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# Money Didn't Buy Happiness\*

Lawrence J. Fox\*\*

## I. Problems

“It’s a great profession. You’ll never be bored. Of course you won’t make a lot of money. But you’ll always be comfortable.”

Those are the words of admonition an aspiring law student would have heard about the prospects of becoming a lawyer until the 70s. Prestige? Yes. Intellectual challenge? For sure. A sense of purpose? Undoubtedly. And, like the school teacher, an acknowledgment that the calling was its own reward. The thankfulness of a client, the recognition in the community, the satisfaction of crafting an innovative solution or precedent defying argument each cherished as satisfaction enough.

The vision is idealized, masking both a few extremely well-paid professionals and thousands of unhappy practitioners who found little or no professional or financial satisfaction from what their seven year education brought them. But it contains more than a nugget of truth, and a power over today’s profession that makes its accuracy largely irrelevant.

For today, the profession, at certain levels, enjoys a prosperity that was unthinkable thirty years ago. Nowhere in the Talmud is it written that the average partner in the top twenty law firms in America (a total of almost 2400 partners) would be making \$750,000 per year, even in the allegedly parlous 90s. Indeed, for our aspiring lawyer from the 60s it would be inconceivable that one

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could “look up” such figures for any law firm but your own. Now a profession-observing (or perhaps profession-defining) legal press, led by the *American Lawyer*, has not only managed to secure this most private of information, but encouraged once circumspect law firms to flaunt these profitability figures as they seek the only recognition that seems to count today: “Our firm has the highest profits per partner of any firm in [name your city].” Similarly, there is no edict requiring that general counsel of Fortune 200 companies would earn more than \$1,000,000 in salary, without counting their lucrative and ethically dubious stock options and other corporate perks. Nor is it mandated that some plaintiff’s contingent fee lawyers would boast of eight figure annual incomes.

Yet all of that has occurred, leaving our 60s observer in disbelief and, one would have hoped, able to give a 90s speech to those contemplating a legal career about it being “a great profession *and* you’ll make a lot of money.” But instead we learn that the entire scene is marred by dissatisfaction. Americans hold the profession in low esteem, and worse yet, for the first time clients are dissatisfied with their own lawyers. And lawyers are an unhappy lot, leaving the profession in droves, or languishing in jobs they no longer enjoy, refusing to recommend law as a worthwhile calling for their children. We find that an entire political revolution, the Republicans’ capture of the Congress in 1994, was built on a plank of attacking values near and dear to lawyers’ most important principles. And ABC News, in an uncharacteristic lapse from any semblance of objectivity, provides a forum for one of its reporters to call lawyers extortionists, engaged in a racket, part of a legal system that is “a laughingstock of the world.”

## II. Causes and Effects

What has caused all of this? The search for causes (mixed in with some effects) is not difficult. Some might assert the root of all evil is the billable hour, though actually what they are referring to is far more complex. There was a time when lawyers simply charged a fee for a service. Then some in-house counsel, concerned about the arbitrariness and unpredictability of that approach, insisted that lawyers should bill based on the time devoted to an engagement, lending a precision to the billing process that admittedly was more apparent than real.

Next, the computer came along, to permit the accumulation of a great deal of hourly data. This was followed by the great

economic discovery that after X hours of work a lawyer's salary and overhead were covered for the year and any additional hours billed and collected traveled directly, "without passing go," to the bottom line. This led to wondrous calculations that if every lawyer in the firm could only add 50, or 100, or 200 hours per year, the gross (and net) effect on profits would be dramatic and extremely satisfying. Then came demands that these increases be achieved, with reports of billable hour accomplishments belched out monthly, ranking lawyers by production with notations to tell who was ahead of target and who behind.

