The Million Dollar Lawyers

By Joseph C. Goulden

A behind-the-scenes look at America's big money lawyers and how they operate

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According to this bar officer, even judges rarely acted when they learned of lawyer misconduct. Contempt-of-court proceedings usually "involve such things as impertinence to the court. They ordinarily do not involve things that we consider breach of duty to a client."

The committee quoted another bar ethics committee official as saying, "A good and decent profession has a headache that cries out for fast relief. We have been put on notice repeatedly. We will compound our own cure or someone will mix up a dose which will curl our hair."

The man understated. The substitute for self-discipline—legal malpractice suits—is not curling the bar's hair, it is causing the hair to drop out by the handful. And the moving forces, notably in California, are lawyers who are willing to take other attorneys to court in malpractice cases, and judges who no longer permit the legal profession to hide behind self-constructed shields.

The most important malpractice attorney in the country, in terms of persuading the courts to write ground rules that give the layman a chance of winning a case against a lawyer, is Edward Freidberg.[14] A fortyish Californian who in relaxed moments has the flip demeanor of a seashore condominium salesman, Freidberg goes after erring professionals with ferret intensity, be they physician or attorney. Freidberg first gained national note for his pursuit of Dr. John G. Nork, a Sacramento surgeon with a somewhat shaky scalpel who cowed (and sometimes charmed) his patients into unnecessary high-risk back surgery. Nork worked with all the finesse of a palsied butcher, and he maimed dozens of persons during the 1960s.

But he was a gregarious fellow popular with patients and fellow physicians alike, and the latter tended to overlook the occasional little mistakes—such as accidentally breaking a woman's spinal column while trying to repair a defective disk, or yanking nerve fibers from another woman's neck.

Behind Nork's confident façade, however, was a harried man who gulped amphetamines before donning his surgical jacket (as much as eight times the prescribed daily dosage) and who did the unnecessary cutting because he was strapped for money.

The first time Freidberg tried to sue Nork for malpractice, in 1963, a reviewing physician looked at the records and said,

"There's no case, Ed, leave him alone." Six years later Freidberg learned the reviewing physician was a close friend and sometime associate of Nork. He was not as careless again. When other Nork cases surfaced, Freidberg searched until he found more than three dozen persons maimed by the surgeon. To prep for the trial Freidberg put on a surgeon's robes himself and, with the guidance of a physician, personally performed a laminectomy* on a cadaver one night in the morgue of an out-of-town hospital. Freidberg's massive evidence so appalled the trial judge, B. Abbott Goldberg, of California Superior Court, that he called Nork "an ogre, a monster feeding on human flesh . . . [who] for nine years made a practice of performing unnecessary surgery, and performing it badly, simply to line his pockets." He awarded Freidberg's client a record $3.7 million, $500,000 of it against the hospital where Nork practiced, the remainder against the physician. By late 1976 Freidberg had socked Nork (or, more specifically, Nork's insurance carriers) for some $13 million in judgments, with another $8 million of claims still to be heard in court.

Nork's performance spoke for itself. So, too, did that of physicians who saw his mistakes and said nothing. "Apparently butchery is commonplace enough that it doesn't bother other doctors," Freidberg said. But Freidberg is no hypocrite: during his own fifteen years of practice he has seen equal incompetence—and coverups—by fellow lawyers. "If you gave me dictatorial powers here in Sacramento, I'd cut off 10 to 15 percent of the lawyers tomorrow on grounds of incompetence. And these are just the ones I know. I'm constantly amazed at the shoddy practices."

Freidberg's first lawyer target was a big one—none other than the president of the Sacramento Valley Bar Association, Jerome R. Lewis. Socially prominent, if somewhat stuffy, Lewis handled most of the upper-crust divorces in Sacramento and had a thriving general practice. He was popular with other lawyers as well. But in 1969 a woman sat in Freidberg's office and told him an incredible story about Lewis' conduct.

In January 1967 Clarence D. Smith retired from the California National Guard with the rank of general, after twenty-one years

*The surgical procedure for repairing a faulty spinal disk; the bulk of the malpractice claims against Nork stemmed from this type of operation.

of service as full-time administrator and staff officer. A month later his wife of twenty-four years decided to sue for divorce, and she hired Lewis to represent her. The couple had few assets: $1,800 equity in a house, some furniture, shares of stock worth $2,800, and two automobiles on which money was owed. During the discussion, however, Mrs. Smith raised a question with Lewis. Her husband was to receive $796 monthly in state retirement; seventeen years later, when he reached age sixty, he would be eligible for an additional federal pension based upon his participation in the reserve program. Could not these benefits be considered community property, and could she not share in them?

