ONE MINUTE LECTURES
On
Business and Business Law Matters©

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Clients and colleagues know that I am prone to convert legal advice into little "speeches," what I call "One Minute Lectures." Here is a collection of some of them. I hope you find them entertaining as well as useful:

1. ***The Candy Jar Speech.*** The buyer in a business transaction is naturally focused on getting the benefit of the bargain. With a business purchase this typically includes the customers and contracts, location, the furniture, fixtures and equipment (aka "FF&E") and the intellectual property, including the trademark(s), URL, domain name, website, phone numbers, emails and other brand and contact information. Often, the business is very attractive. It may be a little like looking at the crystal candy jar we have in our office. But, exaggerating to make a point, I tell my clients: "Don't (just) look at the crystal candy jar filled with the multi-colored chocolate bars. Look at what the purchase contract says about the business because that is what you are buying. The *contract* determines whether you get the same jar and good candy or not, i.e. what you pay for and a fair deal. In short, "Look at the deal, not the property." Some investors I know, including me, will not even look at the property unless the numbers work. This is the financial analysis equivalent of my Candy Jar Speech. Bottom line, remember: It is not FF&E and other assets that you see that you are buying (i.e. getting); it is *what the contract says* about the FF&E and other aspects of the business that you are buying.

2. ***The Document Looks OK to me Fallacy.*** Often the client focuses on the language *in* the form, but does not realize what *is not in it*. For example, I had a self-made millionaire client who was negotiating the purchase of a new business. He asked me to look at the contract late in the afternoon on the day before the Closing. I quickly realized the contract contained none of the seller representations and warranties essential to a business buyer. The client had gone through nine drafts and revised the language *in* the document but did not realize what language was *not* in the document. It takes years of law school and considerable knowledge and experience to know *what the business contract is missing*, e.g. strong indemnification language; precise and favorable definitions of terms; and as in this case representations and warranties about the accuracy

and completeness of financial and other information disclosed, taxes paid, condition of equipment, the absence of liens and litigation, etc. The list goes on.

3. ***The You Don't Want a Lawyer; You Want a Priest Confusion.*** Another problem with the above transaction is that the client came to me at the very last minute. When this happens, often the client is looking for the attorney to in effect "bless" the documents. The lawyer is supposed to do the legal equivalent of the sign of the cross, thereby making the client feel good about the transaction. But, in a case like this the attorney has been outside the loop of the deal, does not know the parties' needs and objectives, has not had sufficient time to give the documents a competent review, and has not previously met with the client to review the documents and discuss the transaction. Because of this, the attorney cannot provide competent advice – at least not the best, most complete and valuable advice -- due to the lack of notice, input and time. It is beneficial to hire an attorney; it is better to use one wisely and get your money's worth.

4. ***The "Landmines" Speech***. Landmines occur in the context of contract drafting and review. "Landmines" are terms that are unidentified, misunderstood or missing from an agreement. Even worse, Landmines often arise from the lack of any agreement at all. Landmines may not be obvious to the lay reader, even when one is trying to be diligent and prudent. Just as it takes a doctor of medicine or one with medical training or experience to recognize and know, in advance, the difference between heartburn and a heart attack, it takes a doctor of law[1] or someone with legal training and experience to recognize legal Landmines. Landmines can be destructive to the success of the transaction, the business as a whole, and your life. Consider, for example, the effect on the business and life of the business owner whose General Manager left his company with impunity due to the lack of a well-drafted Key Employment Agreement. The fact that "Landmines" can be so business and life-altering is a major reason that I strongly recommend legal consultation and advice regarding any important contract or business relationship or contract.

As a final note on this subject, again quoting myself, in reviewing and negotiating a lease or some other contract: "We may not be able to negotiate away or in our favor all of the problematic terms of the agreement, i.e., the "Landmines." But, because of legal representation, we will know where they are."