The rise in stature, power, and control of in-house counsel has been a major contributor to lawyer ennui. When old First of Philadelphia hired Caldwell & Moore for all its legal matters (but unseemly collections) and Caldwell & Moore's senior lawyer, Lewis Harlow, sat on this client's Board of Directors, the cozy relationship generated no anxiety, and the one line fee bills that read "For professional services for the month of June, 19\_\_" were paid without question by return mail. Now with a Vice President and General Counsel who has replaced Harlow on the Board and an in-house staff of fifteen, half the legal work has been brought inside. First of Philadelphia, now known as The First, regularly distributes its work among twelve firms ("We hire lawyers not law firms"), and all work is performed following elaborate protocols down to the need to get permission to use Fedex or have more than one lawyer attend a deposition. These professional services are billed in accordance with detailed formats that account for time in six minute intervals, generating a level of detail that replaces meaningful information with a blizzard of statistical data. The client may save money and even, perhaps, get higher quality services, but the benefits have not been delivered on a cost-free basis. Among the casualties are client loyalty (of course we can take a position adverse to The First), the easy familiarity that comes from a long-term relationship, a cadre of in-house lawyers who are trapped between fawning, business-seeking outside counsel and crushing management demands to reduce the cost of the legal function, and expenses that are viewed as a decided nuisance or, worse, as contributing not one wit to the bottom line.

To in-house counsel goes the credit for inventing the beauty contest, an unseemly competition among law firms responding to requests for proposals (R.F.P.) — as if law work is like a commodity not unlike building highways — in which the first casualties are

candor and analysis. Successive teams of lawyers parade before sage in-house counsel who make judgments based on thirty-minute presentations more dedicated to flattery and hyperbole than the merits of the matter. This process gets raised to a high art form on Steve Brill's Counsel Connect which launches the R.F.P. process into cyberspace, fueling the anxiety of outside counsel with headlines that warn: "This could be your client. And if you're not there to respond, this could be your *former* client."

The epitome of the adversarial relationship that has developed between outside and in-house counsel is the legal audit, the dreaded outside review of time records and other charges in which, with the benefit of 20-20 hindsight, many litigation decisions are second guessed as costing the client too much ("Why did you have three lawyers at that strategy conference?" — a clear example of churning) or as failing to meet a cost-benefit analysis ("How could it take ten hours to write a four page memo?"). What is the level of self-esteem and trust that results from the spectre of the pointy-pencil crew swooping in to review the law firm's records?

But before a misimpression is left, it must be recognized that the bulk of the problems facing lawyers in firms has been generated internally. One problem, largely beyond the control of the lawyers, has been the growth of technology which has had at least two different but equally debilitating effects. First, the cost of running a law firm has skyrocketed as typewriters gave way to mainframe computers which, in turn, gave way to personal computers interconnected through elaborate networks, as the telephone became an elaborate telecommunications device, and as a firm's investment in printers, fax machines, scanners, and telephone switches has soared into the stratosphere. Second, lawyers have become totally dependent on Information Service Directors and their staffs in a way the lawyers of old were dependent on no one. This loss of control has been accompanied by a dislocation in the financial pecking order. Once even the most junior lawyer made more money than the firm's highest paid law firm staff person. Today, many staff members, from non-lawyer Executive Directors on down, earn more than many partners, deservedly so, but the effect is destabilizing nonetheless.

Another problem, for which lawyers are more perpetrators than victims, is the breakdown of firm stability reflected in the growth of lateral hiring, a trend that started as a trickle but today is nothing short of a torrent. At one time lawyers joined firms for

life, starting as associates just out of law school or a clerkship, with a high level of expectation they would become partners. The thought of hiring an experienced lawyer from another firm just didn't occur. But as prospects for partnership began to lengthen, mentoring evaporated, and the loyalty that kept lawyers on board shriveled, entry level lawyers started thinking about their next job almost immediately, and firms were forced to search for fifth year associates to fill gaps created by unwanted departures.

So long as this remained an associate phenomenon the damage was containable. But once the movement of lawyers reached into the partner ranks, the effects were devastating. Partners with large "books of business" were sought by firms that ten years earlier would never have thought of hiring anyone who was not a recent law school graduate or law clerk. These itinerant partners, in turn, were lured by the prospect that the profits per partner at the new firm were higher than those at the departing firm, giving momentum to a "cherry-picking" process that was sanitized by the use of new service providers, the legal head hunters, whose calls flattered and whose failure to call left partners with no inquiries feeling decidedly left out. More important, the firm culture, once jealously guarded and enthusiastically extolled, fell victim to the new partnership that included so many lawyers hired away from competitors and therefore not inoculated with the Caldwell & Moore value system.