No, no, counseled Lewis, those belonged to the general alone. A preliminary decree listed only the physical assets as community property, and the court awarded Mrs. Smith $400 monthly in alimony and child support. The decree became final in February 1968.

Women talk about divorce settlements, and the clucking tongues in Mrs. Smith's circle told her, in effect, "Dearie, you received some bad advice. Now my ex-husband draws such and such dollars in retirement, and when I got *my* divorce, the judge said it was community property, and therefore I get. . . ."

She told her problem to another lawyer one evening at a cocktail party, and he said, "You are absolutely right." This conversation sent Mrs. Smith steaming back to Lewis. "Hey," she said, "I told you so about this community property thing, why didn't you listen?" Threatened with a suit, Lewis did some more research and agreed she might have a point.

In July 1968, five months after the Smiths' divorce became final, Lewis asked the court to amend its decree and award her more money, saying that because of his "mistake, inadvertence and excusable neglect" he did not list the retirement benefits among the Smiths' community property.* The divorce judge dismissed the appeal as untimely.

*The California Supreme Court held later that these words, "although manifestly a confession of error," should not be held against Lewis, for they were legal boilerplate made only to request the amended judgment. "In short, an attorney should be able to admit a mistake without subjecting himself to a malpractice suit," the court said. But evidence in the case other than Lewis' admission supported a malpractice finding, the court held.

Mrs. Smith began making the rounds of Sacramento law offices, trying to find someone to sue Lewis for his negligence. Several attorneys seemed sympathetic and suggested she indeed had a case. But sue Lewis? Take the president of the bar association to court? "Look, lady, I have to live in this town . . ."

Mrs. Smith finally found her way to Freidberg's office. The thought of suing a bar bigwig gave no pause whatsoever to Freidberg, a relative outsider—born in San Francisco, he had come to Sacramento only eight years previously, after graduating from Boalt Hall Law School. "As a lawyer," Freidberg told me, "I take cases as they walk in the door. Whether I accept a case is not determined by the profession of the defendant. If he happens to be a lawyer, this makes no difference to me."

Although Freidberg does little domestic relations work, a few minutes' research in the major legal reference works convinced him that Lewis had goofed. The California courts had consistently held that state retirement benefits, when partially financed by an employee contribution, were community property. The *California Family Lawyer*, which domestic relations attorneys read about as closely as brokers do the stock market reports, had said flatly as far back as 1962, "Of increasing importance is the fact that pension or retirement benefits are community property, even though they are not paid or payable until after termination of the marriage by death or divorce." There *was* a question about federal pensions; however the $796 that General Smith already received came directly from the state of California, and his federal stipend was not to begin until 1983.

But could Freidberg find concrete proof that Lewis knew the law? He dispatched a research clerk to files of the local legal newspaper, which publishes a listing of all cases filed and the names of the lawyers involved. The clerk picked out Lewis' divorce cases over the past ten years, and then went through court records. The results warranted the work, for the clerk found numerous cases in which Lewis had listed military retirement benefits as community property. Lewis had done so in 1965 for a National Guard reservist's wife. He had done so in 1967 for the husband in a divorce action. And he had done so for an Army colonel. But Freidberg found an astounding anomaly amidst these cases. In a 1965 divorce action Lewis had apparently in-

sisted to a wife that she had no community interest in a pension. She had argued to the contrary and finally written the state retirement system, posing the question directly, and brought Lewis letters stating that she indeed had an interest in the pension benefits. Nonetheless Lewis had continued to insist the benefits were not community property and the woman had finally acquiesced.

Freidberg states, "This sort of research can be done in lawyer malpractice cases because much of what they do is a matter of public record. The raw material is there if you want to spend the time and the money to dig it out.* Doing such an extensive cross-check on physicians is impossible, of course, because of the confidentiality of their records."

According to Freidberg, Lewis took the suit lightly. "He thought it was harassment. He never really prepared a defense at the trial level. I devastated him during deposition. He seemed to have no idea of what the law was concerning community property, even though he specialized in family law. He made wrong statements. The fact is, he never believed he could lose the case, because he was a lawyer, and he was prominent. He never talked settlement, and he never prepared."

