THE COMMODIFICATION OF INSURANCE DEFENSE PRACTICE*

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INTRODUCTION

There is a vibrant and growing empirical (and theoretical) literature on the plaintiffs’ bar (Daniels and Martin 1999; Daniels and Martin 2001; Daniels and Martin 2002; Kritzer 2001a; Kritzer 2001b; Kritzer 2004; Rosenthal 1974; Van Hoy 1999). Much of that research, at least in the United States, has focused on the implications of the contingency fee structure for the work of lawyers representing individuals who pursue injury and other kinds of claims. The interest in this work reflects both the growing political salience of the plaintiffs’ bar and the argument that the contingency fee structure may create perverse incentives that produce significant conflicts between lawyers and their clients, and between lawyers and societal interests.

In contrast there is relatively little research, either empirical or theoretical, focused specifically on the lawyers who stand opposite the plaintiffs’ bar: the insurance defense bar. There is Laurence Ross’s seminal book on claims adjusters, but while he discusses the adjusters’ relationships with claimants’ lawyers, there is no discussion at all of adjusters’ relationships with outside counsel hired by the insurance company to represent insureds once a claim is in suit (1980, 215-224).1 There is some theoretical and empirical literature related to hourly fee arrangements (Johnson 1980-81; Kritzer, Sarat, Trubek, Bumiller, and McNichol 1984), which are the dominant way by which insurance defense lawyers charge for their services, but that

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1Ross briefly discusses the costs of outside defense counsel but nothing more is said regarding lawyers hired by the insurer (1980, 139).
literature does not zero in on lawyers doing insurance defense work.² And there is at least some recent interest in the implications of shifts in insurance defense practice toward alternative billing arrangements and the use by insurance companies of in-house or captive firm counsel (Barker 2004; Silver 1998). However, none of the past work provides either a good empirical or theoretical picture of insurance defense practice, either as it might have existed 30 to 40 years ago, or as it now exists.³

In this paper, I present a preliminary analysis of insurance defense practice using the heuristic of a commodity.⁴ The core of the argument I present is that insurance companies have come to view the more routine work of insurance defense as something to be purchased in a market place where there are a large number of interchangeable providers. Loyalty between buyer and seller, if it ever existed, is a thing of the past. Today insurance companies shop for the best deal which may include producing insurance defense services in-house rather than purchasing those services from an outside firm. As is true of any commodity seller, insurance defense firms seek to differentiate their product from their competitors; how successful they are in doing so is hard to ascertain. Insurance defense firms also seek to maintain the kinds of person-to-person loyalties that were probably the mainstay of insurance defense practice 30 to 40 years ago, but insurance companies have increasingly put in place policies that make this much more difficult.

The discussion that follows is tentative. I have virtually completed data collection, but the analysis at this stage is largely impressionistic. Several interviews are yet to be transcribed, and no systematic coding has yet be done. Thus, much of what I say below may change as I engage my data more deeply.

RESEARCH DESIGN AND DATA COLLECTION

In the fall of 2003, a group of researchers whose work focused on civil justice issues was brought together by Professor Les Boden of the Boston University of Public Health to brainstorm ideas for research on the impact of the Daubert decision (Daubert v. Merrill Dow

²There have been studies of areas of private practice where hourly fees are commonly charged, but these studies focus on lawyers who do work for individuals rather than corporations, and hence do not include insurance defense work (see Mather, McEwen, and Maiman 2001; Seron 1996, 154).

³Most of the writing on captive and in-house legal staff in insurance defense focuses on the ethical problems that arise when there is a conflict between the insurance company and its insured.

⁴The idea that insurance defense has become a commodity practice has been expressed previously; see Cox (1997)
Professor Boden was a member of a group based at George Washington University called the Project on Scientific Knowledge and Public Policy (SKAPP), which describes its goals as: to engage “scholars and scientists in the study of scientific evidence and its application in the legal and regulatory arenas in order to enhance the scientific community’s understanding of how science is used in public policy and legal proceedings; to inform decision-makers about the nature of scientific inquiry and opinion; and to advance the public's understanding of the role of scientific evidence in government programs that seek to protect public health and the environment.” Major support for SKAPP is provided by the Common Benefit Trust, a fund established pursuant to a court order in the Silicone Gel Breast Implant Products Liability litigation, with additional support from the Alice Hamilton Fund and the Bauman Foundation.

I proposed a project that I called, “Daubert in the Law Office”; the idea of this project was to observe for a period of months in a law firm in the Twin Cities area that had a book of business that included cases where Daubert issues were likely to arise. Some initial explorations of this idea led me to decide to focus on the defense side and to design the project to have two tracks, one focusing on Daubert and one focusing on insurance defense practice broadly defined. I eventually found a law firm what was willing to have me “hang out” at their offices. During my time in the office, I would be officially designated as a paralegal, and I would take on any tasks assigned to me that were within my competence; I would log any time devoted to paralegal tasks in the firm’s timekeeping system.

The firm, which I call “Etling, Burke & Howe” (EBH), consisted of 60-70 lawyers. The firm is divided about evenly between a transactional practice and a litigation practice. Most of the litigation practice is insurance defense, including auto, construction, products, medical malpractice, other kinds of professional negligence, premises liability, major property loss, and workers’ compensation. The litigation and transactional groups are quite separate; it is almost as though there is an office sharing arrangement that includes sharing infrastructure support (information technology, overhead, human resources, etc.). There is some tension between the two groups: the transactional group is able to charge considerably higher rates to its clients, but they have both a higher overhead and a lower collection ratio; in contrast the litigational group charges lower rates, but the insurance clients pay their bills, at least after auditing.

Over the three and a half months during the fall of 2004, I spent about two weeks with each of five different lawyers plus shorter amounts of time with two other lawyers. These


6The paralegal designation would bring me under attorney-client privilege rules; assigning me some actual work would avoid challenges that this designation was simply a fiction. The tasks I performed included some memo preparation, assisting on drafting of briefs, assisting at depositions, review of discovery materials, and assisting lawyers in preparing for presentations.
lawyers did a variety of types of insurance defense work including workers comp, auto accidents, products liability, professional liability, and other personal injury; the auto work included traditional liability, uninsured and underinsured motorist (UM/UIM) claims, and no-fault claims (Personal Injury Protection or PIP) where the insurer and the insured disagreed over whether treatment was reasonable and necessary. In addition to insurance defense work, the firm also handled insurance subrogation cases and insurance coverage matters.

I chose to do this research in a single firm rather than multiple firms because of the potential for conflicts.Originally, my concern flowed from the fact that the firm did some commercial litigation in addition to the insurance defense litigation, and there was a chance that a case that I saw at EBH might turn up at any similar firm where I might observed with the second firm representing a client adverse to EBH’s client. In fact, I underestimated the problems that might have arisen if I had observed in multiple firms: a large number of cases involved multiple insurers who had adverse interests. In some types of cases, the issue was essentially one of subrogation where an insurer was trying to recover payments made to its insured from another insurer. In other types of cases, there were multiple defendants; this was particularly true in construction cases where the general contractor who, after being sued by an owner, brought in subcontractors and materials suppliers, each of whom had its own insurer. In some types of cases, a single defendant might have had multiple insurers on the risk over a period of time, and there were issues regarding whose risk it was and/or how to share out the risk.

During my observation, which typically was from 8 in the morning until 5-6 in the evening, I kept notes on steno pads. Each evening I transcribed and expanded those notes using my wordprocessor. I have done one detailed review and highlighting of those notes. Eventually, the notes will be systematically coded using qualitative analysis software.