A far worse result was the corollary of this: the identification of so-called unproductive partners, those outstanding lawyers who had been rewarded with what once had been viewed as lifetime tenure, only to find that their billable hours were not quite up to the new standards and that they did not command the portable clients that would make them attractive to other firms and therefore someone worth trying to retain at Caldwell & Moore. Could there be a sadder sight than a fifty-five year old partner, having dedicated thirty years of his professional life to Caldwell & Moore, forced out by the firm for not being "fully engaged"? Partners are victims of a new mentality that asks not what contributions they have made to the firm during their careers, but what they have done for the firm this year, and which values a migratory lawyer with a sexy satchel of business over a loyal partner who has dedicated a lifetime to the enterprise. And, like the devastating effect of capital punishment on the executioner, the result of this new trend is not only exile for the departing partners,

but an overwhelming sense of remorse and regret among the “lucky” ones who retain their positions, prompted in part by the concern that the next round of down-sizing might send them packing as well.

Lawyer advertising must be a factor in the loss of happiness as well. For decades, the legal profession did not advertise and old ethics committee opinions consumed whole forests debating what wording could go on law firm letterhead. Then the Supreme Court decided *Bates*, the constitutional walls came tumbling down, and the Yellow Pages became the home to full page display ads whose bad taste, if not misleading nature, changed the image of the profession forever. Admittedly, benefits flowed from the Madison Avenue revolution: the impenetrability of the profession vanished, and information about affordability of legal services and rights that could be vindicated was given wide currency. But, yet again, the upside was not cost free. Lawyers hawking their services in thirty second commercials that ran with similar length spiels for Vegemats, Carpet Shampoos, and Johnny Mathis CDs were inconsistent with the image of a learned profession somehow above the commercial din of the marketplace.

Most of the profession doesn't advertise, you say, and therefore, this effect could not have been very far reaching. To a certain extent that's true. Caldwell & Moore is not sponsoring Geraldo — yet. But the floodgates that opened after *Bates* have not left Caldwell & Moore high and dry; they don't call it advertising, of course, but blatant commercialism still infects the firm's operations. Public relations houses have been hired, press releases are issued daily recounting trivial accomplishments by firm lawyers (“Lucille Josephs, a fourth year associate, gave a speech at a breakfast meeting sponsored by the firm”), firm newsletters and alerts, sent to huge mailing lists including non-clients, give instant analysis on the latest court decision or legislation, and institutional advertisements featuring stately mansions and thoroughbred horses are found in every charity program, all part of a zero-sum game in which no law firm gains an advantage but the entire profession has a chance to emulate life insurance or penny stock salesmen.

The so-called ancillary business movement reflects another way the profession has lost its soul. Not content to deliver legal services, firms looked with envy as their clients paid huge fees to other service providers for non-legal services. We could surely improve the bottom line, the theory went, if, instead of sending our

clients to Merrill Lynch for investment advice, we had our own investment adviser in-house, or our own environmental testing service, or our own merchant bank. Thus began the development of ancillary businesses for law firms, subsidiaries to which clients of the firm could be referred and which, in turn, could refer clients back to the firm. The fact that such arrangements were ethically dubious, confusing, and raised questions about conflicts, confidentiality, and rule-violating feeder operations was ignored. So was the fact that the resemblance between a law firm with subsidiary operations and any other financial services firm called into serious question the principle that Sears shouldn't own a law firm. Similarly ignored was the threat that establishing ancillary businesses had on the entitlement of the legal profession to self-regulation. If Caldwell & Moore resembles a financial services department store (litigation on 3; investment advice on 5) why shouldn't the law firm be regulated just like Citibank or PaineWebber? Instead of emulating our fellow professionals, the teachers, who as far as I know still aren't peddling school supplies or cafeteria services, our profession followed our colleagues in the medical profession who have engaged in a number of unfortunate practices in which their fees are enhanced by selling diagnostic tests that are administered by doctor-owned corporations.

