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LEGAL AUDITS AND DISHONEST LEGAL BILLS

John J. Marquess*

How many of you here saw the movie *Jurassic Park*? A lot of people. How many of you cheered or laughed when the T-Rex ate the attorney? Just a few. The audience, when I saw it, went absolutely wild. I saw it with my eight year old daughter and she had a great line after the movie. She said, "You know, I would have bet anything that that dinosaur was not going to eat that attorney." I said, "Why?" She said, "I thought he would have passed him by just as a matter of professional courtesy." She obviously heard that somewhere, but it was a very timely comment.

Legal Cost Control is all about accountability; the days of attorneys submitting bills to clients and saying, "Pay us" are gone. They have been gone probably for a good two or three years now. A couple of general comments. We have reviewed as a company over four million legal bills representing about three billion dollars in total fees, and I can stand here and tell you the problems that we have seen are not germane or particular to geography, type of practice, or size of law firms. The things we see are spread out all over the place. A general message to you is that as a group—and I will include parents of attorneys, people that educated us through high school, college, and law schools, and also myself as an employer of attorneys—we have done a rotten job with law students in defining expectations for when they graduate from law school. The single biggest message I can give you here today is you have to do that better, and you have to start doing it, if you do not do it at all now. When I talk to law students, the expectation levels are just unbelievably unrealistic. Any law student who is not going into public practice or public interest type of practice is expecting to graduate and make $85,000 a year. Some of them do not know what to expect. You have to do a better job of letting them know what the real world is all about. From my

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perspective, that includes the ethics of billing.

Just a general commentary about alternative billing systems; I had four hours last year at the American Bar Association ("ABA") on that topic and had a lot of fun with it. The single biggest approach that I hear is the premium billing type of a system, "Pay me X, and if a certain result is achieved, pay me X plus." Now, I always scratch my head at that approach (or at least my ear, because I do not want any more hair falling out). I say to these law firms, "Let me give you my perspective on that: I go to a doctor, the doctor examines me and says, 'John, you have appendicitis, I need to remove your appendix.' I reply, 'O.K., Doc.' He then says, 'The fee for that is $10,000. However, if I successfully remove your appendix, the fee is $20,000.' I run from the room, right? Right! Why? Because I assume going in that that doctor is going to do the best job he or she can do anyway. Likewise with my attorneys. I would never hire a lawyer expecting that person to do a rotten job. I expect him to do an exceptional job." So, when a lawyer comes and says, "Pay me something more if I achieve a particular result," I have a hard time with the logic behind it.

Now pretend I am a law student graduating from law school and I want to know how I set my fees. Many jurisdictions have some favorable rule, whether it is a rule of code or an ethics rule of professional conduct. For those of you familiar with this, Rule 1.5, is Pennsylvania's rule. If I look at the rules coming out of law school, I say, "O.K., how much can I charge a client?" I start reading this rule and discover that it depends in part on whether the fee is fixed or contingent, the time and labor required, the likelihood that I will have to work exclusively for this client and not for others, the fee customarily charged and some of the other items which are mentioned in the fee, the amount involved and the results obtained, and time limitations. This is nonsense. Why is this nonsense? Because it does not tell me anything. There is nothing concrete contained in this that will allow me to understand how I can set a fee for this client who is sitting in my office. Particularly what I find not to be timely is number 2, "When the lawyer has not regularly represented the client, the basis or rate of the fee shall be communicated to the client in writing." In 1994, every fee agreement should be in writing—every single fee agreement. We are constantly being asked to work with local fee dispute committees, and the first question always asked is, "Where is your fee agreement?" Answer: "I do not have one." The attorney is automatically placed on the defensive. So this rule, in any jurisdiction
using it, needs to be changed.

Now, you heard mention earlier about the billions of dollars that are being spent. According to the United States Department of Commerce, based upon the income tax returns of law firms, there are about one hundred billion dollars a year being spent on attorneys. Maybe there are non-taxable firms or there are law firms that perhaps are not reporting income, I do not know. That is the Federal government’s number, not ours.