One of the problems of observing in a single firm is that I might have gained access to the weirdest insurance defense firm in the Twin Cities (many people offered to tell me if that was the case if only I would tell them the name of the firm). To assess the generalizability of what I observed, at least its generalizability to insurance defense practice in the Twin Cities area, I conducted a series of interviews with insurance defense practitioners in other firms. I identified potential respondents in a variety of ways. I started by asking key people at EBH who their main competitors were. A second source was the membership roster of the Minnesota Defense Lawyers Association which is posted on MDLA’s website. The final source was suggestions from respondents (i.e., I asked each respondent what other firms I might want to talk to). A total

7In my study of contingency fee practice, I observed for a month in each of three different law firms.

8In fact, there was at least one case I observed some activities on at EBH that I later heard about from a lawyer I interviewed.

of 16 interviews have been completed with insurance defense practitioners (one more is scheduled as I write).  

Most of the interviews have been recorded and transcribed. Two respondents declined to be recorded; in those sessions I took detailed notes and then reconstructed as best I could the respondent’s answers within a couple of hours of the interview. Given that all interviews have not yet been completed, no systematic analysis has been done of the transcripts. Eventually they will be coded in much the same way as the observational notes will be coded.

The Business Realities of Insurance Defense Practice

Insurance companies buy a lot of legal services, and given the quantity of such services they buy, they want what is akin to wholesale prices for those services unless they are confronting exceptional circumstances (i.e., the threat of a very large loss, probably eight figures or more). Because of that volume, insurance companies are able to secure hourly rates that are well below those that are paid by other commercial clients. Relatively few insurance defense lawyers in the Twin Cities are able to charge rates in excess of $150 per hour. More typical rates are in the range of $110 to $120 per hour for associates and $135 to $140 per hour for even the most senior partners; at some firms, the rates charged by associates start out as low as $90 per hour. To put this in perspective, the going rate for auto mechanics in the Twin Cities is $80 per hour, and for plumbers as much as $150 per hour.

Insurance companies are able to get these wholesale rates because they do not have loyalty to their outside lawyers. Insurance defense lawyers can raise their rates only cautiously because insurance companies can easily move the work, either to competing firms or to in-house/captive offices (see Cox 1997). While for much commercial work, there is a cost to changing lawyers in that the current lawyer will have a lot of working knowledge of the client’s affairs that will take time to replicate in the new firm, the nature of insurance defense work is such that there is little if any such cost involved. Insurance companies have in place detailed litigation policies that can be handed to the new firm, and in many cases the authority of local claims staff is so constrained that the personal relations that might exist between outside counsel

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10 I have also conducted approximately a dozen interviews with lawyers whose practice involves cases likely to raise Daubert issues.

11 This is the nominal rate for mechanics; the time that is charged is based on the “book” time, and good mechanics can consistently beat the book time which means that their real rate is something more than $80 per hour (probably more in the range of $100 to $120 per hour). Moreover, this figure is for labor only, and does not include the markup on parts; my guess is that a good mechanic probably generates close of $150 per hour net of the cost of the parts he or (very occasionally) she installs.
and those staffpersons, particularly when combined with litigation policies, has little impact on the handling of cases.

Alternative Fee Arrangements and Their Implications

The purchasing power of the insurance companies is such that threats to leave or move work in-house can lead law firms to consider “deals” with the insurers that shift risks from the insurer to the lawyer. As one lawyer described the situation to me, “insurance companies became resistant to paying by the hour [because] they didn’t trust the counting of hours and wanted some protection against inflated prices arising due to the slowness of the lawyers.”

The result is a variety of alternative fee arrangements. Most of the insurance defense lawyers I spoke with indicated that the issue of alternative methods of billing had come up with their insurance company clients. Some of the firms were doing work on an alternative fee arrangement, some had done such work in the past, and some had successfully resisted adopting such arrangements. My sense is that the latter group tended to have hourly rates more toward the lower end of the spectrum which might mean that in the judgment of their insurance company clients there was nothing to be gained by alternative fee arrangements. Of those lawyers who reported that their firms in the past had alternative billing arrangements but no longer use them, some reported that the decision to drop the alternative arrangement came the insurance company and some reported that it was a firm decision.

The simplest alternative billing arrangement is some sort of flat fee: the firm receives a fixed amount for handling a case. Such arrangements make sense when cases are fairly predictable and routine. Thus, the most common type of case involving flat fees were PIP cases where the firm represented the insurer in a dispute with the insured over no-fault benefits; under Minnesota law, most of these cases are resolved through arbitration if they cannot be settled. Much of the preparation for the arbitration is done by the paralegal, and the lawyers I observed could handle them with a couple of hours of arbitration preparation; the arbitrations themselves were very quick. Given that most of these cases involved disputes over what medical treatment should be covered by the insurer, much of the lawyer’s time went into setting up independent medical exams (IMEs) and preparing medical records to be provided to the physician conducting the IME. Overall, the time required for these cases was quite predictable, and so lawyers can handle such cases on a fixed fee basis.

However, the fixed fee arrangement creates some other problems. Given that the full fee is payable even if the case settles after it is referred to the lawyer but before arbitration, insurance adjusters may be reluctant to refer cases that they think will settle. One effect of this is that adjusters sometimes delay referring cases, and this can result in cases be poorly postured.

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12One senior partner at Etling, Burke & Howe told me that they had entered into their first alternative fee arrangement in the mid 1980s.
when the lawyer finally receives it. One lawyer I spoke to emphasized this as a recurring problem, and said that his firm was negotiating with one of its insurance company clients to modify the arrangement so that adjusters could consult with the firm on an hourly fee basis prior to referring the case, with any fees generated being credited against the fixed fee if the case were to be turned over to the lawyer. Another lawyer told me that his firm avoided this problem by having an understanding with insurers that referred files on a flat fee basis that if the lawyer felt the case could be handled very quickly, they would handle it on an hourly basis rather than charge the normal flat fee.

I was told of other attempts to use flat fee arrangements in traditional tort cases or in UM/UIM cases. These arrangements seem to be short-lived, with neither the insurer nor the firm particularly satisfied with the results. According to the lawyers, the insurers tend to resent paying flat fees and then having cases settle quickly; one result is that the mix of cases referred to lawyers, which had been the assumed mix when the deal was struck, tends to change with fewer of the “quick” cases, the “slam dunks,” being referred. This is not surprising; if an adjuster has $10,000 on the table and the plaintiff is demanding $20,000, if the fixed fee that will be payable if the case goes into suit is $5,000, the adjuster will find it advantageous to try to settle the case for anything $15,000 or less.

Alternative billing arrangements were not limited to flat fees. Other fee arrangements I saw or was told about include:

- Flat fee with optional opt out for a specified percentage of cases (i.e., the firm can designate up to xx% of cases that it handle on an hourly fee rather than a flat fee basis).
- Mixed flat fee/hourly fee in which the case is handled on a flat fee up until some specified stage of the case (e.g., the start of depositions or the start of trial) and then shifts to hourly.
- Time-capped flat fee in which a case is handled on a flat fee with a cap on the amount of billable time covered by the flat fee such that if the cap is exceeded, the fee shifts to hourly for time beyond the cap.
- Simple phase billing in which an agreed upon amount is paid for each stage of a case (opening and answering, initial motions, depositions, pretrials, etc.); usually these arrangements shift to hourly once trial starts.
- Multi-track phase billing in which cases are identified as simple, medium, and complex with different phase billing amounts for simple and medium, and straight hourly billing for complex cases.
- Mixed hourly and “unit” billing in which some activities are done on an hourly basis and some on a “unit” or per diem basis (i.e., a specific amount for a deposition, a specific amount for reach day of trial).
One lawyer described to me his typical relationship with the actual client. When the lawyer receives the file from the insurer, he writes to the client (the insured) to introduce himself and to alert the client that the case is in suit. The lawyer may have a telephone conversation with the client to get the client’s side of what happened, although if there is a statement from the client, he may rely on that during the preliminary stages. The lawyer will typically not actually meet the client until it is time for the client’s deposition at which time he will have the client come in an hour or two before the deposition for preparation. Unless the case actually goes to trial, the only other contact the lawyer will have with the client will be when he sends the client a letter informing the client that the matter has been resolved.