### III. A Few Ideas

If the catalogue of ills befalling the profession is easy to list, the solutions remain as elusive as they seemed when first identified more than a half decade ago. As the trends have accelerated and the dismay quotient rises, the rush to disillusionment continues unabated, prompting books like Anthony Kronman's *The Lost Lawyer* and Mary Ann Glendon's *A Nation Under Lawyers*.

One thing is clear. There is no one instant panacea that is going to turn things around. The search for solutions is going to be long and arduous, and it's going to require not only leaders who are prepared to run a marathon, but literally hundreds of thousands of lawyers to say they are ready to stop griping and start doing something about it. The following are just a couple of thoughts offered tentatively and with no illusion that their implementation would represent a cure, but perhaps, just perhaps, they can stabilize the patient until those with more vision come up with more effective solutions.



### A. Leadership

First, we need leadership from within the profession. It's one thing to have academics, the judiciary, and the media talking about our ills. It's another to have private conversations among lawyers at bar association cocktail parties decrying the present state of the profession. But until the leaders of the practicing bar throw off the shackles of public silence, speak out on the evils they know exist, and lead the search for solutions, the problems will continue not only unabated but lead to worse effects than today's scene presents. When conferences addressing the crisis, featuring leaders of the practicing bar, are as well attended as the *American Lawyer's* "Managing the Law Firm Bottom Line in the 90's," then things will begin to happen. When the press features these newly emboldened critics with the same gushing attention it now lavishes on the opening of a new branch office or the merger with the shattered partners of some capsizing law firm, then our priorities will have been set aright.

One thought in this regard ironically enough comes from the same Steve Brill whose chronicling of and contributions to our malaise are well recognized. Attacking a complacent organized bar, Brill has suggested that a possible solution to the profession's problems would be to give our leadership longer terms in office. If it's the President of the American Bar Association who should be the spokesperson for the lawyers of the United States, why does that person serve but one year, long enough to get exhausted from criss-crossing the country, but hardly enough time to achieve a name recognition of even one percent. While the idea of rotating leadership and spreading the glory around may have been totally consistent with the profession's needs in a less demanding era, we either must take steps to create giants of the bar's leaders or convince the giants of the profession to accept these leadership positions, not just at the national level, but on the state and local levels as well. If this means making these jobs full-time, well-compensated ones, that seems a very small price for the profession to pay to have high visibility articulate spokespersons assuming the bully pulpits for three or more year terms. Brill is certainly right that few lawyers, let alone the public, can name the last five Presidents of the ABA. This is hardly the fault of the outstanding individuals who have held that position. Rather, it reflects the limitations that are inherent in a one year term.

### *B. Billable Hours*

Let me be clear at the start. The solution to our problems is not to take vows of poverty. Indeed, in an era when script writers for TV sitcoms can command \$13,000,000 contracts and athletes earn eight figures per year, there is nothing wrong with talented lawyers earning very high incomes for their difficult labors. But we have to remind ourselves as we approach the fee issues which confront us, that unlike Steven Spielberg, Michael Jordan, and Deion Sanders we are not free to charge whatever the market will bear. Lawyers are fiduciaries; Arnold Schwarzenegger is not. And lawyers' fees, by ethical mandate, must be reasonable; Julia Roberts's fees are subject to no similar limitation. Finally, lawyers have an obligation to explain the basis for their fees fully to their clients; no one would expect Barbra Streisand to provide MGM with any explanation for her director's fee.

Several specifics could ameliorate the concerns generated by lawyers' fees. Most important is a whole series of issues raised by the billable hour. There is no doubt that this method of billing can be an extremely fair way to charge for legal services. Too often it is impossible or at best extremely difficult for a lawyer to know how much time will be required on an engagement. In a transaction, the negotiations can be short and sweet or long and protracted, the shape of the transaction can change over time ("We'll do a merger; no, a sale of assets will be better"), tax issues can arise, lenders can impose new conditions, and a myriad of other issues never contemplated in the beginning may arise. On the litigation side, the imponderables are equally disconcerting. Will the case settle or be tried, how many depositions need to be taken, will there be a motion to dismiss, a motion for summary judgment, how many years will elapse before the case can be tried?