5. ***The Doctor's Office Speech.*** Doctor's office visits for preventative medicine cost much less than hospital stays or emergency room surgery. Likewise, it is much less

[1] Lawyers receive their Juris Doctorate (J.D.) upon graduation from law school and have nearly the same number of years of training as a medical doctor, excluding time spent by medical doctors in "residency."

expensive to pay for a well drafted business agreement, consultation and advice than to pay the cost of commercial litigation caused by the lack of a well drafted agreement, or prior consultation. This is especially true if the action requires emergency legal proceedings. The typical tailored agreement for our firm's usual business-owner client will cost from $1,500 to $2500, $5,000 at the most, except for unusually complex or large transactions. In contrast the initial upfront advance fee deposit, aka "retainer," for a litigation matter will be from $3,500 to $10,000 or more. The cost of the litigation itself may be many times that. The benefit of sound legal advice and well drafted agreements, as our clients' cases demonstrate, can amount to literally a million dollars. A tailored agreement, or the absence of same, may even determine the business' ultimate viability. As with preventative medicine, under a cost-benefit analysis, "preventative law" is a "no-brainer."

6. ***The "Call Not Received" Benefit***. One benefit of having a well drafted agreement is that it can discourage others from pursuing litigation. Sometimes, when the would-be plaintiff takes the agreement to his lawyer, he learns that (A) his claim has little or no merit under the contract and (B) even if the claim had some merit the lawsuit would not have a favorable "cost-benefit ratio." There would be less certainty of a favorable outcome for the same or greater cost. Either A or B dampens the enthusiasm to engage in costly litigation.[2] We call this "the call not received." Even if the "call is received," the client's position is stronger with a well drawn agreement.

7. ***The Skyscraper Speech.*** My building and the hi-rise buildings around me are filled with lawyers, accountants, business advisers and financial analysts. These professionals would not be there and could not pay the rent unless clients were using them. And, it seems likely that the clients do not use these firms because they *like* them, but because the clients realize that professionals bring value to the deal or business. I doubt Donald Trump uses his professional advisors because he likes them, or likes doing so, but because he knows they help him succeed. I believe it was Tony Robbins who said: "If you want to be successful, find someone who has achieved the results you want and copy what they do and you'll achieve the same results." If successful business people use qualified professionals, it is probably a good idea for you to do so as well.

8. ***The What am I doing Here When I know I'm Right Stance.*** Typically, clashing clients (mine and theirs) start with one thing in common: Each believes that he

[2] For more on this topic please see my article "Follow the Money: The Ins and Outs of Commercial Litigation." You may get a copy of this article on this Site (i.e. the firm website) or from the firm at thefirm@azbuslaw.com.

or she is right, in fact self-evidently so; thus, the other side should just concede, accept the client's position, and go away or surrender. Sometimes, the client will even state something like "I am so obviously right that I should not have to spend one dollar on this case." (Often implicit in this position is the sub-text "I shouldn't have to pay you if I should not have to be here.") Well, in an ideal world perhaps the client *should* not and would not have to spend money to resolve the matter. But in this world the reality is the client does have to spend money on the matter unless he or she wants to forfeit the claim or lose by default. And, if the client were not facing significant harm, he/she/it probably would not be in my office.

9. ***The Perfect Letter Speech***. Clients often, and understandably, assume that if our demand or response letter is correct and persuasive on the merits, then the opposing party will "see the light" and quickly settle. That is almost never the case because of the practical and economic dynamics of the situation. Typically, even a "perfect" letter, written by the preeminent authority on the subject, is not enough (Sometimes I refer to a letter written by "Jesus Christ.") If your adverse party is making $100,000 a year by cheating you he probably will continue to do so until there are some "costs," associated with that conduct. Creating costs for the other side typically requires litigation. The litigation will continue until some "equilibrium" is reached where the imminent downside cost or risk is sufficient to offset the benefits of the aberrant behavior.[3]

10. ***The "Money In Means Money Out" Fallacy.*** Often, there is so much uncertainty about, and focus on, getting a business started or acquired that the owners will (wrongly) assume that if they can get the funds to get started, then the business will generate the income to support them. This may be true in the long run, but as the economist John Maynard Keynes said "In the long run we're all dead." The working assumption of "money in implies money out" ignores or does not account for the fact that startup companies tend to consume mass quantities of capital, and do not typically throw off cash for a period of years. As a result we have the common result in start-ups of "somebody staying and somebody going." The reality of the situation is there is just not enough money for everyone to live on.

11. ***The "Two Letters Rule."*** This rule is not hard and fast, but is more of a "leading indicator." It stands for the proposition that "letter writing campaigns" usually

[3] More on this topic in my article "Follow the Money. The Ins and Outs of Commercial Litigation." You may get a copy of this article on this Site (i.e. the firm website) or from the firm at thefirm@azbuslaw.com.

help the lawyers (bill fees) more than (they help) the client, and that if two letters fail it may be time to move to another level. This can be either dropping the matter or going into litigation. There are exceptions, of course, for example when the parties are in active settlement negotiations. Still, when the "two letter" threshold is reached the client – and the lawyer – should appraise the situation to insure that the client and firm resources are being used wisely and effectively.