From the viewpoint of the law firm, by accepting some of the risk the firm is providing an additional service to the insurer. However, the market position of the insurers is such that they often, if not usually, can essentially get this additional service at little or no cost from the provider.

One major dilemma that these arrangements present is that, as with any billing or fee arrangement (see Johnson 1980-81; Kritzer 1994; Kritzer 2002), the incentives of the payer and the payee of the fee dependent on the arrangement, and behavior is at least modified by the incentive structure, even if there is an agreement that cases will continue to be referred as before and that lawyers will continue to handle cases as before. I discussed above some of these incentives with regard to the flat fee; it is easy to imagine the incentives effects that go with other arrangements (e.g., for open-file billing, there is an incentive to keep a file open at least until costs have been covered).

This is a particular problem when the client is not the insurance company paying the lawyer’s bill but the insured whose policy requires the insurer to cover the cost of defense. While in most cases, claims are well within policy limits, and hence the insured simply wants to have the insurance company deal with the case and be involved only when necessary, alternative billing arrangements can be extremely problematic if there is any risk of the case going to trial and resulting in a verdict that exceeds insurance coverage. Thus, if the incentive structure discourages the defense lawyer from undertaking the same level of pretrial preparation that lawyer would undertake if being paid on an hourly fee, then the lawyer may be subject to claims of malpractice from the insured, and possibly to disciplinary action from the regulatory body responsible for the legal profession. The solution to this problem is to limit the use of alternative fee arrangements to matters where the lawyer represents only the insurance company (no fault claims and UM/UIM claims) or to cases that clearly fall well below any policy limits.

The lawyers at Etling, Burke & Howe appeared to feel that how they handled a case was influenced, at least somewhat, by the fee arrangement under which they were working. Under

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arrangements where they do not bill the client for their time, there is an incentive to increase efficiency. Thus, if there is a choice between using a formal discovery process to obtain needed information and trying to get that information without the time and expense of a formal process, under alternative billing arrangements the lawyer may be more inclined to use an informal process. Under some of the arrangements there is an incentive to move files along as quickly as practical given the issues in the case; one EBH lawyer work who often worked under alternative fee arrangements commented to me that he has had plaintiffs’ lawyers say things like, “thanks for getting this done so quickly.” Another lawyer whom I accompanied to a judicial settlement conference commented as we walked to the court house that that he had no incentive to keep the case going because it was a flat fee case (he also commented that the plaintiffs’ lawyer probably wanted to get it settled because that lawyer’s investment in the case already well exceeded any fee the lawyer could expect to get).

Another kind of incentive effect of various fee arrangements is with regard to who within a firm should do various tasks. Under an hourly fee arrangement, the obvious incentive is to have as much work done by “timekeepers” (i.e., staff who track and bill for their time) as possible, provided that the client is willing to pay for work. Typically, the insurer’s litigation guidelines specify some tasks that they will not pay for on the assumption that the work should be handled by clerical staff (e.g., scheduling depositions, arranging for a court reporter, sending forms requesting medical records, etc.). However, even within such guidelines, there is a lot of discretion reflecting how tasks might be characterized. For example, what is involved in requesting medical records? If it is simply filling out a form requesting all records between two dates, attaching a release from the plaintiff, and mailing it to the medical provider, it makes sense to label it a clerical task. However, if what is involved is reviewing medical records received to date, identifying gaps in the medical records or issues that require additional investigation (e.g., possible pre-existing conditions), and preparing a request that specifies in some detail the records being requested, this is more than a clerical task. Thus, the goal under an hourly fee is to push tasks upward in the fee hierarchy. This must be done with some sensitivity, both to formal guidelines and to the continuing relationship and the desire for future business; a lawyer does not want the insurer to develop a view that the lawyer is “overstaffing” a case, either in the sense of spending too much time on the case or in the sense of having tasks done by more expensive personnel than is necessary.

While an hourly fee creates an incentive is to push work up to timekeeping and higher priced staff, under a non-time-based arrangement the incentive is the opposite: to have the work done by the least expensive personnel that can do an adequate job. The firm wants to keep costs as low as possible because any difference between costs and fee is either profit or loss; the lower the costs, the higher the profit (or the lower the loss). Thus, even if an insurer being billed on an hourly basis would pay to have a paralegal complete a task (e.g., preparing a treatment chronology), if the task could be done by a secretary paid $20 per hour rather than a paralegal paid $30 or $40 per hour, if the time was not being directly billed to the insurer, it is advantageous to have it done by the secretary. Similarly, if there was an investigatory task that could be done either by the lawyer or by the paralegal (or a law clerk or an investigator), the incentive as to who should do the work depends on the billing arrangement.
In some ways these seem like straight-forward choices. The difficulty arises when a firm does work on a variety of fee arrangements. If company X pays by the hour while company Y pays on an “open-file” basis, the firm would like to have work distributed differently depending on whether the file is from company X or company Y. However, from a management perspective, this is extremely difficult to bring about. At Etling, Burke & Howe there was a drive to increase the ratio of timekeepers to secretaries as a way of reducing overhead. However, this only reduces overhead under the hourly arrangement where secretarial staff is a pure cost and produces no income; under alternative arrangements secretarial staff can be a profit center if the secretary is able to do work that under an hourly arrangement would be assigned to a more costly timekeeper.

**Marketing: Getting and Keeping Business**

As with any business, insurance defense firms prosper only as long as they have a continuing flow of work that is reasonably predictable. Traditionally, firms did many things to maintain a good flow of work from their insurance company clients. One element of this was to be very cognizant of the insurers’ expectations vis-a-vis costs. While the natural incentive under an hourly fee is to bill as much time as possible in a given case, this is not true of one is dependent on current sources (and payers) for future cases; under that circumstance, the lawyer has to take care that the bills do not seem out of proportion with what other firms are charging or the adjusters’ expectations.

The adjuster with whom the lawyer interacts has played an important role in the dance of expectations, and law firms have worked hard to maintain good working relationships. In the past firms would arrange to entertain the adjusters that they worked with. This could involve happy hours, going out for meals, tickets for sporting events, golf outings, hunting and fishing trips, and the like. Social aspects were important to keep the relationships well-oiled. However, insurance companies have moved to limit the role of the front-line adjusters in these relationships. This has happened in a variety of ways. Insurers have centralized claims offices so there were no local personnel (making social events difficult), or have greatly limited the

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14 One other issue that has developed relates to gender. Many of the traditional marketing activities are geared more toward male interests than to female interests (sporting events, golf, hunting, fishing, etc.). This made sense in a time when most adjusters were male (Ross 1980, 28). However, the adjusters with whom the lawyers work are increasingly women; one lawyer estimated the percentage of women adjusters as high as 90 percent, and no one whom I asked gave a figure less than 50 percent. Some firms have adjusted their entertainment activities to include theater tickets and even have designed events so there was a choice between playing golf and spending time in a spa. At least one woman attorney I spoke to expressed discomfort over social situations where she found herself taking a male adjuster (or a group of male adjusters) to dinner or out for drinks; waitstaff would always present the bill to the male.
Limited authority at the local level is by no means a new development (see Ross 1980, 15-172-174).

Many insurers have begun enforcing policies they had on their books restricting adjusters’ participation in these activities; such policies are not new, but little attention had been paid to them until recently. At least some firms have tried to work around these policies by wrapping meals or other “goodies” into seminars at which they present information on recent developments that are relevant to the adjusters’ work.