But the use of the billable hour depends entirely on the integrity of the lawyers to (1) keep accurate time records, (2) proceed efficiently, (3) make subtle judgments about the cost-benefit of undertaking a particular task, and (4) avoid overstaffing. So long as lawyers remember their fiduciary obligation to put the interests of the client ahead of the interests of the lawyer, there is no problem. But too often we have read of the abuses in the system. Double billing for time, churning of hours reminiscent of what some stock brokers have done with their customers' disappearing portfolios, billing for phantom hours ("I billed five hours

for that memo because that's what I charged my first client for it"), and other abuses have been reported too often in the national press.

We would like to think these are aberrations but, in fact, we suspect they more likely reflect an epidemic. Before we condemn the miscreants who have been "caught," however, we must recognize that the entire profession (or at least that portion that employs billable hours as a basis for charging our clients) has created this monster, that we all share some responsibility, and that we can take steps to correct it.

What can we expect from our colleagues when law firms proudly announce their billable hour quotas, goals or requirements for paralegals, associates, and partners? When we publish billable hour results? When penalties and awards are handed out based on these numbers? When partners and associates are asked to look elsewhere when their billable hours don't meet expectations? When we use billable hours as a substitute for determining who is indolent and who is motivated despite the fact we all know totally conscientious lawyers can have reduced billable hours simply because there is not enough work?

If you were a client and were told you were being billed by the hour, wouldn't you feel slightly uneasy, or worse, if you knew that the law firm you just hired had set a billable hour requirement for its associates of 2000? Wouldn't you worry that unfair pressure is being put on these lawyers and that some of that quota would be fulfilled at your expense? Just as you might hesitate going to a physician for a judgment on whether to undertake an MRI when you knew the physician owned the MRI center, the billable hour requirements call into question the integrity of the hours the client is billed.

Yet that integrity can be restored if the profession would rise up as one and condemn these unseemly billable hour goals, targets, quotas, or whatever other euphemism is used to describe what everybody understands to be requirements, if law firms would announce they were jettisoning this problematic management approach, if partners would recognize that it was not the associates' or the clients' but their responsibility to keep the firm's lawyers busy, and if law firm managers would embrace the notion that the determination of who was lazy and who dedicated to the business of the law firm required far more subtle judgments and attention than looking at some chart of lawyers ranked by hours billed

yesterday, last month, or last quarter. We must throw off the questionable approach and restore to clients the confidence that when hours are billed to their matters, it is because these hours were required and not because some lawyer was worried about keeping her job.

### *C. Pro Bono Commitment*

While eliminating the billable hour requirement would strike a blow for ethics and professionalism, this argument should not be taken as advocating for 1200 hour years. To the contrary, the 1800 or 2000 hour year for those engaged full time seems perfectly appropriate. No dedicated lawyer should be spending significantly less pursuing his or her career. But instead of spinning wheels, lawyers should be spending truly meaningful hours addressing the problem that is presented by a disturbing disconnect that confronts the profession. On the one hand, firms are complaining that lawyers' hours are down, associates and partners are not fully engaged, and that demand for high priced talent is not expanding fast enough to feed the insatiable needs of firm expansion. On the other, the current legal needs of the poor and the middle class have never been more compelling. Legal Services offices are closing, lawyers for the indigent are being laid off, back-up Legal Services resource centers specializing in health, housing, education, and other important areas of concern have been shuttered, twenty-three post conviction defender organizations have been threatened or eliminated, and among the middle class, it is almost impossible to find lawyers to perform any services at affordable rates, other than those that can be provided on a contingency.