12. ***The Angry Ex-Response.*** Unlike those above this "speech" does not involve a mistake, but one potent response to a hostile takeover action in a so-called "partnership dispute" or "business divorce." In a partnership dispute one group of co-owners may believe the affected "partner" is weak, not carrying his weight, or perhaps greedy or dishonest. Whatever the reason, one owner or group of owners will take sides against another owner or group of owners and act so as to deprive the recipient party(ies) of the benefits of their ownership. The hostile[4] actors may terminate employment, remove the others from bank accounts and public records and operate the company in such a way that no money flows through in the form of dividends or distributions to the ousted partners. This is called a "corporate squeeze-out."

One response to this hostile takeover action is the "Angry Ex (spouse) Response." The affected party may reply something like this: "Even if what you say were true (i.e. weak, greedy, etc.), you do not get my interest for free. You need to buy me out. If you don't buy me out, then I will exercise my ownership right to be actively involved. As an outsider I will not be working there every day so I need to be vigilant in protecting my rights and interest. I will need to be more involved than ever in reviewing the books and records, calling and attending meetings and participating in the management and operations of the company."

The power of this gambit is that more than just about anything else in a hostile takeover situation the remaining partners want the affected party (the "ex-spouse") to be gone. This strategy imposes a "cost" on the hostile partners by making it clear the excluded party will not go quietly and, unless there is a suitable buyout, he will in fact be involved with the company more than ever. The firm had a Canadian client who was locked out of an Arizona insurance agency but had no money to pursue litigation, especially against a strong defendant who owned a chain of such agencies. Doing nothing more than exercising a business owner/investor's statutory right to call and participate in company meetings and to inspect the books and records of the company, and reminding

[4] "Hostile" in the sense of acting against another's wishes the result of such actions causing the recipient harm.

the hostile owners that the client was entitled to his percentage distribution (see next paragraph) we were able to achieve a favorable buy out.

13. ***The Free Ride Effect.*** The expelled partner may also respond something like this to the hostile partners: "I do appreciate your hard work to manage and operate the company while I am away (the implication that the partner is going to Tahiti or some exotic isle). I look forward to the increase in the value of my ownership interest, and the yearly dividends or distributions to me. I'll check back in, say, five (5) years to see how we are doing." (I call this the "Free Ride Effect."). The power of this gambit is that the value of the excluded partner's interest and right to money distributions is not a function of actually working at the company.[5] Hostile business owners hate the fact that the person they are trying to exclude still has the right to dividends and distributions and to the increase in the value of the company. In fact, the excluded partner may be in a better position than they are because he does not have to work to receive distributions or increase in company value. Meanwhile, the remaining partners may be working long hours without pay, loaning money to the company, etc.[6]

14. ***Sweat Equity for Fun and Profit***. "Partners" (the generally used term for co-business owners) sometimes pay for their membership interests in LLC's or corporations (not corporations in Arizona) by providing services to the company. There are some pitfalls to this, which include:

A. The service provider's claim against cash provided by others in the event of withdrawal or dissolution, say for example, my 50% for services against the other partner's investment of $500,000.

B. Vesting before performance. See *A.*

C. Not defining the services to be provided. Often the only reference to this will be "Services to Company." A better rule would be to have the title, position, duties and milestones identified. This protects the service provider because "If you cannot identify when a breach has occurred, the contract terms may be too indefinite to even have an enforceable agreement." And, it protects the company because if continued work is required, then the failure to provide that work is a reason to expel the

[5] This is a major source of conflict and one reason why a Shareholders' Agreement or LLC Operating Agreement should carefully define what each member owns, what each must give for that ownership now and *in the future.*

[6] The partners in control may operate the business to earn no money therefore have no distributions to the partners, including the expelled partner, but as long as he remains an owner the excluded partner has the right to the books which information could create or substantiate legal claims against the hostile owners. Depending on state law these claims could include, breach of the business judgment rule (i.e. acting as a prudent business person in operating the company), breach of fiduciary duty (the highest standard of honesty, loyalty and care at law), conversion ("civil theft"), etc.

member or shareholder or reduce the amount of his ownership interest. And,

D. Absent an agreement to the contrary an LLC member or corporate shareholder does not have to work in the business. (This happens.) You can have a situation where the "partner" does not work in the business but who has a claim for his percentage of distributions and against the net worth of the company in the event of dissolution.

