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## Torts

### Jotwell

#### Late-Night Law Firms

Nora Freeman Engstrom, *Sunlight and Settlement Mills*

[[http://www.law.stanford.edu/sites/default/files/publication/259915/doc/slspublic/Sunlight% 20and% 20Settlement% 20Mills% 20-% 20Final.pdf](http://www.law.stanford.edu/sites/default/files/publication/259915/doc/slspublic/Sunlight%20and%20Settlement%20Mills%20-%20Final.pdf)], 86 N.Y.U. L. Rev. 805 (2011).



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Every year, I ask the students in my torts class whether any of them came to law school because they wanted to practice tort law. So far, only one has said yes. And she planned to join her father's personal injury practice, so that was something of a special case.

This is not surprising. An awful lot of my students do not know what tort law is, at least not at the start. And those that know what tort law is tend to associate it with the lawyers that advertise on late-night television. Though most first-year students do not know what they want to do, they do know that they do not want to be one of *those* lawyers, whom they take to occupy the bottom rung of a profession that is not held in all that high esteem anyway. It is a constant struggle to get my students to see that there is more to tort law than those late-night lawyers.

But it turns out that those late-night lawyers may not deserve the scorn that they get. In *Sunlight and Settlement Mills*, Nora Freeman Engstrom argues that firms like the ones that advertise late at night have developed practice models that achieve many of the aims that reformers have for no-fault accident compensation schemes. They deliver compensation cheaply and quickly, because they settle almost every claim and nearly never go to court. They resolve claims predictably and consistently, on account of cozy relationships with insurance adjusters that lead to a shared sense as to what different sorts of claims are worth. And perhaps most important, they increase access to justice, offering representation to clients with meritorious claims who would otherwise not seek lawyers or find ones willing to pursue their low-value claims.

The story Engstrom tells about late-night law firms is not all rosy, however. They process claims so fast that they

hardly screen clients, and presumably pursue more fraudulent claims as a result. Their rush to settle cases leaves many clients undercompensated, and the problem grows with the extent of the client's injuries. They often rely on paralegals and other non-lawyers to handle settlement negotiations, running afoul of ethics rules. And they claim fees that look high in light of the cookie-cutter nature of their work.

Engstrom argues that the standard ways of regulating lawyers—bar discipline, malpractice liability, and judicial oversight—are not likely to staunch the worst settlement mill abuses. The typical client is not sophisticated enough to spot misconduct or likely to complain about it if she does. And the market is not likely to provide much discipline either, as the clients of law firms that advertise late at night are not likely to hear much about a lawyer's reputation from sources other than those ads.

Engstrom thinks that reform is needed, but because she sees so much to admire in the work that settlement mills do, she thinks it should be done with a light touch. She doesn't argue that we should restrict the activity of settlement mills. Rather, she suggests, we should put prospective clients in a better position to judge the quality of representation that different firms provide. And she thinks that if we do that, the firms themselves might curtail some of their more objectionable behavior. The mechanism she proposes is a mandatory, public closing statement that all lawyers would be required to file whenever they accept work for a contingency fee. The disclosures would include, among other information, the nature of the claim, the amount of damages sought, the amount recovered, and the amount paid in fees. Engstrom further proposes aggregating this information and making it publicly available, so that potential clients could, say, search a website to learn which firms in their area recover the highest percentage of damages claimed, or accept the lowest fees.

I doubt that Engstrom's proposal will help the clients of settlement mills much. If they were sophisticated enough to search for and interpret this sort of data, they might already be in a position to seek better representation. That does not mean that public closing statements would be worthless, however. At the least, they would provide a better picture of the practices of late-night law firms, and that might push us toward more intense reform. Or scare us away from it, lest we throw out the baby with the bathwater.

And it is that latter possibility that I find most intriguing. I have defended a picture of tort law on which the institution pursues corrective justice by empowering victims to hold wrongdoers accountable for their injuries. That picture captures well what happens in a tort suit, when a court evaluates a plaintiff's claim that a defendant wronged her and owes compensation as a consequence. But settlement mills nearly never file lawsuits; instead, they work out quick compensation with the would-be defendant's insurance company. There is little to the practice that looks like justice or accountability.

And yet, I'm inclined to agree with Engstrom that there is something attractive in the work that settlement mills do. This is because they operate in a space where people are more apt to be concerned with compensation than corrective justice. The typical settlement mill client suffered a minor injury in an automobile accident, which is hardly the sort of indignity that calls out for corrective justice. If settlement mills have managed to jury rig a no-fault compensation scheme for minor automobile accidents onto the tort system, then we should probably say bully for them. But we should also join Engstrom in her efforts to make sure that their clients understand just what sort of

service they provide.

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