One would think this coming together of demand and supply would yield spectacular returns. But, in fact, buyer and seller haven't even met. Law firms are busy celebrating what amounts to little more than token results. A whole ABA project has been built around congratulating precious few lawyers contributing just three percent of their time to the unmet needs of the poor. And a few firms' extraordinary examples of pro bono service stand out in part because almost no one else is doing it. If hundreds of patients were not receiving open heart surgery for lack of physicians, the screams of outrage would be reproduced in twenty point type across the headlines of America. Yet literally hundreds are now on death row without any counsel to process their first federal habeas corpus petition.

To answer this need, why shouldn't every firm of over fifty lawyers take one of these admittedly gut-wrenching, time-consuming cases? With hundreds of talented and experienced legal services lawyers being laid off, why shouldn't every firm of over 100 hire one, just one, legal services lawyer to be an in-house pro bono coordinator? With legal services offices closing throughout the major cities, why shouldn't every law firm with over 200 (over 150 firms) lawyers establish a neighborhood office like Leonard, Street & Deinard in Minneapolis to replace the needed services in the neighborhoods? And with fifteen key legal services back-up centers and more post-conviction defender organizations closing, why shouldn't every firm of over 300 (over seventy in all) and every ABA Section and major State Bar Association join together to "adopt" one of these centers?

None of these suggestions is intended to "slight" solo practitioners, lawyers in firms smaller than fifty or, most importantly, lawyers practicing in-house. The pro bono response must come from the entire bar, though certainly those whose incomes soar into higher six figures have less fiscal constraints on their being both daring and dramatic. One particularly disappointing area of pro bono commitment at present is the thousands of talented lawyers employed by corporate America. The few companies that have made a major commitment have proved what can be done, even when the lawyers are full-time corporate employees. Yet they stand in too sharp a contrast to an abdication by others that is totally inconsistent with in-house counsels' understandable demands to be treated as full-fledged and fully respected members of the Bar. And one perfect way to improve relations between outside counsel and in-house lawyers is to establish partnerships in pro bono that permit each side to bring their special talent and capacity to the problems of the indigent.

The Biblical precept of tithing — contribution of ten percent — could also be the goal for everyone in the legal profession. And if every lawyer in every law firm and law office cannot find an outlet for 150 or 180 or 200 hours per year, let these lawyers, through aggregation, achieve the same result by having some of their lawyers devote full time or half time to legal services for the poor.

Lawyers have a monopoly on legal services. What better way is there to preserve this privilege than to demonstrate that without mandatory pro bono or other involuntary programs, lawyers are

prepared to dedicate real time — ten percent of their time — to the provision of free legal services to the needy? Not only will this commitment translate into a new view among the public of the legal profession, but the effect on the lawyers, the satisfaction of dealing with clients who truly appreciate what they are doing, the opportunity to be self righteous, the chance to remember why one went to law school, all will translate into a level of satisfaction that may, just may, counterbalance the disquiet we hear so much about and assure that every lawyer is busy for 1800 or 2000 hours, even if they are not all billable.

#### *D. Quality of Life*

While we are addressing hours, it is a good time to raise another sensitive subject. The profession has too easily fallen into a trap that 1800 or 2000 billable (or non-billable) hours must be a norm. The latter represents forty hours per week with time off for just a few major holidays. Every conscientious lawyer knows two things. To be a good lawyer, significant additional time must be devoted to reading advance sheets and law review articles, attending continuing legal education programs, and engaging in other activities necessary to stay abreast of new developments. Second, unless one is attending a trial, a deposition or a closing, it is almost impossible to get a billable hour out of an hour on the clock. We take breaks, are interrupted, eat lunch, grab a cup of coffee, take calls from friends and so on. Which means an 1800 billable year represents perhaps 2500 hours in the office or working at home, a figure that translates into fifty hours per week.

This extraordinary expected time commitment, even when self-imposed (and among most lawyers I know that is the case) exacts two real costs. First, we are working too hard, leaving ourselves not enough time to enjoy families, read a novel, take in a concert, stare at a gallery of paintings, walk in the woods, or pursue a hobby. Second, we are cheating the profession out of the opportunity to have the participation of those who, out of necessity or choice, wish to work part time, particularly given the fact that our profession's part-time commitment would translate into full time in most other areas of endeavor. We give lip service, of course, to accommodating the needs of those with child care responsibilities, but the statistics on the dropout rate of those on whom these tasks fall most heavily — women lawyers — suggests that we have failed miserably, losing talent, dedication, diversity, and opportunity,

while at the same time creating an additional source of dissatisfaction that overlays all of the other pressures on the profession.

