A Reappraisal

BY RONALD M. SANDGRUND

Almost 20 years ago, when I was 45, I wrote an essay called "The Audit" for the Denver Bar Association's *The Docket* magazine.[1] It concerned events that occurred during my legal practice more than 30 years ago, when I was 35. Recently, I stumbled across the essay, reread it, and wondered if my view of those events (thinly fictionalized) had changed after all this time. The essay is reprinted below, and after it concludes, my 65-year-old self looks back.

"The Audit"

It was not a good sign that the auditor the Very Sound Fidelity & Guaranty Insurance Company (VSF&G) sent to examine three years of invoices was named "Charity." I still have no idea what criteria she used to find that our law firm had "overcharged" VSF&G $32,341 out of over $3.5 million in billings. I suspect it was akin to the coverage defense some insurance companies fall back on when their policy language fails them, the "sincere desire not to have to pay" exclusion. When combined with the "we have more money than God" gambit and the "we can litigate this for an eternity" maneuver, it takes a stubborn policyholder to weather such a perfect storm.

Although Charity labored in our office for several weeks, she was rarely spotted emerging from behind the stacks of "dead files" heaped on and around her desk. Yet, Charity was like a modern-day medium, able to make those dead files speak. And the Sphinx itself could not conjure up more confounding riddles.

"What was this $23.75 charge for?" she whispered. I strained to hear the question, then strained to read the faded entry: "November 4, 1992. $23.75. Receive, read and analyze letter from Plaintiff's counsel." Seemed rather self-evident to me. "Well, Charity, it appears that on the fourth day of November, Nineteen Ninety-Two, I got a letter from Plaintiff's counsel in the mail, read it, and analyzed whether any sort of response was required." "Why did it take you 15 minutes to read this letter? It is only a paragraph long," she said nudging the file toward me. The letter said, in its entirety: "Dear

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Mr. Sandgrund: I would like to schedule a Rule 30(b)(6) deposition of VSF&G. Please make the necessary corporate representatives available at my office on November 20, 1992."

I had zero recollection of the five-year-old letter or the requested deposition, and just a vague memory of the case. I knew there was no way I would make any corporate representatives available or even identify likely deponents without first insisting on a full description of the subject matter of their testimony. Also, it would have been very difficult to have made anyone from VSF&G available to testify on such short notice, particularly around Thanksgiving, and particularly for a Rule 30(b)(6) deposition (just try to find any Colorado case authority in 1992 explaining a deponent's obligations under Rule 30(b)(6)). The advance woodshedding of the witnesses alone would take at least a week, plus at least another two weeks to find adequate substitutes once we realized that the head of underwriting, while probably an excellent underwriter, was the wrong person to explain in plain English (you know, the kind of English jurors won't roll their eyes at) what anything having to do with insurance meant.

I explained all this to an expressionless Charity, a lawyer who had never litigated a case in her life. I couldn't sleep for months after this exchange, my dreams charged with the specter of a visit five years down the road from an auditor named Faith or Hope, demanding that I justify spending a quarter hour talking with Charity about a $23.75 charge. At our discounted "insurance" billing rate of $95 an hour, this quarter hour conversation would cost the firm . . . $23.75.

There are few things as satisfying to insurance defense counsel as having to substantiate one's bills from five years ago. Certainly nothing cements the bonds of trust between you and the corporate client responsible for 85% of your billings more than a very pleasant letter explaining to whom your $32,341 refund check should be sent. Never mind that over $21,000 of the "rebate" was for money the firm actually paid (we had the receipts) out of pocket to a contract lawyer to summarize tens of thousands of records in a $25 million pollution coverage and bad faith dispute that we settled for less than $360,000, in which case another insurer got hit with over a $10 million judgment. And, let's ignore the fact that we had obtained the oral approval of the local claims manager for this special hire and that he willingly paid all our charges without comment or question. Our sin was that we had failed to "get the pre-approval in writing," before the claims manager was downsized to

the Shady Home Retirement Center for Good Ol' Boy Adjusters Who Did Everything on a Handshake Because Who Wants to Deal With All That Paperwork Anyway.