The moral of this story is to get some legal or accounting advice regarding sweat equity and the expectation that the partners will actually work in the business.

15. ***The Process.*** In business disputes, typically, the parties begin with directly opposing views of how the case should turn out. I call this the "Paradigm" of each party. The parties proceed from countervailing Paradigms to work up the case, exchange demand and response letters, argue back and forth, and perhaps file initial and subsequent pleadings. They engage in the legal process until the parties reach the point of settlement or decide to continue with full scale litigation. This period is what I call the "Process." Each case will require a certain amount of time and money for the Process. No matter how well-written and legally correct a demand letter may be, one does not get $100,000 in return for a demand letter. One reason for this is the application of the "Follow the Money Rule" discussed below. Thus, we have the Process.

16. ***The Reality Check.*** If the estimated amount needed for the Process (or to at least work up and get a good start in the case) is, say, $10,000, and the client does not have $10,000, then the decision is made. The client cannot afford a lawsuit. As with surgery or pharmaceuticals you either have the money for the operation or drug-treatment or you don't. If you don't, then that's the end of the analysis. I call this initial sum the "Reality Check." This "Reality Check" applies to both Plaintiff and Defendant.

17. ***The Legal Savings Account.*** The need for the Reality Check is one reason why having a savings account for legal purposes is so important. My father had a small town appliance and hardware store for 40 years and to my knowledge he never sued anyone nor did anyone sue him. Times have changed. Now, if you ask people how they plan to succeed in life, many of them will answer "by winning the lottery or a lawsuit." These customers or competitors are predatory and want the business to make a mistake. They are looking for an excuse to sue. And, some attorneys are standing by to help them.

Many times having the hypothetical amount of, say, $10,000 or more set aside for a "legal rainy day" can mean the difference between success and failure in business. This

"legal savings account" provides funds to hire legal counsel to enforce agreements, deal with government agencies, and to bring or defend legal claims. $10,000, of course, would not cover the complete cost of litigation, but it might cover all or most of the initial Process with the goal of resolving the issues and ending the dispute. And, if one does not use the funds for legal purposes, the account can become a savings account for retirement.

18. ***"Costs" Are The Basis of Settlement***

An important part of litigation is the "Costs."[7] At the beginning of a dispute each party believes its position is correct, so the costs of anticipated loss have not yet begun to accrue. At this juncture then, "Costs" consists mainly of attorneys' fees. However, as the Process continues and the parties learn more about the case, "Costs" equals not only attorneys' fees, costs and other expenses but also actual or perceived imminent downside risk and damages.

A perhaps inaccurate, and to a statistician perhaps even laughable, rule of thumb I sometimes use is: Likelihood of success percentage (%) times (X) Value[8] ($) = maximum attorneys fees to spend on case. For example, sometimes I can estimate the odds of success as 60/40, i.e. 60%. If the Value, as assumed to be here, is $100,000, then 60% X $100,000 equal $60,000 as a maximum amount to be spent on attorneys' fees. Note, in absolute terms, if the Value is $100,000 then attorneys' fees and expenses in an amount up to $99,999 would be defensible. But my formula weighs the amount to be spent by the likelihood of recovery, so it is more conservative. The questionable assumption here is that one can know the "success percentage." And of course we cannot really know that, but we can have "feelings" about the case and the clients usually ask about that, so appreciate the exercise. One may apply this "formula" at any time during the litigation to see where one stands.

19. ***Acting Out of Legal Ignorance***. Often the party "Acting Out," that is acting in a manner that is hostile to the business and legal rights of another, does so out of what I call "legal ignorance." Here, "ignorance" does not imply stupidity. To the contrary, business owners are virtually always exceptionally bright or outstanding in some way. Rather, in this context, "ignorance" means lack of knowledge of the legal and financial consequences of their actions." In about seven out of ten partnership disputes or employee competition/data theft cases the persons acting out have not contemplated and are unaware of the "Costs" (as defined in section 14 *supra*) of their actions; that is, they do not know or have ignored the serious legal claims which may be brought against them, the compensatory and punitive damages which may be awarded on these claims, and the

[7] From my article "Follow the Money: The Ins and Outs of Commercial Litigation." You may get a copy of this article on this Site (i.e. the firm website) or from the firm at thefirm@azbuslaw.com.