So, while on the one hand I urge us to dedicate ourselves to 2000 hours per year, billable and non-billable, on the other, and without being too inconsistent, I urge us to embrace to our professional bosom those who are forced or wish to work less. And I ask each of us to ask ourselves whether we wouldn't be that much happier and better lawyers if a greater portion of our waking hours were dedicated to some totally non-law related activities.

In the same vein, we should think of other ways to improve our professional lives. Go to a cocktail party with a group of lawyers, listen to some tales of discontent, then ask who would leap at a chance to take some real time off. Suggest a sabbatical and a Greek chorus will respond with enthusiasm that clearing the cobwebs is just what is required. But then you will learn, if the talk turns serious, that these lawyers couldn't possibly do this because (1) they fear losing clients, (2) their partners would never permit it, and (3) they don't know what they would do with the time. Yet several firms have elaborate and mandatory sabbatical programs in which their lawyers successfully recharge their batteries teaching, writing, traveling, or working in a legal aid office. And if a few can do it, any firm can if the bottom line ceases to be the only value, if partners agree to backstop each other, and if the firms as institutions recognize that the cost of this program will evaporate as their lawyers become happier and come back refreshed with rich experiences, enhancing their ability to be better lawyers.

### *E. Client Loyalty*

In addition, we must end the assault on client loyalty. Many forces have come together to create this problem. First, there is the breakdown of the client-lawyer relationship. Gone are the days when Caldwell & Moore was the exclusive law firm for First of Philadelphia. In part to enhance the power of in-house counsel, in part to hire the best lawyers in particular specialties ("Caldwell & Moore really isn't very strong in environmental"), and in part to conflict out a large number of capable firms, clients now spread the work among ten, twenty or more firms. Law firms in response have felt that since The First is now using so many other law firms, maybe there are certain matters Caldwell & Moore can take adverse to the First.

Next is the growth of large law firms, some numbering over a thousand lawyers, operating in many cities, resulting in a concomitant increase in the number of conflicts that they must confront together. Third, is the lateral movement discussed earlier — lawyers moving from firm to firm like free agent outfielders, carrying their potential conflicts in their travel bags. When these factors are added to the last — the extraordinary financial pressure, in this cut throat age when the generation of new client matters is the Holy Grail, to avoid turning down a new matter — the assault on the present conflict of interest rules becomes a crusade.

We now hear calls to permit wholesale screening of transferring lawyers, without client consent, forcing clients to accept on faith and without protest that their lawyers carrying confidential information to the opposing law firm can be trusted not to share client confidences. We hear serious arguments that separate offices of the same firm should be treated as different firms for conflict purposes and stories are told of law firms in the mergers and acquisitions area representing buyer and seller. We have the State of Texas adopt an “ethics” rule that permits representations adverse to existing clients so long as the matters are not substantially related. We watch an ABA Standing Committee on Ethics and Professional Responsibility issue an opinion which permits lawyers to treat the members of a corporate family as if they were separate clients. We observe Reporters for the ALI Restatement of the Law Governing Lawyers seriously argue that a representation is not “adverse” when you are on the other side of a transaction, as opposed to litigation, with a present client.

All of these are frontal attacks on the traditional notions of client loyalty. The fact that they are responses to client conduct, financial pressure, and the realities of the legal employment marketplace is seen as justification enough for this trend. However, as a profession we cannot afford to accept such a wholesale challenge to one of our fundamental values in the name of either retaliation or financial expediency. Not when the cost is the public’s view that lawyers are willing to sacrifice traditional notions of loyalty, one of the few principles that separates us from the commercial workplace. The public simply will not regard the profession in the same way when, without seeking client consent, we ask a client to accept the lawyer who switched sides because he has been “screened” (whatever that means). Nor will we earn respect when we simply inform the client that we have sued its



subsidiary because the affiliate is not the client and, therefore, we owe it no duty. Clients cannot understand what ethical principle is being fostered by a rule that concludes a law firm representing Chevrolet cannot sue Oldsmobile, but a law firm representing Ford can sue Jaguar. Nor do clients understand the narrow view that the only adverse representations subject to the conflicts rules are those in which there is some animosity.