Even with such limits in place, it is clear that defense lawyers continue to value the relationships they have with the adjusters they work with on a regular basis. The lawyers I sat in with at Etling, Burke & Howe routinely spent a bit of time during most telephone conversations with adjusters engaging in some informal social chat about family, activities, sports teams, and the like. While in most cases this amounted to only a minute or two at the beginning of a call, in occasional cases it could go on for some time. After one fairly lengthy bit of social chat I overheard with an adjuster, the lawyer commented that this adjuster tended to go on and on, and to maintain the relationship the lawyer felt it necessary to engage in the long conversations even though he could not bill the time. Lawyers at EBH continued to do more traditional activities such as taking adjusters to lunch, distributing tickets to sporting events, and purchasing small gifts for adjusters at opportune moments. An example of the latter involved an adjuster who was a theater buff and who was making her first trip to London; the lawyer went to a local book store to purchase a couple of travel books on London as a gift for the adjuster (an expense that would be billed to the firm’s marketing account).

Bill Auditing and Litigation Guidelines

Insurance companies have sought to develop systematic methods of monitoring the billing practices of the outside lawyers they employ. Best known in this is the controversial use of outside auditing firms where the bills submitted by the firm are reviewed and frequently reduced (never increased). Lawyers in many states have attacked such auditing practices as violating attorney-client relationships and the lawyers’ ethical responsibility to the client (Brennan 1998; Conley 2001; Van Duch 1999). Outside auditors have an incentive to cut the lawyers’ bills as a justification for the fees they are paid by the insurers; if they do not find cuts greater than their own fees, insurers may see the services as not worth their cost, although if the lawyers limit their billing in anticipation of the audits, the savings might be realized even in the absence of specific cuts made by the auditors.

Even if outside auditors are not used, insurers may require lawyers to submit bills through an on-line system, either one provided by an outside vendor or one created and run by the insurer itself. One lawyer complained to me about the fact that a major insurance company client had started using an outside vendor, but required that the submitter of the bill pay the vendor’s fee! That is, every time the law firm submitted a bill for a case, they had to pay the

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15Limited authority at the local level is by no means a new development (see Ross 1980, 172-174).

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outside vendor a fee of $20. This creates a disincentive to submit bills for small amounts of time because the billing fee of $20 can take a nontrivial chunk out of the amount being billed. And when aggregated across a large number of cases, the $20 fees quickly add up to a sizeable amount. One side result is to encourage the firms to carry small amounts of outstanding time across billing periods. This effectively allows the insurers to secure an interest-free loan from the law firm; while any one such “loan” is small, for a large insurer with many files out at law firms, the total amount of such interest free loans outstanding at a give time many be quite significant.

Another way that insurance companies have sought to control outside counsel has been to establish formal guidelines that specify procedures that defense counsel must follow and identify a list of things that the insurer will not pay for. Typically such guidelines require the lawyer to provide a written report periodically to the insurer, and to obtain approval for key steps in the litigation process (e.g., obtaining independent medical examinations, hiring experts, scheduling depositions, and the like). Some insurers require the lawyer to prepare a litigation budget for each file the insurer refers to the lawyer.

The lawyers viewed the guidelines as a necessary evil, and found ways to work within them such that they became part of the routine. No lawyer I spoke to reported that they encountered significant resistance to a litigation plan (i.e., taking depositions, doing medical exams, etc.); occasionally an adjuster might suggest holding off on an activity (e.g., a medical exam or a deposition) in the hopes that the case might settle without incurring that expense. The more frequent problem that lawyers mentioned was simply getting the adjuster to respond to the request to proceed with some activity; lawyers attributed this to the heavy case load most adjusters carried and to the trust they felt existed between the adjusters and themselves. The solution that most lawyers arrived at was to simply tell the adjuster that they planned to proceed as outlined unless they heard otherwise from the adjuster. One lawyer told me that a particular adjuster told him to simply put memo in his (the lawyer’s) file indicating that he had received verbal approval to proceed so if a question came up during an audit, they were covered.

While one might expect lawyers to complain about being required to prepare budgets, I heard little objection. Some lawyers told me that they dealt with the budget issue by updating the budget regularly as the case progressed. One lawyer commented that it was sometimes a problem to increase a budget as a case progressed, not because of the adjuster but because of the adjuster’s superiors; the lawyer found that he often had to write elaborate letters justifying the increase in the budget. Other lawyers told me that they simply gave the adjuster a “high side” budget to reduce the likelihood that they would have to increase it and thus avoid these kinds of problems. Perhaps the most interesting comment on budgets was from a young lawyer who told me that he was very suspicious and hesitant about budgets initially but had come to realize that the requirement to prepare budgets forced him to think through cases more thoroughly when the initially came in.

Billing guidelines—what can and cannot be billed—raise fewer problems than one might expect. One specific area that did seem problematic was the policy of many, if not most,
The training is not just an issue for new staff; there is also the issue of teaching old dogs new tricks. One young lawyer who was a shareholder in a small, relatively new insurance defense firm commented that at her previous (larger) firm, many of the older lawyers had substantial difficulty adjusting to the demands of the insurers for documenting exactly what they were doing. Where previously they might have simply recorded “prepare for deposition,” they now had to detail what this preparation involved, or the insurer would refuse to pay for the time.

The other problem that the billing guidelines, when combined with auditing by the insurers, is the need to adequately describe activities so that whoever reviewed the bills would not question whether it was a billable item. Part of this involves the need to identify an appropriate code for the specific activity involved and another part involves the need to provide a narrative description of the activity. One lawyer I interviewed told me about a particularly extreme example: The lawyer called the representative of the insurance company to find out what billing code to use in connection with some work he had done that saved the insurer $40,000 by finding a basis to deny coverage. The representative he talked to asked what exactly he had done. The lawyer explained that he had spent an hour thinking through the client’s situation and had come up with the idea which the insurer used in a letter it sent to the insured denning coverage. The contact told the lawyer that there was no billing code for “thinking.”

A more common example is requesting medical records. A simple request to a medical provider to send medical records is deemed to be a clerical task that should be completed by clerical staff who are not timekeepers (i.e., it is not a billable task). However, preparing a request for medical records can be billable if it is more than clerical; a paralegal can bill his time for this task if the billing notation says something like, “reviewed medical records received to date; identified possible prior treatment that might be related to claimed condition; prepared specific request for medical records for relevant treatment and time period.” This work is seen as involved judgment rather than simply performing a clerical activity. An issue that law firms have to deal with is training staff, both junior lawyers and paralegals, to use the appropriate descriptions and catch phrases that will reduce the likelihood that a billed item will be questioned.16

The Tyranny of Time

Despite the growth of alternative billing methods, time and timekeeping are central to insurance defense practice. Every lawyer I spoke with reported that the expectation at their firm

16The training is not just an issue for new staff; there is also the issue of teaching old dogs new tricks. One young lawyer who was a shareholder in a small, relatively new insurance defense firm commented that at her previous (larger) firm, many of the older lawyers had substantial difficulty adjusting to the demands of the insurers for documenting exactly what they were doing. Where previously they might have simply recorded “prepare for deposition,” they now had to detail what this preparation involved, or the insurer would refuse to pay for the time.
was that lawyers would bill at least 1800 hours per year; it some firms this expectation was formalized while at others it was an accepted goal. Lawyers reported having billed between just under 1800 hours to over 2200 hours during 2004. The time billing expectation creates two problems: putting in the time and capturing the time into billing records.

The lawyers I spent time with made many remarks about needing to keep pushing to get enough hours billed; they would remark that they were “getting behind” and needed to find ways to make up time. This often meant working at home in the evening, or coming in on week ends, or starting the work day as early as 6:00 am. It also was reflected in comments complaining about having to spend time on activities that they did not feel they could bill. Some of this was overhead activities such as preparing for seminars which were part of the firm’s marketing activities. Some of it was time spent on other overhead activities (e.g., reviewing billing records, attending internal firm meetings, preparing personal business plans for the coming year). Some of it was time spent on cases where the lawyer simply felt they could not bill the time to client. An example of the latter involved a lawyer who had a very peripheral role in a case but was the only person available when a call came in from a client about the status of a court filing in the case. The lawyer spent over an hour trying to track down what had happened because no one else (no lawyer, no paralegal, and no secretary) was in the office or reachable who could quickly provide the information. The lawyer commented to me as he worked on this task that he was going to have to “eat most of this time.”