[8] "Value," here, means the amount in question, which can be funds improperly held or withheld by the defendant or harm caused by the defendant to the plaintiff.

cost of litigation itself. In our partnership dispute example above the legal claims against the parties Acting Out include (in some states) breach of fiduciary duty, conversion (civil theft), civil conspiracy, civil aiding and abetting, etc.

The dynamics of how the "Process" (discussed above) works to educate the protagonists about the Costs of their actions is interesting. To exaggerate, often is not (just) our firm's legal work, but the work of the protagonists' legal counsel that brings the aberrant behavior under control. In my article "*Let Us Now Praise Opposing Counsel*" (which you can read on the Site or by acquiring a copy from our firm at thefirm@azbuslaw.com) I make the point that sometimes having an attorney, instead of just the protagonist(s), on the other side can be advantageous. This can be particularly true if you have a strong case because the attorney can explain to the adverse parties the consequences of their actions and make recommendations based on a cost-benefit analysis. This may lead to the Process of attorney bull-walrusing, argument, negotiation and settlement where otherwise the Acting Out might continue unabated and without compensation.

20. ***Don't Play the Other Person's Game.*** A corollary and concomitant mistake of acting from legal ignorance is playing the other person's game. I have been amazed that adverse parties, which I acknowledge may be extremely successful and even brilliant at what they do, believe (thereby making a horribly false extrapolation of their competence and control) that because they are outstanding in their field, say medicine or engineering, that they can match wits with an attorney on the law and in the legal process. (To realize how absurd this is consider the opposite: the attorney who believed himself adept at medicine and medical procedure.) The underlying principle here is to do or expand from what you know. Just as a lawyer probably has no background in software design and manufacturing, a tech expert probably has limited knowledge of law and experience in the legal Process. Thus, the tech expert's attempt to play the lawyer's game is "suicidal."

21. ***Pride Comes before a Fall.***[9] A party Acting Out is often over-confident. Over-confidence, in addition to legal ignorance, is a recipe for disaster. In one case the opposing party in a business partnership breakup quoted partnership law *to our firm's attorneys* in support of a completely indefensible position. After the party hired legal counsel just before a court hearing, the first thing his lawyer had to say to the judge was to retract his client's arguments and concede our position. The firm has brought down many "hotshots" over the years, whose fall was all the greater due to their over-confidence.

[9] Proverbs 16:19: "Pride goeth before destruction; a haughty spirit before a fall."

22. ***Be Aware of Pre-Litigation "Stage Management."*** Another form of "legal ignorance" is being oblivious to the importance of strategy, pre-litigation planning and "stage management." "Stage Management" is based on the premise that each case has a story as told by the party. In a way, litigation is a "battle of the stories" as they would be presented at trial where the best and most believable story will win. The objective, then, throughout the case, is to get as many facts as possible in support of one's own story, and to prevent or reduce the number of facts which support the opponent's story. (I refer to this battle of fact accumulation as each party's "yellow pad.") Once legal counsel is hired, often the attorney will coach the client to engage only in communications designed to elicit certain responses and otherwise not to communicate at all with the other side, witnesses or parties of interest. Attorneys are masters at asking the under-inclusive question, the answer to which may be truthful as far as it goes, but does not tell the full story. Also, attorneys ask "box car" questions which assume facts not in evidence, perhaps facts that are not even true, or which add conclusions or interpretations which are not how the client would state, explain and present his case. The firm has had cases where the client has been "staged managed" by selective questioning and communications so effectively by the other side that by the time the client walked in the door the case was almost unwinnable. To prevent this, once we know "the game is afoot,"[10] we will advise our client not to answer, send or engage in any communication with the adverse party, or any knowledgeable or interested party, without prior approval and input from the firm.

23. ***The "Yellow Pad Speech***." As alluded to above, litigation is a battle of stories, so the challenge is to have the most developed, logical and compelling story. The story is comprised of the facts of the case – as we remember and present them. Our recollection of facts may come to us in bunches, but often there are "stragglers," and the facts may come to use when we're in the shower, not sitting at our desk or laptop. For this reason I recommend that the clients keep a "yellow pad," which these days may be an iPad or laptop, with them at all times during the early stages of case work up and legal process. This way important facts will not be lost or overlooked, which easily and unfortunately does happen.

