care to send clients regular updates of activities, charges, and expenses, even if operating pursuant to a contingent fee contract.

The full costs of representation, including inevitable and unavoidable costs, the most probable costs, and the contingent costs that depend on how the opponent proceeds and which path of strategy is successful should be specified to the extent possible at the beginning, or as soon as they become reasonably obvious. Otherwise, a lawyer can expect client complaints to bar associations and grievance committees as well as loss of “word of mouth” recommendations and referrals that can be provided by satisfied former clients.

#### H. Evaluation Principle # 8: Accounting for the “Fog of War”

The *fog of war* is a natural human reaction when encountering intense, dangerous or chaotic situations in which the consequences of success and failure are high.<sup>64</sup> The *fog* blocks our ability to perceive accurately and timely. This prevents us from making the instantaneous decisions needed to function well. Stress, fear, emotion, uncertainty, and chaos are generated by conflict and goal seeking. These emotions and the corresponding tendency toward over reliance on pre-developed plans of action tend to inhibit our ability to perceive clearly, and to understand what is happening at an early enough point where we can defend against others’ actions or take positive actions that advance our strategies.

The *fog of war* is a constant consideration and danger for the trial lawyer. A recent example involved a case on which I was consulting. The lawyer had spent two years working on the client’s civil dispute and had researched and prepared in great depth. He clearly understood the facts, issues, and nuances. Yet on his opening statement he forgot to present the client’s counterclaim and did nothing to remedy the oversight until a considerably later point in the trial. The judge ruled at that point that his omission had waived the counterclaim and refused to allow any instructions or argument to the jury based on that claim. The plaintiff in the case had sought more than \$850,000 in damages, and the defendant-client had been counting on the counterclaim to set off against any recovery.

The plaintiff was in fact an extremely dislikeable person to the extent that the bailiff later admitted he heard the jury stating how much they disliked her. The outcome was a \$20,000 verdict for plaintiff, but the jury also attempted to render a separate verdict for the client-defendant. The judge informed the jury that they could not give anything to the defendant due to the fact that there was no counterclaim before them, and sent the jury back

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64. For an intriguing analysis of the derivation of the concept “fog of war,” see Eugenia C. Kiesling, *On War: Without the Fog*, MIL. REV., Sept.-Oct. 2001, at 85, available at <http://www.clausewitz.com/bibl/Kiesling-OnFog.pdf>.

in to finalize the verdict. The defendant was understandably upset with his lawyer and demanded the return of an \$8,000 fee payment he had recently made and informed the lawyer he would not pay him any fee for the week in trial. The pressure of trial made an otherwise competent lawyer "choke" at trial and cost himself and his client a substantial amount of money. This is the *fog of war*.

#### I. Evaluation Principle # 9: Sometimes Settlement is Not Possible

How do you decide whether to attempt to resolve a dispute through "alternative" means or pursue litigation? Among the key questions responsible advocates must ask are: "What does my client want or need and what is the best way to achieve an outcome consistent with my client's desires with the least expenditure of resources?" Diagnose, plan, prepare, evaluate, reevaluate, and acquire information continuously. This includes various forms of intelligence gathering, including "spying." Information accessing, development, distillation, and refining are at the core of effective strategy. They are also expensive and time consuming.

Well-funded defense strategists approach litigation with the attitude of imposing significant costs on the opponent through what is called "papering" the case through discovery, investigation, and continual motions that require responses.<sup>65</sup> This often exhausts plaintiffs' resources and forces lawyers to make choices about how much time and money they can afford to put into a case. Obviously this is affected by upfront assessments by the lawyers about the nature of the opponent, the amount that can realistically be sought, the probabilities and risks relating to achieving a particular outcome, and the costs of the type of case. Cases with significant medical issues projected across multiple clients may offer the appearance of very significant returns over time but can easily become "money pits" in which large sums are sunk that might never be recovered.