The magazine, *Law Firm Economics*, does a survey every year. They ask a lot of questions in the survey of a lot of different lawyers and law firms about how you measure results. This is a disturbing general commentary from my point of view: “A law firm’s performance is largely determined by the number of hours and the amount per hour that can be billed and collected in a given year. Its performance is therefore largely dependent on a performance of its people in terms of income generated and expenses incurred.” What is missing from the formula? Quality, results. I am not saying that people do not still want to win cases or do not want to get the best results, but suddenly that has disappeared from the formula. It used to be that if you were a money driven individual, you went out and practiced law, if you were any good at it, at the end of the year you made a good income, if that was your goal. What changed in the 1980s was the shift from practicing client-centered law and counting your money at the end of the year to, “Let us be revenue generators.” Revenue generators constantly are looking for the next available profit dollar. The Rand Institute in Santa Monica states that lawyers on both sides are beset by conflicting interests that often transcend the interests of their clients. In litigation, ninety-two percent of all cases in this country settle, which means only eight percent go to trial. When I practiced, even I handled every case as if it were Armageddon. The world will end if I lose this case. And that is not necessarily so.

Now, let us talk about the hourly rate, which in a sense is the single biggest problem driving all this. When you go out and talk to lawyers, law students, law firms, or corporations, you ask somebody to define how a firm sets up its fees, and a lot of people cannot tell you. There are three elements: overhead, cost of doing business, and a profit margin because firms are entitled to make a profit. Now, let us discuss what impacts that adversely. When I started practicing, I was a law clerk for a firm and a partner called me in the first week I was there and said, “This is the shape of our law firm: we are a triangle, at the top of the triangle is a partner, and that is where you
want to get to, on one side is an associate and on the other side is a legal secretary” (and you can note that that person equated a good legal secretary with a good associate attorney, because, then and now, it is still harder to find a good legal secretary than it is to replace an associate in a law firm). What happened in the 1980s and today is that we have voting and non-voting partners; we have senior and junior associates—senior associates being people who traditionally would have been thrown out of the firm if they did not make partner. Today we keep those people, and tell them, “You will never be a partner. We will pay you a little more than an associate, but you will never be a partner here.”

With paralegals, the message we always give the clients is: you better know who the paralegals are. I would venture to say that there is not one person in this room that could give me a good working definition of who should be a “paralegal.” The courts have said paralegals do work that would have been “otherwise performed by an attorney.” What should be the education and qualifications? Now, we ourselves tell clients that since nobody else has said it, including the paralegal organizations, the legal assistant organization, and the ABA, we will set the definition: graduate of an ABA approved program; graduate of a state licensed school or agency; or three or more years experience for those that do not have the education. The eye-opener for us and the reason we started this process in discussing with clients, was that sometime ago we went into a Washington, D.C. law firm and that firm had billed out a lot of money over a number of years to a client. We were going to do an audit. During that time period, twenty-two people had billed as either paralegals or legal assistants. We said, “Let us see the resumes of these people.” Now, of the twenty-two, thirteen of them clearly qualified under anybody’s definition. These people were either educated or experienced. Now, there were nine others who did not fall into anybody’s definition. Let me tell you the backgrounds of these people who were being billed out at $135 an hour. None of these people had any education. You just have to take my word for it. One person had been a summer assistant manager of a Mrs. Fields cookie store; $135.00 an hour. (In November I was at a closed door forum, the magazine American Lawyer sponsored it, closed door, no media, no notes, no article being written, myself sitting at a table there with representatives from the forty largest law firms in the country. A number of people tried to defend that person by saying, “Well, what was he or she doing?” I said, “I do not care what she was doing; unless she was baking cook-
ies for the law firm in the kitchen, she was not qualified to do any-
thing, especially at $135.00 an hour!
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Another person had been a Marshall’s Aide in Federal Court. Her job had been to take prisoners to and from Federal prisons for either sentencing or trial. Somehow the assumption was that through osmosis that person had learned the legal process. $135.00! The next person had been a secretary, a receptionist, and a new accounts repre-
sentative—all at failed savings and loans. This last person was my personal favorite. We said, “What are the [person’s] qualifications?” Well, we have someone with a little education. O.K., what is it? Successfully completed, as opposed to unsuccessfully completed, two non-credit semesters, as opposed to credit, in conversational Arabic. We said, “Is that all?” They said, “No, there is a little more: extensive travel throughout over sixty countries, Europe, Asia, Africa, Latin America, and the Middle East; has varying degrees of proficiency in French, German and colloquial Egyptian Arabic, which he knew from the successful completion of the two non-credit hours.” Right. The message is you better know who your people are.