A key issue for everyone in this system is capturing the time. One of the more senior lawyers I spoke with talked at length about the problems of getting lawyers who are supposed to record time to do it accurately and to get it all down even when they are expected to bill a certain amount of time; he related his own problems tracking his time: at the end of the day, he reviews the time he has recorded, and it often seems an hour or more short, and he can’t figure out where the missing time went. This is a problem even for lawyers who tend to spend concentrated

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17 At least one lawyer I spent time with specifically commented that my presence was “slowing me down”; I suspect that some of the other lawyers felt this as well even if they did not verbalize their concerns. This was an issue that I was very sensitive to, and I tried to refrain from asking questions except at natural breaks (i.e., trips to get coffee). Even so, my presence frequently prompted lawyers to talk about what they were doing or to ask me questions about how I would evaluate something.

18 In some situations it wasn’t the lawyer who felt he couldn’t bill all of the time, but the firm. The management at EBH looked closely at both the hours billed and the revenue generated by each lawyer. This can be a particular problem when there are alternative fee arrangements. A lawyer under pressure to bill 1800 hours may “flog” files that are billed on a nonhourly basis because the lawyer does not have to be concerned about the insurer auditing his or her time. However, this is a very significant concern for the firm which wants lawyers to generate revenue equal to (or, preferably, greater than) their hourly rate for 1800 hours.
periods of time on a single file rather than jumping among up to a dozen files in the course of a
day.

Lawyers have a variety of strategies to deal with this problem Some lawyers simply keep
the billing/time record software open in a window and try to immediately record every bit of
time on every case as it happens. One lawyer I spent time used a computer program called Time
Stamp that is something like a chess clock that allowed him to simply click among files; at the
end of the day he could look at “clock” and record his time during the day. One problem he
encountered was being sure to open a clock for a file if an unexpected telephone case came in;
another was being sure to “hit the button” to switch among files.

Even with a good strategy to track time, there are issues of what to record and what to let
slide by. The standard minimum billing unit is a tenth of an hour (six minutes). It was common
for lawyers to record that minimum for any activity even if the activity, sending a quick email or
a telephone call, required only a minute or two. But there is still the question of how to count the
time spent playing telephone tag (i.e., do you record one tenth of an hour if you try to call an
adjuster or opposing counsel or expert and end up leaving a voice mail message?) or reading an
email that does not require a reply (is this worth a tenth of an hour?). Imagine the following
sequence on the “Smith file”: at 9 am lawyer Jones gets a call from the adjuster asking about the
status of the case, and Jones tells the adjuster that he is waiting to hear back from the plaintiffs’
lawyer on a date for the plaintiffs’ deposition; the call lasts two minutes. At 10:30 the plaintiff’s
lawyer calls to say that he can make the plaintiff available on a specific date; Jones checks his
calendar and agrees to that date; the call lasts two minutes. At 1 pm, Jones’s secretary brings in
the mail and in it Jones finds a long awaited medical record for the Smith file, and spends eight
minutes looking at it. He does nothing else on the Smith file that day. How much time should
Jones record for the file? Should he aggregate the time and record two tenths of an hour, or
should he treat each bit of time as a separate billable item and record four tenths? Would it be
different if the tasks were done consecutively so that the lawyer spent a total of twelve minute
but it during a single time stretch?

From the viewpoint of a lawyer who needs to accumulate 1800 billable hours in the
course of a year, billing for distinct tasks increases the amount of time that might be billed in the
course of a day. It may be possible to actually bill eight hours during a period of eight hours in
the office if there are a lot of partial tenths involved. In the course of an hour, a lawyer might try
to return a dozen phone calls, completing only three each of which lasts fifteen minutes. For
each of the three completed calls he might bill three tenths of an hour and for each of the nine
voice mail messages left, he might bill a tenth. The total would be eighteen tenths of an hour
billed for a sixty minute period.

As I spent time with the lawyers at Etling, Burke & Howe it became clear that tracking
and billing time is a learned skill. This was most evident as I watched one lawyer work with a
paralegal who had been promoted from a position as a secretary. In the earlier position as a
secretary, the employee had no needed to track time. As a paralegal, she was now a timekeeper
and the firm expected paralegals working full time to bill 1600 hours per year or roughly 32
The new paralegal was having trouble even coming close to this in the time she recorded. Part of the problem was that she was not sure what she could and could not bill for; some of the problem was simply keeping track of activities in the course of the day. The lawyer was meeting with the paralegal every day or two to go over what she had billed and discussing what she didn’t bill that she should have.

Handling Cases/Working with Adjusters

The activities involved in handling insurance defense cases vary depending upon whether the case is personal injury (tort or UM/UIM), no-fault, workers’ compensation, or property damage. Typically the lawyers have to assess cases in terms of liability, causation, and damages (or, in the alternative, the insurance company’s exposure). Initial activities on a case involve opening the file (checking for conflicts and getting a file number for billing purposes) by completing some internal forms, preparing and serving and/or filing answers to complaints, notifying the insured that the lawyer has been retained, beginning to collect relevant documents such as medical records and police reports, and preparing an initial assessment for the insurer.

The next phase of the work involves the more formalized investigatory activities such as taking the plaintiffs’ (or claimants’) deposition, scheduling medical examinations, retaining experts to investigate and opine on causation issues (in products-related cases), and assessing more systematically damages. In personal injury cases there may be substantial delay between the time a file is received by the defense lawyer and the completion of this phase if the plaintiff’s medical condition has not plateaued. A key issue during this phase is selecting physicians to conduct independent medical examinations, and other experts relevant for the case. The selection of experts draws the experience of the lawyer and his or her colleagues in the firm; the lawyer may contact experts used in the past whom the lawyer knows does not quite “fit” the instant file, and ask that expert for suggestions. In products-related cases, the lawyer may ask the client for suggestions of reputable experts.

Once the file is “mature” the case is ripe for settlement. In some situations there may be ongoing settlement negotiations as the file develops, but those negotiations may not involve the defense lawyer; that is, there may be negotiations between the plaintiffs’ lawyer and the

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19 One issue EBH was struggling with were new overtime regulations which meant that paralegals who worked more than 40 hours in a week had to be paid at time and a half. The firm could not pass on overtime costs to clients, so paralegals had to meet their billing targets within the 40 hour per week limitation.

20 I say “serving and/or filing” because under the rules of civil procedure in the Minnesota state court, complaints and answers are not filed with the court until some action by the court is required; pleadings are simply served on the relevant parties. Lawyers in Minnesota speak in terms of a case being “in suit,” meaning that a complaint has been served.
insurance adjuster even as the defense lawyer works on the case. Sometimes the adjuster will tell the defense lawyer to hold back on developing the file because the adjuster hopes to reached a settlement without incurring substantial litigation expense (this may arise if a case is filed to protect against a statutes of limitations problem or if the adjuster had held off making good offers to see how serious the plaintiff’s lawyer was).

Typically the defense lawyer does not receive any settlement authority until the file is well-developed (i.e., IME’s have been completed, depositions of the plaintiff and defendant have been completed, and the defense lawyer’s experts have provided at least an informal report). This does not mean that early settlement discussions never happen, but there does not appear to be pressure from the adjusters to move quickly to settlement except when the settlement discussions continue between the adjuster and the plaintiff’s lawyer. When the lawyer does receive settlement authority, that authority is likely to be at the low end of the lawyer’s evaluation of the case. That is, if the lawyer tells the adjuster that the exposure if the case goes to trial is $30,000, and that a good settlement would be perhaps $15,000, the lawyer’s initial authority in the case is likely to be in the range of $3,000 to $5,000. As the settlement negotiations progress, the lawyer usually has to go back to the adjuster for increases in authority. For example, in the judicial mediation I attended, the offer on the table was $50,000 and the plaintiff’s demand was $60,000; the defense lawyer’s authority was $52,000. The judge asked the plaintiff’s lawyer if $55,000 would settle the case, and the lawyer replied in the affirmative. The judge then asked the defense lawyer to find out if the adjuster would go to $55,000; the lawyer left the room, called the adjuster, and got approval for $55,000, thus settling the case.