Freidberg prepared his case not once, but twice. Originally, several Sacramento lawyers had agreed to testify that Lewis had committed malpractice. Just before the trial, however, they called Freidberg with varying, embarrassed excuses as to why it would be impossible for them to appear. So Freidberg hurriedly recruited lawyer witnesses from San Francisco.

The trial lasted twelve days, and the jury deliberated only thirty minutes before sending word to the judge it had reached a verdict. As the jurors filed into the courtroom one of Lewis' lawyers beamed at Freidberg: "We won; how could they have reached both liability and damages in half an hour?"

The verdict: $100,000 for Mrs. Smith.

And Freidberg wasn't surprised at all. "A lawyer doesn't stand much of a chance in a malpractice case if you make inferences against his competence or integrity. Jurors do not identify with lawyers."

*Freidberg does not hesitate to invest money in a case that he senses will be a winner. To prepare for the key malpractice case against Dr. Nork, he spent $175,000 in research and staff work.

On appeal Lewis argued that the community property laws are so tangled that even well-informed lawyers can differ on their interpretation.* Under California law, he maintained, an attorney cannot be held liable for error in such a situation.

The California Supreme Court roundly disagreed, in a five-to-one decision written by Justice Stanley Mosk. Had Lewis "conducted minimal research into either hornbook or case law, he would have discovered with modest effort" that General Smith's state retirement benefits were likely to be treated as community property. The court cited many of its own opinions to this effect, as well as standard legal reference works. And the court listed four specific criteria by which a lawyer's professional performance should be judged:

—He is expected to "possess knowledge of those plain and elementary principles of law which are commonly known by well-informed attorneys."

—If there are gaps in his knowledge, he must "discover those additional rules of law which, although not commonly known, may readily be found by standard research techniques."

—Even if the law in a specific area is unsettled, the lawyer is obligated to "undertake reasonable research in an effort to ascertain relevant legal principles."

—Once this is done, the lawyer must "make an informed decision as to a course of conduct based upon an intelligent assessment of the problem."

Justice Mosk's opinion asserted that Lewis flunked all four points. Rather than doing his necessary book work, Mosk wrote, Lewis "rendered erroneous advice contrary to the best interests of his client without the guidance through research of readily available authority."

Freidberg's victory over Lewis did not make him a popular figure with California lawyers, each of whom realized, "Now it's easier for *me* to be sued, and lose!" Nor did his snappy re-

*Lewis' lawyers in the action were the Sacramento firm of Bullen, McKone & McKinley, through George W. Bullen; and attorneys Robert A. Seligson of San Francisco and Stephen J. Gray of Sacramento.

marks to press interviewers who came around after his landmark case. "I'm really anxious to start going after lawyers," he told *Juris Doctor*, a legal publication. "Lawyers," he told Roger Rapoport of *New Times*, "are worse than doctors." Speaking at a cocktail party of the San Francisco Trial Lawyers Association, he said, "You've got to clean up your act or expect to get sued." Journalist Robert Kroll wrote that the audience responded with "catcalls, cursings and cowardly insults." (Kroll also noted that some of the hostility seemed motivated by Freidberg's "slightly too serious" attitude and a "great deal of professional jealousy" at his fees in the Nork cases, which trade talk put at $3 to $4 million.) And someone grumbled to *Time* that Freidberg was "just a wise guy looking for trouble."

All of which, of course, serves solely to whet Freidberg's appetite for battle. "I'm not a bar politician," he told me. "I don't care what other lawyers think about me. In fact, if I was too popular, I wouldn't be doing my job properly." So Freidberg ignores the cold stares and the snooty remarks: his aim, when I talked with him in early 1977, was to push the boundaries of professional malpractice even further, by making attorneys liable for punitive damages in instances where they harm a client through deliberate action, rather than negligence.