In such cases preparing and deposing the medical experts and related witnesses may easily run costs into the hundreds of thousands of dollars long before the end game is reached. One result in many cases depending on client resources and realistic potential outcome is that some investigation is not done and some information that might have been critical in determining

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65. The history of tobacco litigation offers an example of this strategy. It is argued: [T]he tobacco companies were also successful in using their size and financial strength to make litigation as difficult as possible for the plaintiffs. The tobacco industry filed and argued every conceivable motion, took countless depositions, and sent out extensive interrogatories. As a result, it was extremely burdensome and expensive for plaintiffs and their attorneys to pursue their cases.

*Tobacco—Tobacco Litigation*, JRANK.ORG, <http://law.jrank.org/pages/10805/Tobacco-Tobacco-Litigation.html> (last visited Jan. 3, 2012).

the outcome never uncovered. In other situations plaintiff-oriented law firms carefully screen cases prior to agreeing to represent the clients because they are going to have to front the significant costs involved as well as handle the cases on contingency arrangements that require provision of their legal services without fee payments in the expectation that they will gain from the ultimate settlement or jury verdict. If recovery is not made, the lawyers “eat” large amounts of costs and other expenses and have essentially donated hundreds or thousands of hours of time without compensation.

As business entities, lawyers and law firms cannot be expected to handle such cases without the realistic expectation of return on the investment required. Sophisticated analyses therefore go into plaintiffs’ lawyers’ decisions about whether to even accept a complex case on a contingency fee basis. On one level this is absolutely reasonable. But when lawyers take such cases anticipating relatively minimal or low-level settlements as being the norm—not because of the disputes’ real value but the lawyers’ balancing of the “package” of cases they are handling—they have betrayed the client unless this has been a clear part of the discussion prior to the agreement for representation.

Consider that in any case there are themes and facts that are critical determinants. If they are in your favor, then it helps in the process of evaluating the potential outcome and deciding whether to settle or take the case to trial. If they are against you and you do not have countering or mitigating themes of substantial power, then it assists in your own evaluation of the dispute, including what appears to be a good settlement on your client’s behalf. Along with a dispute’s “thematic” power there are often specific facts that may work either for or against you. These are often ones in which you ask yourself how “real” people would view certain facts and considerations, and whether they would be compassionate, angry, disgusted, or in some other strong emotional state that helps or hurts your client’s interests.

Such considerations do much to shape your evaluation and strategy, including placing a price tag on a dispute’s value whether through settlement or trial. These valuations are different due to the higher risk factors that are present in trials even if the thematic and factual considerations appear to clearly be on your side. It is when the gap between what is judged to be the dispute’s value in settlement versus the considerably higher valuation through trial, even after risk and probability discounting, are so far apart that a trial offers the only realistic mechanism. Look at the following examples and consider the key thematic and factual considerations that appear to have been in play and that virtually guaranteed that settlement or ADR were not viable options from the plaintiffs’ point of view.

In Warren, Ohio a jury returned a \$13.9 million award to a ten-year-old girl and her family in a medical malpractice suit. The child has cerebral palsy due to a lack of oxygen during delivery, with the claim being that the

dangerous condition was evident on the monitors during the birthing process but ignored by the obstetrician. The girl's life span is projected to be in the normal range, meaning that she requires a lengthy lifetime of expensive medical treatment. The award is the highest ever in the area in such a case, surpassing an \$8.5 million verdict in the wrongful death of a six-year-old child. A key factor is that the same lawyer represented plaintiffs in both cases. *Key Considerations:* *a.* ten-year-old little girl with another sixty to seventy years of "normal" life; *b.* the little girl was in the courtroom and the jurors could see the consequences; *c.* defendants presumed to be able to pay a significant amount; *d.* brain damage caused by lack of oxygen; *e.* jurors could see themselves or their children or loved ones in that kind of a situation; *f.* the monitors showed the problem; *g.* the doctor ignored the problem; *h.* we are told to trust doctors and to place our lives in their hands; *i.* the plaintiff's lawyer had won a high verdict in the jurisdiction in a similar case.