Law Clerks. Law firms have used law clerks from the beginning of time. They happen to be the most worthless individuals in the firm. Are they not? What are they doing? Learning to be a lawyer. They are not secretaries; they are not paralegals; they are not attorneys. At one time, law firms did not bill for them. Today they bill for them. I venture to tell you that most of the time you do not get anything out of the law clerks.

Then, of course, there is administration. Bottom line: it is not a triangle any more; it is some other type of a shape that has to be supported, and that leads to increased pressures on billing.

Now, let us go to the hourly rate definitions. What is the cost of doing business? The cost includes law books, Lexis and Westlaw, clerical word processing support, overhead, rent, heating, ventilation and air conditioning and supplies, and employee costs. Let us talk about some of the problems with all of that. Deceptive business prac-
tices, ineffective time-keeping, accuracy of keeping time records, and an audit billing system is not a law firm priority. It should be, but it is not. Secretaries keeping professional time: we have run constantly into a number of firms where no one keeps their time and a secretary or an administrative assistant keeps their time for them. Unless they follow me around all day long, no one has a clue about what I am doing. We also find firms that are not tracking their expenses at all, but are going back to the client firms that are marking up their ex-
penses. The most deceptive practices are those put forth by Lexis and Westlaw: "We will give you a bill that is already marked-up and present it to the client; get reimbursed fully and if you pay us you get a thirty-five percent discount." I think that is deceptive.

Fraud, for work that is not done, functions not attended, excessive hours per day and the padding of bills. It is amazing how many lawyers we have run into that bill fifty and sixty hours a day on a regular basis. You can call it anything you want. I call it fraud. I do not know what else to call it. There was some recent billing, very large billing, that came out of one law firm and I will touch on a couple of items and leave it open for discussion later. For example, buying proof-reading. We said, "What is the proof-reading? This client has already produced a written directive, so you cannot then charge for proof-reading time." So, this is not time, this is an expense: "I am a Dartmouth grad and I went out and hired a bunch of Dartmouth students to proof-read materials before I sent them out."

"Lawyer out-of-pocket expense," we still do not know what this is. "Lawyer overtime expense" was a first for us. The law firm was billing at $200 an hour up to eight hours; over eight hours it went to time-and-a-half, $300 an hour. Beyond the argument about, "Well, if you worked 8 hours on behalf of Smith and Jones, and you did not start my work until 5:01, you really were not on overtime for me," shows how ludicrous this is. What are the expectations of people graduating from your law schools if this type of billing is appropriate? Someone has to be telling them it is appropriate. Someone should be telling them it is not.

"Non-legal overtime" was for secretarial-type work. The rest of the expenses are not worth commenting on in the brief time we have: "Miscellaneous", we still do not know what that is, $11,000. The overtime heat and air conditioning—not the regular heat and air conditioning. Once again, beyond how that was tracked, the law firm had the nerve to say to us, "Legalgard is nitpicking." We said, "Yes, but you gave us a nit to pick. What did you expect us to do?" By the way, that was the item on the bill that got general counsel's blood boiling and got us involved initially.