In the most extreme situation, the adjuster essentially authorizes each specific offer that the defense lawyer extends to the plaintiff. One lawyer told me about a case that got to the eve of trial:

Prior to suit, the plaintiff’s demand was $50,000 and the adjuster’s offer was $5,000; after the case went into suit and the plaintiff’s doctor had been deposed, the adjuster authorized the lawyer to offer $10,000. The plaintiff reduced his demand to $40,000 but no further offers were made until a week before trial when the adjuster authorized the defense lawyer to offer $20,000. The plaintiff’s lawyer responded that he had no authority to accept anything less than $40,000, but would “look at” an offer of $35,000; the defense lawyer reported to the adjuster who said, “let them stew.” The defense lawyer contacted the plaintiff’s lawyer and asked for a firm demand under $40,000. 21

21This example illustrates the risk aversion of at least some adjusters. I was struck by the fact that the lawyers were often more inclined to go ahead to trial than were the adjusters with whom they worked. This was by no means a universal pattern, but there were several cases I saw at EBH where the adjusters were very anxious to get a case settled and avoid the risks of trial.
Two days before trial, the defense lawyer reported to the adjuster that she had heard nothing further from the plaintiff’s lawyer and told the adjuster to expect a trial result between $15,000 and $50,000. When the defense lawyer came in the day before trial, she found a voice mail from the evening before from the adjuster in which the adjuster said they were rethinking. The defense lawyer called the adjuster who said his supervisor had said to go ahead and up the offer; the defense lawyer told the adjuster that she thought that “it’s going to take 40.” The adjuster instructed the defense lawyer to offer $35,000, which the lawyer proceeded to do.

Two hours later the defense lawyer called and said they won’t go below 40. The defense lawyer called the adjuster; she told the adjuster, “The plaintiff knows you want to settle, and they won’t take less than $40,000.” The adjuster authorized the lawyer to offer the $40,000. The case settled for $40,000.

In some situations the lawyer may have substantial authority to work with. This seems to be particularly true at a mediation where the lawyer may come in with some substantial authority. The lawyer will make a first offer that is very low within that authority, but may be able to settle the case within the authority he or she has at the outset. I sat in on a mediation where the lawyer came in with $100,000 in authority. The sequence of demands and offers went as follows:

<table>
<thead>
<tr>
<th>$315,000</th>
<th>$20,000</th>
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<td>$285,000</td>
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<td>$200,000</td>
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<td>$180,000</td>
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<td>$165,000</td>
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<tr>
<td>$160,000</td>
<td>$65,000</td>
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<tr>
<td>$140,000</td>
<td>$75,000</td>
</tr>
<tr>
<td>$120,000*</td>
<td>$75,000**</td>
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* but says he would take 110
** but says he would settle at 100, but won’t make a formal offer at that amount

When the offer stood at $65,000, the defense lawyer contacted the adjuster, who shortly was going to be leaving her office, and asked to have his authority increased to $125,000 in case he needed more than $100,000 to settle the case; the adjuster agreed to the increase. The lawyer told the adjuster that he hoped he would not need to use the additional authority. About 90 minutes later, the case settled for $100,000.

While in the above case the lawyer worked essentially within his authority, it is common for an adjuster to actually be present at a mediation. In this situation, the decision making about offers is essentially a joint enterprise between the defense lawyer and the adjuster. Even when the adjuster is not present, the lawyer may go back to the adjuster to discuss each move rather
than working within some authority. Whether there is anything systematic that explains how much reign lawyers receive from the adjusters in the settlement process is unclear. Certainly some of it has to do with the constraints under which the adjuster operates (i.e., what is company policy regarding granting settlement authority to outside counsel). One might be tempted to say that it is a function of the lawyer’s experience and hence the degree of trust that the adjuster has in the lawyer’s judgment; however, I saw the same lawyer work both within a context of extensive leeway (s/he had substantial settlement authority in a case) and within a context of substantial constraint (s/he had to obtain specific authorization for each move).

If mediation and settlement negotiations fail to resolve a case, the lawyer must prepare for trial. This involves a detailed review of materials in hand, the preparation of exhibits, the preparation of a “trial book” (i.e., a notebook outlining the case the lawyer will make at trial, containing key documents, bits of transcripts, medical reports, etc.), taking testimonial depositions of medical and other experts (including treating physicians), taking testimonial depositions of other witnesses who will not be able to appear in person at trial, and some intensive contact with witnesses the lawyer will call in person at trial. The lawyers I spent time with delayed as much of this preparation as possible as long as they could. Importantly, this was not simply the tendency of many (most?) people to put off today what you think you can do tomorrow. Rather, it was a more calculated decision to avoid incurring costs that the insurer would have to pay. The goal was to keep insurers happy by limiting costs if at all possible. The result was that the day or two before trial was very intense because so much had been put off. In the simplest cases, the lawyer might even wait until the night before trial to really work intensively on it, particularly if there were ongoing settlement discussions during that day. For the lawyers, a trial starting on a Monday was almost ideal in terms of cost controls because little negotiation would occur over the week end; thus if the case did not settle on Friday, the lawyer would have two days to get ready for the Monday trial.

One final point regarding the lawyers’ relationships with the insurance companies who retain them: those insurers sometimes ask the lawyers to do things that the lawyers have significant doubts about. For example, one lawyer I spent time with refused, under the instructions of the insurer, to turn over some materials that the insurer claimed was privileged. The lawyer told me that the insurer always resisted requests for these types of materials even though once the plaintiff’s lawyer brought a motion to compel, there was no doubt that the materials would have to be surrendered. From the insurer’s perspective this was a matter of principle and they would continue to insist that counsel resist the requests even when advised

22These examples are based on observations at EBH. I tried to devise questions that I could use in interviews to access the generalizability of these patterns, but none of the lawyers I spoke with would acknowledge these types of happenings. It is possible that this is unique to EBH, but I very much doubt that is the case. I suspect that many of the other lawyers had similar experiences but either my questions were inadequate to the task, or lawyers simply will not acknowledge these kinds of experiences, and the only way to find out about them is to actually simply be present when they occur.
that they would lose any motion to compel. In another small case involving a dispute over the
necessity of medical treatment an insured had obtained and was claiming under Personal Injury
Protection (PIP) coverage (no-fault), the insurer was insisting that the counsel demand that the
claimant appear in person at the PIP arbitration hearing even though the insurer could agree to
allow the claimant to appear by telephone (he now lived out-of-state), and the expense of travel
to attend the hearing would greatly exceed the amount in dispute. The lawyer expressed serious
qualms about demanding that the claimant appear in person; she saw the insurer’s demand in this
regard as unreasonable, albeit within the insurer’s rights under Minnesota’s no-fault statute.

Another lawyer at EBH expressed frustration to me after a no-fault arbitration hearing
about handling cases where the insurer had no good defense. The lawyer expressed the view that
the insurer had made a business decision to fight such cases as a means of deterring certain
classes of claims even though the insurer should have known that the claimant who persisted
with the claim would prevail. Another lawyer described a case he was working on as a “virtual
sure loser”; in the lawyer’s view the type of case involved could be won only when the claimant
would present so poorly that the claimant would have a total lack of credibility.