In another medical malpractice case in New York City, the pregnant mother began bleeding during labor, and it was overlooked and not properly investigated by the delivery room personnel. The bleeding resulted in severe oxygen deprivation in one of the twins she was in the process of delivering. There were indications of problems with the first-born infant, but the staff still did not rush the delivery of the second born twin. The child suffered severe brain damage. A Brooklyn jury returned a verdict of \$47.3 million. *Key Considerations:* *a.* a breach of the trust we put in doctors since we are at the mercy of their skills; *b.* the effects of brain damage on our sense of the quality of life with which the plaintiff is left; *c.* delay in the medical staff's actions even though there were already indicators of a problem; *d.* our fear of brain damage; *e.* ability to depict the effects graphically; *f.* sympathy for a mother whose child was needlessly harmed.

The infamous and often criticized McDonald's "hot coffee" case offers another example. It is often used as a way to demonstrate the supposed irrationality of runaway juries in a litigious society. The problem is that it was not an irrational jury decision based on a full review of the evidence. Evidence from McDonald's internal documents revealed what had occurred represented the classic corporate tradeoff between a known potential for harm and risk to the user of the Company's product, in this case hot coffee sold to people in the "platform" of a moving vehicle rather than a stable restaurant table. The temperature at which McDonald's marketing data indicated the Company's coffee outperformed sales relative to other fast food chains was substantially higher than the other chains. This provided McDonalds with a clear sales advantage even though the hotter coffee created a greater risk of serious burns. McDonalds made the decision to allocate the risks of burns to its consumers purchasing coffee through the drive-in window option while reaping the higher profits. *Key Considerations:* *a.* McDonald's had been put on notice of other burns caused by its coffee at drive through service windows; *b.* the company had already made an inter-

nal decision that the profit realized from having hotter coffee than its rivals was worth the risks of being held liable for burns any patrons suffered; *c.* a jury would find a ruthless corporate decision-making process that placed profit above customers' safety to be actionable; *d.* the members of the jury could see themselves in the same situation and resent being treated by the corporation as a faceless cost of doing business in order to enhance profits.

In such a situation it is very difficult if not impossible for the competing lawyers to be on the same page in determining how to proceed and to evaluate the most important risks and outcome possibilities. If there is a series of similar cases that shows a trend in one way or another then there is a frame of reference or benchmark that can be used to evaluate the case. Otherwise the lawyers are in limbo with no firm guidance.

#### J. Evaluation Principle # 10: The Psychology of the "Eve of Trial" Settlement

The large scale trade-offs between multiple cases that require attention and the demands of full trial preparation and performance in the allocation of your time is one reason few lawyers actually want to try a case. Unless they have an extremely wealthy client or are part of a governmental institution that has committed significant resources to the dispute, they do not have the time or incentive to put other work aside. No matter what they say during negotiation, most lawyers are still patching their case together on the eve of trial.

This is why many settlements occur at trial or a little way into trial when all bluffs have been called and/or lack of adequate preparation catches up to one or both sides. The lawyers know they are not prepared for more than an opening statement and perhaps the examination of one or two witnesses, and do not want the embarrassment of being exposed as a professionally inept character. It is also a fact that until they are impaneled a jury is a hypothetical entity. You hope you can seat one kind of jury but sometimes you cannot get what you want and sense that the jurors as final decision makers in the case are not likely to go in your favor. When this happens cases sometimes settle during trial, but even this is based on assumptions about the particular jury rather than any certainty.

#### K. Evaluation Principle # 11: Knowing Self and the Decision Makers

If we know others, and observe and understand their strengths and weaknesses, we can better see and evaluate our own context. This includes others' perceptions of us, and how they respond to us. No matter how perceptive we are or think we are, everyone is deceived about something at some time. We are often deceived because we want to be deceived, or at least want to avoid confronting something unpleasant about ourselves or our

preferred vision of things. There are many things we *want* to believe about ourselves, about the world, and other people. Self-deception is an important coping mechanism for everyday life. It allows us to blur the harshest edges of reality. We create illusions to mask reality, to retain our cherished beliefs, and to make us feel better. The lawyer cannot afford to have illusions because illusions are really delusions. There is a price to pay for the clarity that is an essential quality of the lawyer's perception, but if you want to be an effective lawyer it must be paid.