Here is another example. A Phoenix, Arizona law firm went to a client and said, "We are qualified to handle litigation for you in this part of California even though we are a Phoenix firm." "Oh, really," said the client. "Yes, we have an office." "Where is it?" "Visalia, California." If anybody here is from California, you know that Visalia in the middle of nowhere. What the firm did was, it went out, rented
an apartment, stocked it and charged it back to the client. The funniest one is the $40 sign. Do not ask me where you can get a law firm sign today for forty bucks, even hand-written on paper. The software that was purchased for $398.00 was something that was going to remain on the law firm's computer forever, but they charged the entire amount back to this client. "Supplies for special project," as opposed to non-special projects, turned out to be pens, pencils, and file folders. Who is telling these people that this is a perfect way to bill to a client?

Now, let us talk about some other examples about outrageous billing, because these are the ones that get people's blood going. A client was charged for the lawyers' use of the health club facilities and charged for entertainment of another attorney in the same firm. Another lawyer went to Denver and spent four days on the telephone. We suspected the lawyer had a companion with him, but we cannot prove it, and he never left the hotel room. The client was charged for a cellular phone rental to replenish the firm's petty cash, and for air telephone use to a different client! Another attorney went from Atlanta, Georgia to Charlotte, North Carolina and could have flown there on Delta Airlines, I think for about $280 round trip. But this guy had a plane and he liked to fly the plane. He flies his plane, fuels it up, and charges $4,400 to the client. The party purchased a cellular phone and charged it; a lawyer purchased ties and charged it to a client. Let me go a little further on that one; a lawyer went from Houston to Cleveland, spent a week in Cleveland and bought clothes while he was there and charged them back to the client, including suits, shirts, ties, underwear and socks. His excuse was, "I thought I was there for four days, so I took four days worth of clothes. We did not finish on Friday, I had to come back on Monday, and, of course, there are no dry cleaners in Cleveland." So he had to buy new clothes! Law firms contribute to political action committees and often charge that back to the client, too.

I had a situation recently, some massive litigation, and periodically every law firm that was handling this, so that they would all be on the same page, came to New York City so that they would meet for a few days, discuss things, make sure that they were proceeding in a uniform manner on behalf of the client. Partners came, associates came, paralegals came, legal assistants came, some of whom could even bake, everybody came. Each and every firm brought their entire bureaucracy with them. Each day, every person in that bureaucracy from every law firm went into the hotel and had a massage done, for
$75 each, and billed it back to the client. Anybody want to pay that? Anybody think that it is an appropriate cost of doing business that should be passed back to the client? Do you think I need a daily massage to be able to be effective? If you do, I may go get one and send the bill to Professor Simon, here. That is a recent example. Again, the message here is that we could be here for weeks and months, because after four million legal bills we have seen an awful lot. The bottom line is that your students need to get the message because the old timers, that is anybody out of law school more than fifteen years, do not want to hear it.

So where do you start making change. Right here, because I cannot go back to childhood and spank the parents that raised these people, and I cannot go back and spank the teachers that had them in high school or college, but I can go to you and say, you better address this problem in your schools so that people come out of law school with a different mentality.

Rule 106 of the ABA, which is similar to Pennsylvania Rule 105, is where I started; here I am again. I am a law student, I have just graduated law school, I have passed the bar and I am ready to take on clients. How do I go about setting a fee for that first client that walks in the door? They have a real estate matter, or a matrimonial matter, or whatever it might be. Look to the following rules: the time and labor required, novelty and difficulty of the questions, requisites of the performance, preclusion of other employment, customary fee, is the fee fixed or contingent, time limitations, amount involved, results obtained, experience, reputation, my own ability, the undesirability of the case. Can anybody tell me as a new attorney how I am going to set my fee based on that rule? The rule needs to be changed. It needs to be updated and brought into the 1990s. Thank you.