The first such case, appropriately, came against his old adversary Jerome Lewis.[15] The client in this instance was a Greek-American woman, Mrs. Lili Kromidellis, who was the chief beneficiary of her uncle's estate. She hired Lewis as her lawyer. Somehow Lewis also ended up representing the executors of the estate, and a special administrator. The dual representation did not come to Mrs. Kromidellis' attention until Lewis had persuaded her to settle the estate on terms which she decided were grossly unfavorable. In essence (this is complicated) she lost 45 percent of the estate to the uncle's disinherited son and to a woman who once lived with the uncle and cared for him. She fired Lewis, and when he threatened to sue for payment of his bill, another lawyer referred her to Freidberg, who after reading the file gleefully took the case. He wrote Lewis a letter saying, in effect, "What you have done is improper." Whereupon Lewis replied, "Go to hell." Freidberg said, "This was right after the Smith case, when I had beaten Lewis in court, and he was feeling rather feisty. So he sued my client—his former client—for a

$3,000 fee. I crossed-claimed for fraud, and we won $25,000 in compensatory damages and $35,000 in punitive damages. Brother Lewis was not happy."

As a private attorney Ed Freidberg does not come equipped with white horse and lance. Unless he is granted membership on a bar ethics committee or is a firsthand witness to legal chicanery, an individual lawyer cannot pin on a policeman's badge and patrol the behavior of his colleagues. But malpractice suits, when they bring recompense for punitive as well as actual damages, bear the sting of punishment. In another case, this one outside Sacramento, a lawyer kept a client's money after a divorce settlement. The amount involved was relatively small and when Freidberg wrote the lawyer a stiff letter on the woman's behalf he paid it over promptly. "In actual damages, we suffered only $32 loss, the amount of interest for the time he illegally held her money." But Freidberg sued anyway, asking for punitive damages. "I am convinced that had not the woman hired another lawyer, the guy would still be sitting on her money. Lawyers shouldn't do such things."

The case wasn't easy, even after Freidberg got it to court. For one thing, the judge (Freidberg discovered belatedly) was a former law partner of some of the attorneys involved, and they still owed him $25,000 for his share of the partnership. Further, the judge's wife, under her maiden name, had a role in the case, another relationship of which Freidberg was unaware. "I didn't find out these things until pretty far along, and I was pretty sore. The judge was doing some odd things for the defense without giving me any say. For instance, he would set a hearing, and then cancel it the night before, without giving me any notice or reasons. I demanded that he get out of the case. He refused." Freidberg won anyway, the jury giving him punitive damages of $32,000.*

What galls Freidberg is that regardless of the malpractice—even in instances involving possible criminal activity—the California State Bar is laggard in going after erring lawyers. "The state bar is good when it comes to drunks, pillheads, the easy

*The defense later moved for a reduction, arguing there was a "remarkable disparity" between the actual and punitive damages. The judge was ready to agree and reduce the award to $16,000, when Freidberg quietly pointed out that the statutory period for asking reconsideration had passed before the defense had moved for a reduction. "They paid off; there was no appeal," Freidberg said.

cases. They don't have the time nor the money to get into more sophisticated things."

But Freidberg does have a long-range confidence. Tort litigation eventually had a salutary effect on manufacturers and physicians, if only to kick their insurance rates to a level where they either took greater care or lost coverage. "When the insurance companies cut out the bad apples, they stopped practicing." Also, tort litigation alerts enforcement agencies to derelictions within a given profession—although, as Freidberg tartly notes, "A man can be convicted of converting a client's funds, and still remain a lawyer, provided he is prominent enough in the bar."

As we talked Freidberg spewed out yarn after yarn of lawyer derelictions—including even a case where a woman client offered her own attorney $2,000 under the table if he would quit his stalling and finish her case. Then Freidberg surprised me.

"I've been guilty of malpractice myself," he volunteered.

Oh? Tell me more.

"Sure. There have been situations where I missed filing pleadings on time or let a statutory period lapse. The only way to handle it, in my opinion, is to admit error to the client and to your insurance carrier.

"In one of these cases, fortunately, the other side had screwed up as well, and I saved the case, which was lousy to begin with. But I sent the client to another lawyer, so she would be fully advised of her rights, and I paid her out of my own pocket. The way I see it, any lawyer can make an honest mistake. What's worst is the lawyer who makes a mistake, and hides it, and lies to the client. This sort of lawyer, my friend, does not command any sympathy from Edward Freidberg."

But the evasive lawyer, for years, did command the sympathy of the courts, which gave him privileges not afforded other professionals. But the special protections are falling, lawyer anger notwithstanding. In another of its landmark decisions, this one handed down in 1971, the California Supreme Court drastically revised the statute of limitations as it pertains to legal malpractice. As the court noted, "An immunity from the statute of limitations for practitioners at the bar not enjoyed by other professions is itself suspicious, but when conferred by former