Sometimes demands come from the insurer that the lawyer can readily refuse on clear
ethical grounds. For example, one lawyer told me about a telephone conversation that she had
recently had with an adjuster whose supervisor had just decreed that the company would not pay
on the file unless the defense counsel called the claimant’s treating physician to see what the
physician had to say about the case. The lawyer was able to essentially laugh off this demand by
explaining that it would be unethical to call the treating physician of a represented claimant;
furthermore, while the claimant had signed a release for medical records, the claimant had not
signed a release authorizing the physician to speak with anyone other than his own lawyer, and
under HIPA, it is illegal for a physician to discuss a patient’s medical situation unless
specifically authorized to do so.

**Working with Other Parties**

Insurance defense lawyers spend significant time interacting with lawyers representing
the plaintiff and lawyers retained by insurance companies to represent codefendants. Just as is
the case for contingency fee practitioners (see Kritzer 2004, 234-241), defense lawyers value
cooperative relationships. This does not mean they expect the other lawyers to be less than
vigorous advocates for their clients; it does mean that they value honest dealing and willingness
to accommodate reasonable requests in the course of the litigation. Just as plaintiffs’ lawyers
reported that they found some defense lawyers reasonably easy to work with and others difficult,
the defense lawyers report the same with regard to plaintiffs’ lawyers. I encountered a surprising
number of comments about the difficulties that the opposing lawyers were probably having with
their clients (e.g., that the client had unrealistic expectations about the value of her case, or that
the client was being difficult in scheduling an IME).
A very significant portion of the interaction the lawyers had with lawyers representing other parties involved lawyers representing other insurance companies. Another way to put this is that a significant proportion of tort litigation consists of insurance companies fighting among themselves. As briefly mentioned when I discussed my decision to focus my observation on a single firm, this happens in two ways.

First, a good bit of litigation involves matters of subrogation in which one insurer has paid out on a policy and is now trying to recoup its payment from the insurer of an alleged tortfeasor. The most obvious example of such litigation involves significant property loss cases. Let’s say that a fire destroys a business; the business’s insurer pays off on its policy, both for the physical loss and the lost business revenue. The investigation of the fire suggests that the source of the fire was around an area where a number of pieces of electrical equipment were plugged in, and while not definitive, the fire inspector concludes that there was probably a short-circuit in the outlet, and the circuit breaker that was supposed to cut off failed to do so. Further investigation indicates that the circuit breaker was recently installed, and it may not have been installed correctly. The business’s insurer files suit, in the name of the business owner, against the electrician who installed the circuit. The lawyer hired by the electrician’s insurer then brings in the manufacturer of the circuit breaker as a codefendant; the insurer for the manufacturer retains another lawyer. You now have a case involving three insurance companies, one trying to collect from a second, and the second pointing a finger at the third. While nominally the parties are the business, the electrician, and the manufacturer, in reality this is a fight among the three insurers as to which of the insurers should be responsible for paying for the fire.

The second situation involving fights among insurers was partly included in the above example: the finger pointing among defendants or insurers. I saw two fairly common situations where this arises in fairly extreme ways. The first involves workers’ compensation cases.

A workers’ comp claim is filed. The claimed injury is an aggregation of a prior injury, and the aggregation is something that would have probably developed over time (rather than being the result of a clearly identifiable incident such as an accident on the job). The condition of the claimant is such that she requires significant medical treatment and will be off of work for several months. The prior injury occurred ten years ago at a previous employer, Company X, who at the time was covered by Insurer A. Six years ago, the claimant left Company X and went to work for Company Y doing the same type of work. Two years ago, the claimant was hired by his current employer, Company Z. These were all small construction companies, and each frequently changed insurers in order to get the best insurance rates; in the ten years the employers and insurers were:

<table>
<thead>
<tr>
<th>Year</th>
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<th>Insurer</th>
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<tr>
<td>1</td>
<td>X</td>
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<td>3</td>
<td>X</td>
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<tr>
<td>4</td>
<td>X</td>
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There appears to be some case law in Minnesota that favors the theory that damage from moisture intrusion is deemed to be a “continuing event” and thus that all insurers on the risk from the date the owner took possession from the builder are liable, and the damages should be split proportional to the time each insurer was on the risk. See *Wooddale Builders, Inc. Vs. Maryland Casualty Company et al.*, MN Court of Appeals, No. A04-1442, A04-1612 (2005) [available at http://www.minnlawyer.com/opinions/050509/a041442.htm, visited May 20, 2005]. However, the lawyers I spoke with seemed to see the coverage issue as more ambiguous than this suggests.

The insurers for Company Z might claim that the current condition is not an aggravation but simply a normal progression of the original injury, and hence it should be the responsibility of Insurer A. Insurer A might argue that the current condition has nothing at all to do with the original injury but was in fact a result of the claimant’s recreational activities; in the alternative, Insurer A might argue that given the accumulated nature of the injury, all seven insurers should share in the payment with the shares proportional to their time on the risk. The insurers for Company Y (C, D, and E) might claim that the injury was due to a specific incident at Company Z; Insurer F might agree with that position and point specifically to an incident in Year 10, thus arguing that Insurer G should bear the full cost of the new claim.

I asked two different workers’ compensation specialists what percentage of their files involved multiple insurers trying to resolve responsibility and/or shares. Their estimates differed substantially, with one giving an estimate of 10 percent and one estimating the figure to be 25 to 35 percent (omitting asbestos cases which always involve multiple insurers).

The other setting where this type of finger pointing routinely occurs involves construction defect cases. There are a large number of cases in Minnesota where homeowners are claiming that construction defects have led to moisture intrusion which causes significant damage and can make houses uninhabitable if there is significant mold growth. In these cases the homeowner typically sues the general contractor who brings in subcontractors (stucco, framer, roofer, window installer) and materials suppliers (window manufacturers). Many of these parties have multiple insurers over time, and the law is unclear as to whether liability (and thus coverage) depends upon the date the work was performed, when the damage was discovered, when the damage occurred, or some combination. The result is that these

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construction defect cases involve anywhere from three to ten insurers. In some cases, the insurers for a single party may agree on a joint defense and on how to share the payment of any damages; in other cases there is no such agreement and every insurer may retain its own defense counsel.

Finger pointing among insurers can also arise in traditional personal injury cases. A good example would be a construction accident where a new type of scaffolding that is being used collapses. The scaffolding might be manufactured by a company in England. A U.S. vendor is responsible for selling, providing manuals and safety materials, and training purchasers. The scaffolding may be rented from a equipment supplier that contracts with a company that actually erects the scaffolding at the building site. Part of the scaffolding system might include a hoist that can handle some specified weight limit. The scaffolding collapses when a workman employed by the insulation contractor is on it, and at the same time the roofing contractor is hoisting a batch of roofing shingles. It is not hard to imagine the finger pointing that would go on:

- The general contractor has overall responsibility for the site and the work, so it gets sued.
- The insulation contractor can’t be sued because it was the employer of the injured worker, but it’s workers’ compensation carrier files a subrogation claim.
- The roofing contractor is sued alleging that its workers overloaded the hoist.
- The company that erected the scaffold is brought in under the allegation that the scaffolding was not properly erected.
- The company that owns the scaffolding is sued under the allegation that it failed to insure that the company it hired to erect the scaffolding knew what it was doing.
- The U.S. vendor of the scaffolding is sued for failing to adequately warn the company that bought it about the hoist’s limitations, and for failing to provide proper training.
- The foreign manufacturer is sued manufacturing and selling for a product that was faultily designed.

There is no question that something happened that should not have. While there may be a dispute about appropriate damages (assume that the injury is such that the workman will no longer be able to work in construction, and will be unable to engage in active recreational activities that had been an important part of his life), this case would be more an issue of resolving who should pay what portion than it would be a matter of the plaintiff demonstrating that he was entitled to significant compensation.