It was tough for our senior partner to write that $32,341 check to VSF&G—he'd sacrificed sweat and tears for that company for nearly 30 years. Shortly after we dropped the payment in the mail, VSF&G announced that it was consolidating much of its work with a single, "economy-size" Denver law firm. Within two short years, VSF&G was bought out by the Very Big Fidelity & Guaranty Insurance Company (VBF&G), which later merged with the Mother of All Fidelity & Occidental Insurance Companies (MOFO).

Fools that we were not to see the legal services market shifting beneath our feet the years before sending in the money, we were not so dim as to fail to see the handwriting on the wall while writing the check. The relationship that existed between many insurers and their loyal "panel" counsel was changing markedly as the bottom line, for some insurers, began to replace what was best for their insureds or fair to their lawyers. The 1990s was a decade of consolidation for the insurance industry—of mergers and buyouts intended to drive stock prices up, increase executive bonuses, and release golden parachutes.

So, as VSF&G was auditing us, we were auditing it.

It is hard to say whether we fired VSF&G or VSF&G fired us. Either way, the divorce was preceded by an uneasy separation due to our obligation to continue to serve VSF&G's insureds, our clients, through the completion of their cases, even though we knew that we might never get paid in full for our work. Finally, we parted ways. Then, my partners and I undertook the grim task of developing a brand-new practice from scratch, crossing either from the dark side of the force to the light, or vice versa, depending on which end of the bar you stood.

30 Years Later: A Reappraisal

When I wrote this essay, I ended the story when the firm and its long-time client's relationship terminated in 1995. But, by the time the essay was written and published, 10 years had passed, and the rhetorical questions raised at the end of the essay had for the most part been answered. By then, the firm had developed a brand-new practice "from scratch," in the sense it had previously handled very little plaintiff-side construction defect and insurance coverage and bad faith litigation, and now that was almost all that it did. But from another angle, we had really simply repurposed our litigation skillset. From a business model standpoint, however, we truly did start from scratch, transitioning from a primarily hourly based practice to one almost exclusively based on contingency fee work. Instead of getting paid monthly for our time and reimbursed for our expenses, we often had to wait at least a year (and often years) to get paid. For a nitty-gritty examination of those years, take a look at my March 2020 InQuiring Lawyer column—"Can Entrepreneurial Principles Make You a Better Lawyer?"[2]—in which my law partner and I are interviewed about those very uncertain and ultimately very exciting years.

After the *Docket* essay was published, I heard from a few readers. Some were former insurance defense counsel who had endured similar audit experiences. A few had moved on to other work, expressing much anger toward the insurance industry. Many commiserated with my firm's experience, and trashed insurers, expecting me to trash them as well. I don't recall doing that—maybe I did and I've forgotten, but I don't think I did because I don't recall feeling that way. Mostly I recall thinking that business is business, that I'd been around long enough to put on my "big boy" pants, pivot, and chart a new course forward with my law partners. I had done a lot of work for insurers, and I certainly appreciated the bureaucratic behemoths they had become. I also knew that our modern world would probably not work well without insurance, that it would be vastly different, even more uncertain and worrisome. I also understood that most front-line insurance employees are just trying to do their job, are often underpaid and overworked, and see lots of human hardship, loss, and pain every day to which they must mostly inure themselves to do their job. Have some insurers and their employees stepped (or jumped) over the line since I started representing insureds? Yes, of course. And looking back since my home and those of all my neighbors went up in flames in December, 2021 certainly reminds me how fraught the claims process can be.[3]

So, that's where I stand 30 years after the events described in the essay. I hope the piece is viewed as responding to those disappointing and deflating events mostly with humor, not bitterness, because anger surely corrodes any vessel in which it is held. CL

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NOTES

1. Sandgrund, "The Audit," 27 *The Docket* (Oct. 2005), https://web.archive.org/web/20041103145439/http://www.denbar.org/docket/doc_articles.cfm?ArticleID=3916.
2. Sandgrund, "Can Entrepreneurial Principles Make You a Better Lawyer? Part 3," 49 *Colo. Law.* 18 (Mar. 2020).
3. Sandgrund, "What Do You Do When Disaster Knocks? Lessons from the Marshall Fire," 51 *Colo. Law.* 16 (Nov. 2022), https://cl.cobar.org/departments/what-do-you-do-when-disaster-knocks.

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