24. ***"Black Hat" – "White hat." Look for Legal Advice Tempered with Business Reality.*** Clients come to our firm for legal advice. That is what they are paying us for. For that I wear my lawyer "black hat." But often, it is not feasible for the client to follow

[10] From Shakespeare's King Henry V. 'Before the game is afoot, thou still let'st slip. Arthur Canon Doyle "The Adventure of the Abbey Grange" when Holmes tells Watson: "Come, Watson, come! The game is afoot."

our advice exactly. In some cases the business may already have acted in ways inconsistent with what our legal recommendation would have been. And, in other cases the business could not survive if it followed our legal advice to the letter. Our firm understands that. For example, one of the business' employees, say, a key software engineer, may be having immigration visa problems. Because the employer may face civil and criminal penalties, and the employee may suffer inadmissibility if there is a violation, the "pure" and conservative legal advice and recommendation would be "not to go there" until an immigration attorney can straighten things out. But, at the practical level, the business needs the engineer and the employee is here and needs to eat. In this case wearing my "black hat" I will clearly state the legal principles and provide my legal advice. If the client has immigration attorneys on board I would recommend that we bring them into the mix. But, having done that, then wearing my "white hat" at the client's request we would discuss various options to determine the course of action which best balances the risks and benefits.[11]

Three principles intersect here: One, clients do not like being told by the attorney that they cannot do something. They do not come to the attorney to hear that and it is not the lawyer's place to do that. Two, the objective of the representation is to have the client as informed as possible so the client can make a well informed decision, cognizant of the risks. If the idea is terrible we will explain that. But the final decision belongs to the client. (This does not apply to groundless lawsuits because the ethical rules prohibit that.) Three, the riskier option *may* be the most profitable, at least in the short run, and perhaps overall. Say, for example, the engineer makes the company $1,000,000 a year. $1,000,000 a year will pay a lot of attorneys' fees, so there is a reasonable chance that the "do & defend" course of action is the best course overall. This is legal realism. Businesses want and need lawyers who can help them work through this kind of problem, so find a lawyer who can.

25. ***Have a Course of Action and Case Strategy.*** Strategy in litigation is always important, perhaps particularly so when the client is the weaker party. Our firm represented a new business owner who had been the top designer for his former employer. The designer had not signed an employment or other agreement which would have prevented him from having a competing business or from doing business with customers of the old firm who chose to follow him. But, knowing that having this designer as a competitor could hurt them badly, the former employer filed suit and applied for an emergency temporary restraining order ("TRO") and injunctive relief to

[11] It is important to note here that the firm is not and cannot represent the employee. Because much of the serious downside risk would be borne by the engineer, the firm would strongly advise the employee to get his own counsel.

bar the designer from using any designs in his portfolio created during his employment and from even referring to names of the clients for which he had done the work. As a designer's portfolio is an essential part of doing business, a negative outcome in the suit would in effect have put the designer out of business.

All of this happened before the client hired our firm. Facing claims of arguable merit and not having the $10,000 or more one needs to even get started in the emergency TRO proceedings,[12] the client had no choice but to make the best deal he could. As a result the designer surrendered rights to intellectual property, clients and territory he might have kept with a better strategic position. The client could have handled this situation better by having the firm counsel and help him *before* and after his departure from the company. This Strategy, Pre-Litigation Planning and "Stage Management" would have included:

(1) Educating the client on the likelihood of litigation with his former employer, taking into account the harm his leaving could cause the company and the Follow the Money Rule, discussed herein;
(2) Counseling him on the "right way" to leave and to avoid what (to a lawyer) would be obvious mistakes (e.g., announcements are okay, but advertising pitches may not be). Sound legal advice can make the opposing party's case much more difficult;
(3) Discussing, perhaps, the timing of departure, e.g., whether and when he could satisfy the Reality Check's requirement of Adequate Funding[13]; and
(4) Preparing him for the Process by discussing the principles of Pre-Litigation "Stage Management"

26. ***The "Follow the Money" Rule***. The "Follow the Money Rule" is comprised of two parts: One, having adequate funding and two, a case that makes sense under a cost-benefit analysis. Even as expensive as attorneys and litigation are, if the benefit of legal action substantially exceeds the costs and if one has the money to afford the attorneys and legal action, then it is a "good investment" to proceed. As long as the anticipated attorneys' fees, other costs and pain, i.e., costs, to a party, are less than the upside gain–here, the assumed initial Costs[14] of $10,000 applied against a "Value" of $100,000–then

