



LET US NOW PRAISE OPPOSING COUNSEL.©

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Let us now praise opposing counsel. The good they do can live after them.¹

Roughly, seven out of ten cases the firm receives are in the conflict stage. The client is being victimized by a partner, ex-employee or contract party who is acting unlawfully; that is, creating legal claims. Often the offending parties (i) do not realize the conduct is unlawful, (ii) the extent to which legal damages can be assessed against them and/or (iii) how incredibly expensive civil litigation can be.

The firm's counsel and reaction to this is to advise a "complete case work up," which includes a chronology and extensive knowledge of the facts, analysis is of the legal issues, research as necessary on the current case law, drawing legal conclusions as to the possible outcome of litigation, and drafting of the "demand letter from Hell." The demand letter contains all of the above and can run from four to six pages or more.

The above process takes time and money, but has value in at least two ways:

¹ This is a takeoff, of course, on Ecclesiastes 44: 1-15.

One, it makes it less likely the recipient party will throw the letter away. While it is easy to throw away or ignore a one page demand letter stating only general facts and conclusions, it is much more difficult to ignore a letter tailored to the facts and case at hand and stating as its conclusion that the recipient is, or could be liable, on a number of legal claims, some of them with punitive damages, which add up to a large sum of money. If nothing else our letter may trigger a tremendous urge in the other side to respond and tell us how wrong we are.

Second, it makes it more likely that the recipient will take the letter to an attorney, who becomes the "opposing counsel" alluded to above.

While it may seem counter-intuitive to want opposing counsel involved, not only is it typically a good thing to have opposing counsel involved, but also, paradoxically perhaps, often the "better," i.e. knowledgeable and well-informed in business law, opposing counsel is, the better it is for all concerned. Opposing counsel who has extensive knowledge and experience in the area can advise the client as to the unlawfulness and legal consequences of the offending client's conduct. The attorney can tell the client that, at minimum, the legal consequences can be a lawsuit and the attendant horrific costs of litigation; at most the case could result in a large judgment being awarded against the party. So, again perhaps ironically, it is often opposing counsel who gets the wayward party under control, which goes back to the earlier point that frequently the offending party is acting out of ignorance or willful blindness. Once the opposing client is educated as to the nature and consequences of the conduct the case can go through what I call the "Process."

The "Process" is the clash of paradigms between how my client sees the case and wants to happen and how the other side sees the case and what it wants to happen. Typically, the clashing clients (mine and theirs) start with one thing in common: Each believes that he is right, in fact self-evidently so; thus, the other side should just concede that point, accept the client's position, and surrender. Sometimes, the client will even state "I am so obviously right that I should not have to spend one dollar on this case." Well, maybe the client *should* not have to spend money to resolve the matter but the fact is the client does or will have to spend money on the matter unless he or she wants to concede the matter to the other side and

conceding in this case would mean major loss to my client. If my client were not facing significant harm, he/she/it probably would not be in my office.

So, back to the "Process." The Process may be likened to the parties sitting on the opposite end of a conference table. Unless the matter goes all the way to trial the matter most likely will be resolved with the parties reaching agreement somewhere more or less in the middle one-third of the "table." But this does not happen overnight, even in reaction to and as a result of a well-crafted "demand letter from Hell." A response letter is written, telling us our claims are weak and wrong-headed. The attorneys state their clients' positions as logically, and sometimes forcefully (what has been called "bull walrusing") as they can. Eventually, the claims and defenses can reach equilibrium and a settlement can be reached. This is the Process. Unfortunately the Process can often cost \$10,000 per side – and this is can be without litigation, i.e. a lawsuit. Again, this outcome is reached because the offending, misbehaving party is advised on the unlawful nature of the conduct, learns the dollar amount of damages the court can award against him, pays substantial attorneys fees and faces the prospect of paying a whole lot more: to his attorney and to this firm if we prevail in the legal action.

But the Process can go a whole lot smoother and faster if the opposing counsel knows the area well enough to tell and advise the client as to the reality of the situation and reject spurious arguments that just waste time and money. B.S. can be eliminated and the parties can go to the heart of the matter. For example this firm just negotiated a severance package for an owner and engineer of a start-up semi-conductor company. The employer wanted to set up the client for "cause" termination to avoid paying the severance package. But, that claim was not sustainable under the existing case law or even the factual allegations made. Thus, in return for our firm's client agreeing to look at a pending third party buy out of the company for his payment for his shares, the severance agreement was quickly reached. This is a good example of where the stature, knowledge and experience of the attorneys served each client well.

Bottom line, I like it when a misbehaving party has legal representation. And, I like it even better where the opposing attorney is well versed in the area of business law. So, let us now praise opposing counsel; the good they do can last through the generations.



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