Regardless of the atmospherics, clients do not want their lawyers on the other side without their consent; clients recognize that adverse effects can result just as easily from a negotiation as from a jury trial. And every time we, as a profession, try to erect a sophisticated argument around the conflict of interest rules, we may be awarded for our ingenuity and even earn a few extra dollars, but the cost to our professional image in the eyes of the public and, more important, in our own eyes is again too high.

Now is a time, with the profession's standing under attack, when we must strengthen our ethical precepts, not undermine them with proving how clever we are. The principle of lawyer loyalty is one of the most important factors that distinguishes us from the commercial rabble; our goal has to be to err on the side of avoiding conflicts, not seeing how close to the ethical boundary we can walk.

#### *F. Relationships*

We must learn to take care of each other. So much of the change in the profession reflects lawyers attacking lawyers, undermining our own institutions, abandoning our values for some fleeting commercial advantage. This is occurring at so many levels, between outside counsel and in-house counsel, between partner and associate, and even between partner and partner.

We must lower the decibel level in the relationship between outside counsel and in-house counsel. These lawyers are serving the same clients, and they have so much more to gain and to offer from mutual respect and cooperation than they will ever gain from some accomplishment that comes at the other's expense. We all know that in-house counsel's distrust, reflected in excessive record-keeping requirements, a burgeoning bill-auditing business, second guessing based on 20-20 hindsight, and threats to move the business elsewhere, has prompted or been prompted by examples of excessive billing, overstaffing, failures to communicate, and other transgressions that outside counsel know all too well occur with too much frequency. Outside counsel has to recognize the enormous

pressures on in-house counsel, earn their trust by delivering high quality services at a reasonable cost, and ensure in-house counsel is kept well informed and is a full participant in the decision-making process. This should be reciprocated with the elimination of needless nit-picking, the prompt payment of invoices for professional services without the need to fill in yet one more form, the building of long term relationships, the sharing of responsibility for the results, and a reduction in the humiliating anxiety outside counsel now endures. All of this, of course, will have the added benefit of assuring that the mutual client will get better services from a happier inside-outside team, simply because all members of the team recognize the importance of taking care of each other.

We also must rebuild the values of our law firms, remembering that while there is nothing wrong (and, indeed, everything right) with putting firms on a business-like basis, law is not just a business, that not every decision that improves the bottom line is, therefore, the right one. A big start would come if partners would make associates feel that they are not simply so many billable hour producing machines to be terminated as soon as they fail to meet firm billable hour quotas or goals or when there is a one year downturn in their area of practice. We must assure associates that they are not participating in a run for partnership where the route is obscure, the finish line ever receding, and the rules never stated. We must make sure our associates are not trapped in the library, stripped of their weekends and nights at home, rarely receiving constructive criticism and feedback, denied a sense of belonging that lawyers in an earlier generation received in generous quantities. It takes time, it costs money, it's hard work, but if we don't provide the caring mentoring, the understanding, and the leadership, partners will reap as we sow.

Most important, because everything follows from it, law firms must rededicate themselves to remembering what the title "partner" means. Nothing has provided more glue to our profession than the concept of partnership within law firms, the idea that at some point judgments are made that a lawyer is worthy of being invited into the firm, to be a partner, to earn something akin to tenure, to know that more than equations will determine how partners are prepared to take care of each other. Prosperity appears to be destroying this concept, turning partnership into a less secure status than being an associate was just two decades ago. But if we cure our own houses where we live, then work on our

relationships with in-house counsel and clients, speak out on important issues that confront the profession, remember that we are not operating just another commercial enterprise, and dedicate ourselves to pro bono, there is no limit to the success we can achieve.