It is not enough to *study* your opponent in gathering intelligence information. You need to literally put yourself in a state of mind so that you are able to develop your opponent's strategy. Put yourself in the opposing lawyer's place, although that is not enough. Acquiring essential strategic knowledge requires that you master a wide variety of roles and perspectives. It is almost as if you develop the ability to occupy multiple personalities, except that you are fully aware of all you are doing and apply the insights gained to more effective representation of your client. One critical perspective is that you must *become* your opponent in order to understand the issues and consequences from that perspective and get beyond your own subjectivity. Not only must you understand self in the sense of strengths and weaknesses, but be able to perceive the motivations and values of key decision makers. Depending on the type of dispute and the stage at which it is at any particular moment this can include analyzing the behaviors and motivations of judges, arbitrators, or jurors. But along with this goes the need to understand the perspectives of opposing clients who are the decision makers who have to approve settlements. You do not simply prepare your side of a contest, but need to visualize the entire case from the perspective of your adversary. This allows you to see yourself and your weaknesses and strengths in a different light. This means we must know how the world functions. Then we put ourselves into the perspectives and frames of reference of our opponents in order to see *into* the opponent and into ourselves. Ask yourself such questions as: "*What are my opponent's strengths? What would he/she perceive my weaknesses and strengths to be? How would the opponent evaluate our side? How is he/she likely to think he/she can best manipulate me and my client?*"

The concept used here includes not only actual legal adversaries, but potential adversaries and even those who declare themselves to be neutral. Allies or seeming friends may be using you as a stalking horse. A neutral posture can be a sham or, even if in good faith when created, only temporary and capable of shifting as the stakes change or deals are cut by you or your opponents. Potential adversaries can be standing on the sidelines, hoping to step in after you and your opponent have exhausted yourselves. Rather than expend their own resources, they are letting you use up yours.

You need, for example, to be able to see how people of the kind that will be the ultimate decision makers will evaluate the facts and the witness-



es. A trial lawyer tends to become too close to the facts and people involved in a dispute and thus suffers from excessive subjectivity that interferes with the ability to understand how the decision makers will perceive the dispute. To overcome the inevitable subjectivity the trial lawyer needs to seek others' impressions, views, and emotional reactions to the facts, themes, and people of the case. To do this you must develop the ability to *become* the decision makers. This requires that you put yourself inside the analytical, motivational, experiential, and emotional worlds of the people who will decide the outcome and look at it through their awareness and system of valuation and choice. When you do this you will know how to adapt your strategy to present it to those decision makers in a way they will understand and accept as valid.

Becoming the decision maker does not only involve understanding the values and perceptions of judges, jurors, or arbitrators. It also includes determining the motivations, expectations, needs, and values of the principals on the other side of the dispute or opportunity. This is because they will ultimately decide if there is to be a settlement or a deal of some kind, whether pre-trial, during trial, or on appeal. It is important to understand how they will view the terms, and the people. Being aware of what outcomes they fear or the consequences of gain or loss is part of the evaluative process. Ask yourself if regardless of what they might like to do personally, do they have a constituency they have to appease, placate, or impress?

Another factor in choosing a path involves the nature of the decision makers who accept or reject offers in that path. Negotiation, for example, will often not be the best path for a plaintiff to reach an outcome involving the highest amount of damages. This is particularly so if the damages are "soft" and involve pain and suffering, loss of quality of life, punitive damages, projected future medical expenses, and other non-economic damages. The idea is that these can be driven upward by jury sentiment, indignation, or outrage at a defendant's callous behavior. In such situations, trial may offer by far the highest outcome potential for the most severely harmed individuals. But the unpredictability and the sometimes all-or-nothing risk that many trials involve is a limiting factor. We can think of the distinction as that of outcome *probability* contrasted with outcome *potential*. Probability and risk must be considered in determining a case's true value.