The transaction costs associated with these cases are very high because of the numbers of parties and lawyers involved. One could make an argument that a significant portion of the costs
associated with tort litigation arise not from demands by injured parties but by fights among insurers over who should pay and/or how to apportion the payment among multiple insurers. How much might be saved in transaction costs born by insurers and their insureds if there was some system whereby insurers did not fight over these issues and there was some simple rule which determined which company should bear the loss? In fact there is a history of such agreements, called “knock-for-knock” agreements, in some settings where insurers essentially waive subrogation rights on the grounds that over a large number of cases things will balance out, and it is best to avoid the transaction costs of fighting over responsibility in individual cases. The problem here is akin to a prisoners’ dilemma: if all insurers were to abide by a knock-for-knock type policy, most insurers would gain; however, as soon as one insurer seeks to invoke its subrogation rights, other insurers would feel compelled to do so as well. The breakdown is particularly likely in the case of a very large loss which would look bad on the insurer’s books and place the company management in an awkward situation with shareholders and potential investors.

**Responding to Commodification**

The idea that insurance defense practice has evolved into a “commodity” area of legal practice has been expressed before. In a 1997 *National Law Journal* article, law firm consultant Harvey Goldstein described insurance defense as a “commodity practice” which he compared to wills and trusts work. The nature of the practice and the nature of the market for such work allows insurance companies to “nickel and dim[e] the firms to death” (Cox 1997). A good example of this “nickel and diming” is the requirement that firms use an online system for submitting bills, and then requiring that the firms pay a fee to the system vendor each time they submit a bill.

Insurance companies have long been able to demand good rates from their lawyers simply because of the amount of legal services they buy. However, the emphasis on the bottom line, combined with trends such as company consolidation and the growth of in-house (or captive firm) legal staffs has led to a major shakeout in insurance defense practice over the last decade (perhaps extending back to 1990). Some of the larger firms in the Twin Cities that were known as insurance defense firms have essentially abandoned that area and shifted their focus to other areas. As part of my interviewing process, I typically asked respondents to name insurance defense firms that I should be sure to contact. The name of one firm came up repeatedly, but my efforts to schedule an interview at the firm ran into problems (I was turned down by several lawyers I contacted). I finally contacted the managing partner of the firm who agreed to meet with me; however, when in the course of our telephone conversation I mentioned that many people had suggested his firm as one that I should contact, the managing partner expressed chagrin that other practitioners were describing the firm as an insurance defense firm. He went on to explain that the firm had shifted its focus to other areas and that insurance defense work was a very small part of their current book of business.
The strategy of some of the smaller firms that did insurance defense was to develop expertise in specific, more specialized areas where cases involved higher stakes. One area that many firms seek out is defending medical malpractice claims, particularly for large, self-insured medical providers. Another area involves specialized motor vehicle accident cases such as claims against trucking companies or claims against companies that provide specialized transportation services (e.g., medical transport, employee transport, etc.). A third area that is booming at the moment in the Twin Cities is construction defect cases of the type discussed previously; this area at times seems like it is at least temporarily a full-employment program for insurance defense lawyers because each case involves a number of parties and often multiple insurers for many of the parties. As part of my interviews with insurance defense practitioners, I asked each to tell me about the most recent case they had settled; the most common type of case that was described was a construction defect case.

For the larger firms that want to continue in the insurance defense area, a possible business model is to develop a diversified defense practice that includes a combination of more routine insurance defense (both liability and workers’ compensation) and more complex cases involving medical and professional negligence, products liability, major construction defects (beyond the “wet house” cases) plus areas not involving insurance defense such as intellectual property litigation or other kinds of commercial litigation. The rationale is that a larger firm can use the routine work to help cover firm overhead in areas such as accounting and billing systems, human resources, technology support, and the like. While the routine work may not generate significant profits that accrue to the partners, it can be done on a break-even basis. The routine work serves as a training area for younger attorneys, and provides a pool of staff resources that can be mobilized for larger, more profitable cases where a team of lawyers is required. Given that many of the insurers who have large number of small matters also have commercial lines of insurance that produce some large claims, the relationships that are developed and maintained handling the routine work can lead the insurer to refer larger files to the firm. In a sense, the goal here is to develop a portfolio of cases some of which come to the firm in a steady and predictable way and thus provide a stable cash flow, plus a set of less predictable cases that are more episodic, but which can be billed out at higher rates because of the complexity and stakes involved. This is not unlike the portfolio of cases I have previously described for contingency fee practitioners (Kritzer 2004).

Finally, in my interviews I sensed at least some frustration, particularly among lawyers with substantial experience. They remember a time when their relationships with local claims personnel was central to their work. These local people not only steered work to them but also could provide support if questions arose about bills and litigation strategy. Local claims people have become much less important, both losing decision-making authority and being displaced by centralized billing and audit systems; in some cases they have simply disappeared as insurers have consolidated claims operations at regional, or even national, offices. At a personal level, lawyers may feel that their work is not appreciated; they are just a cog in the claims machine—a cog that can be easily replaced if a cheaper one comes along. One lawyer expressed this very clearly when asked what has changed in his practice over the last 10 years:
Q: In what ways have your relationships with the insurance companies changed over the last 10 years or so?

A: I could talk a long time about this. It’s one of the great disappointments I have in my practice. Two main areas: loyalty and gratitude. It’s not that we don’t get the gratitude from the insureds, the small guy. We continue to get that, and it’s one of the great things about doing this work... The gratitude issue that is a problem for me is the adjusters, the supervisors–and this blends into the loyalty issue–they don’t care. It doesn’t matter. You might spend all night, all week trying the case... In the first ten years I practiced, there were a dozen occasions, I might get a letter from a corporate executive of the [insurance] company thanking me for the job I had done... That hasn’t happened in 10 years; I haven’t seen it.

Nor has there been the loyalty we used to have. It seems to be more a matter of numbers, of budgets... I understand that it’s a business; I understand that it’s corporate, [but] there are a lot of personal elements involved here. I have some clients that I have worked with for twenty years. Those guys are generally appreciative, but the heat that they’re under from their companies now versus ten years ago, it’s night and day. ... We could do the best job possible for a company today; get the best verdict possible, and that would mean nothing in terms of loyalty for the next case. If another firm came along and offered them five dollars less per hour, that’s where they’d go.

Conclusion

Insurance defense practice has never been the most lucrative fields of practice for American lawyers. However, the absence of high fees and the resultant high income was offset by stability and predictability. Lawyers and law firms established relationships with specific insurance companies and barring major changes (mergers of insurance companies or droppings of lines of insurance by the companies), lawyers and firms could rely upon a steady stream of business over a period of many years. Unlike contingency fee practitioners who always had to worry about where the next client would come from, insurance defense lawyers knew that more files would be arriving next week.

The working environment for insurance defense practice has changed radically over the last ten to twenty years. Insurers are much more conscious of costs and are constantly looking for ways to reduce their expenditures on defense counsel; that may mean moving work in-house, it may mean seeking alternatives to hourly fees, it may mean putting work out to bid, and it may mean changing firms if a better price can be obtained. Today insurance defense practitioners live in a highly competitive world where they must be prepared to lose a major source of work at any time. They also must be prepared to live with being “nickled and dimed” again and again and again by the insurers who send work to them.
These kinds of changes are not unique to the field of insurance defense. They are generally consistent with the changes that have been occurring within what has been called the corporate hemisphere of the bar (Heinz and Laumann 1982; Heinz, Nelson, Sandefur, and Laumann 2005). The corporate world has become much more cost conscious vis-a-vis the legal services it buys. Corporations have built up house counsel operations both as a means of direct cost saving (i.e., in house lawyers can do the work cheaper than outside counsel) and as a means of intelligently monitoring the work of outside counsel both for cost and quality. What distinguishes insurance defense work from other legal services provided to corporations by law firms is the relatively low rates that insurers are able to obtain from the firms to which they refer work. The likely reason is that other types of corporate work have not become “commodity” in nature because the corporation is likely to incur some significant costs in shifting work from one firm to another because the current firm has acquired significant knowledge specific to the corporate client. The more routine, commodity nature of insurance defense work means that insurers do not incur these costs in changing legal service providers.

References


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