Any case needs to be discounted by a responsible assessment of the risk factors associated with taking the case all the way through a trial verdict, and subsequent appeal. One way a plaintiff's lawyer can hedge the bet for the client is to sue multiple defendants when appropriate, and settle with some of them prior to trial. In that situation, the plaintiff already has a guaranteed win, and can afford to go for broke against the remaining defendants.

**L. Evaluation Principle # 12: Understanding and Using Timing and Rhythm**

Each process moves at different speeds and rhythms. Does the lawyer want a speedy resolution or a lengthy delay? Speed stands not only for the quickness, but the slowness, of case resolution. Negotiation can resolve a case in moments, or take years even if being done in good faith. Arbitration has its own pace and rhythm, more compressed and accelerated than is found in trials. If a mediator is brought in early in a dispute when the parties say: "We have a problem and are hitting each other over the head without getting anywhere. Let's involve a mediator and see if we can get it taken care of," then it can resolve the situation quickly, or it may not work at all. On the other hand, good faith negotiation and mediation can be considered successful if parties learn important things about the case, including whether settlement is likely. A successful negotiation does not necessarily require a settlement.

Law cases have predictable cycles and characteristics. The existence of a rhythm means that each path requires a specific set of behaviors as it unfolds. If you do not settle a dispute quickly, for example, a different settlement rhythm takes hold. If a plaintiff files pleadings, then negotiation still takes place, but it is a different kind of negotiation. Litigation negotiation becomes part of, and is responsive to, the formal rhythms and timing schedules imposed by litigation rules and judicial practices. It is therefore distinct from non-litigation, primarily transactional negotiation, and pre-litigation negotiation. The parties will become part of the timing patterns dictated by the rules rather than being in control of their own timing. When litigation occurs the process to some extent takes over key aspects of the case. When the formal rules are invoked the processes of regulated litigation are more in control of what is happening. This includes creation of the primary pressure points at which settlement is most likely.

Each strategic path has its internal mechanisms for generating pressure and costs. There are channels within cases created by the system of informal and formal dispute resolution that allow for the steady building of pressure on the disputing parties as they approach the prescribed deadlines and tasks demanded by the rules of litigation and procedure. As you move along the formal processes, the channels through which you act become increasingly narrower. Bottlenecks develop that intensify pressure as they approach and then decompress the pressure if the parties do not settle. The pressure may be high at initial stages, low for a significant period afterward, and then build as the lawyers perform the intermediate tasks of case preparation and exploratory negotiation against a backdrop of a process that is moving steadily toward trial or binding arbitration if the parties cannot agree. These rhythms and pressures are built into the process. But failing to resolve disputes at these points creates a new situation in which added resources have been expended, capital invested, and in some instances "sunk costs" in-

curred that up the settlement demands and reduce the probability of a settlement until trial or arbitration occurs.

### CONCLUSION

The central premise of this analysis is that far too many clients are being betrayed by their lawyers through the combination of fee abuse, neglect, and incompetence to the extent that the representation can be a cynical sham or a professional embarrassment to anyone aware of what has occurred. For many clients the attempt to obtain quality service from their lawyers is a kind of con game in which the promises and illusions woven by the obscure mystery of their lawyers' activities far exceed the results. Nor are there any effective mechanisms in place to protect clients or that allow them to know when their lawyers have abused their responsibility of loyalty, trust, and quality.

It should be clear from the examples presented in this article that lawyers and judges cannot be trusted to "self-regulate." Consider the numerous situations where I directly observed clearly unprofessional behavior related to delay, fee churning, grossly negligent acts and failures to act, fraudulent over-billing, and more. I experienced such conditions, but as a lawyer and teacher of ethics and strategy, I didn't file a single grievance or ethical complaint against another lawyer. Nor did I inform opposing clients of what I considered to be significant breaches on the part of their attorneys that harmed their interests, both because I was forbidden to do so by ethical rules against contact with opposing clients and because it was not in my clients' interests to "provide aid and comfort to the enemy." Along with this is the fact that the procedures and intensity of conflict with other lawyers against whom complaints could be made would almost certainly be a drain on time, energy, and resources as well as a poisoning of relationships with other lawyers. When we add onto these considerations the failure of judges who are aware of the behavior of lawyers in cases but do little or nothing to demand higher levels of professional and ethical performance, it should be clear that the self-regulation on which the lawyers' system of professionalism and ethics is premised is a non-starter.

Self-regulation is at the core of lawyers' arguments that they should be trusted with oversight of the behavior of lawyers. The ABA's Model Rules of Professional Conduct leads off with the assertion that: "The legal profession is largely self-governing. . . . [T]he legal profession is unique in this respect because of the close relationship between the profession and the processes of government and law enforcement."<sup>66</sup> The Model Rules go on to state: "To the extent that lawyers meet the obligations of their professional

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66. MODEL RULES OF PROFESSIONAL CONDUCT PREAMBLE, *supra* note 34, ¶ 10.

calling, the occasion for government regulation is obviated. Self-regulation also helps maintain the legal profession's independence from government domination."<sup>67</sup> In the Preamble's paragraph 12 the conclusion is that: "The legal profession's relative autonomy carries with it special responsibilities of self-government. The profession has a responsibility to assure that its regulations are conceived in the public interest and not in furtherance of parochial or self-interested concerns of the bar."<sup>68</sup>

Of course as I have sought to demonstrate, the entire foundation on which the organized bar rests the edifice of entitlement to self-regulation and special rules is a self-serving bed of sand having little to do with the reality of private law practice. My argument is that since lawyers' oaths professing duty and loyalty on clients' behalf do not work for many lawyers, there is a need for a regulatory system with "teeth." A system is needed that increases the likelihood that lawyers will improve their behavior due to an enhanced probability of exposure of failures and accountability whether through loss of the right to practice or compensation awarded to wronged clients for inadequate legal performance.

As the system now stands, the organized bar's regulatory mechanisms are ineffective, and legal malpractice standards through which wronged clients are required to seek redress are too complex and expensive. It is currently impossible to enforce rules on quality of legal services through private litigation at this point due to the cost and complexities of those cases and the requirement of proving that the lawyers' deficient representation caused damage. This creates a disincentive among lawyers that allows them to offer deficient representation with virtually no concern about chances of personal negative consequences. This insulated system of non-accountability for lawyers works to deprofessionalize the bar because lawyers can get away with almost anything. The challenge is how do we motivate lawyers toward improved client services and eventually weed out the worst lawyers through identification.

My argument is that the false system of legal ethics and phony or theoretical lawyer liability is "broken." It cannot be fixed by tinkering with its apparent rules because the primary flaws have to do with implementation rather than technical language. The existing system should therefore be abandoned and a specific statutory system developed for consumers of legal services. Without such a system there will be no real lawyer ethics practiced by many attorneys, and clients will continue to be provided ineffective and overly expensive services without any real remedy.

In fact ethics and professionalism as currently conceived have little to do with the behavior and operating conditions of lawyers as a business. The

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67. *Id.* ¶ 11.

68. *Id.* ¶ 12.

pretense of an independent self-regulating legal profession simply allows lawyers to rationalize and justify poor and venal performance and insulate themselves from accountability. A system involving consumer warranties of service quality, fraud statutes, fee and expense shifting from clients to lawyers when a client's claim for inadequate service is established, and a minimum in statutory damages if neglect is demonstrated, along with requirements for realistic pre-engagement estimates concerning the likely costs of representation (at least in some categories of cases) could dramatically influence lawyer behavior.