[12] Unlike a normal suit for damages, which can take more or less a year to complete, one must be in court to defend a TRO Application within a few weeks.
[13] This refers to my article "Follow the Money. The Ins and Outs of Commercial Litigation." You may get a copy of this article on this Site (i.e. the firm website) or from the firm at thefirm@azbuslaw.com. Reality Check §16 *supra*.
[14] Please see section 18 on "Costs" above. At the beginning each party believes its position is correct, so the costs of anticipated loss have not yet begun to accrue. At this juncture then, "Costs" consists mainly of attorneys' fees. As

the party has incentive to begin and continue legal process. This is a major reason why people hire lawyers and we have lawsuits.

On the other hand, in some cases, one might need to spend $5,000 to get or keep $5,000 in Value. In that case, even if one has the money, one might think twice before "investing" it in the litigation. Some other use of the money may be a better investment. This use of the term "investment" is not by accident. If one has a choice in the matter, which is not always the case in litigation, funds spent in the suit should be weighed against other uses for them. In may be that from a cost-benefit analysis, particularly where the analysis is expanded beyond the immediate suit to consider other potential gains or losses, the suit will be more clearly seen as a good or bad investment.

A corollary to the Follow the Money Rule is the impact of "Market Forces." If the cost-benefit numbers work, (i.e., the Value is sufficiently greater than the Cost), and if one has the money to fund or defend the litigation, then one is almost "trapped in the incentive to sue." The human psyche or some metaphysical market force to seek gain over loss virtually compels the plaintiff to seek recovery of, and the defendant to seek to keep, the Value in question.[15]

27. ***The "Triple Whammy" Advantage of the Party Acting Out.*** The party Acting Out, (the "Defendant") for example, in a partnership dispute has some advantages over the victimized party (the "Plaintiff"):

(1) Defendant has and controls the Value, so the Defendant has less to lose because part of the "Cost" in question is the Plaintiff's Value.
(2) If that Value is money or the generation of money, as in the takeover and control of the business, the Defendant may use the Plaintiff's money (i.e. Value) to defend, and in contrast,
(3) Plaintiff has lost and seeks to recover the Value, so must have and draw upon other funds to pay for the Process of recovery.

Often in partnership disputes, breach of contract and collection cases the injured party, the Plaintiff, has his cash, income and net worth invested tied up in the matter, which the Defendant now controls, and may have no other significant amount or source of funds. Thus, as a result of the "triple whammy" the Plaintiff may not be able to satisfy the Reality Check of adequate funding.

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the Process continues "Costs" = attorneys fees, costs and other expenses plus actual or perceived imminent downside risk and damages.

[15] This compelling "market force" to seek gain and avoid loss seems to be a metaphysical property of the human psyche if not the universe itself.

28. ***Know the Ten Tough Questions and the Other Party's "Right Hook."***

Some years ago I attended a Continuing Legal Education seminar in which a presenter discussed the fact that a complex litigation case typically has "ten tough questions" and that if you can answer those questions you can win the case. Likewise, it follows that the other side must be prepared to answer your ten tough questions. Interestingly, in my experience usually only three or four of the questions are actually asked in a deposition (legal testimony under oath). The problem is that we do not know which ones opposing counsel will ask.

A corollary to the above principle of preparing for the tough questions is to know the other side's "right hook." Often the case has a few critical facts or arguments which must be answered or deflected to avoid having the case decided by that fact or argument.

But, it is not unusual for our clients not to tell us the seriously adverse fact. This may be because the clients are afraid of looking stupid, believe that we will think less of them, forget, or just don't realize its significance. That is why it is essential that the client turnover all documents and disclose all information that could possibly be relevant. There are few facts or arguments that cannot be challenged, offset, refuted or mitigated if the attorney has advance knowledge of them. It is when the attorney does not know the critical fact or question until it comes out in a deposition that he is blind-sided and forced to scramble to recover.

29. ***Maximum Benefit Requires Maximum Input.*** It is not unusual for a client to hesitate about beginning a Process with a probable cost of $5,000 or more when the case has a Value of $40,000 or more. This hesitation is not necessarily just by clients who do not have the money. Some of these clients have adequate funds. The problem seems to be a false assumption that the act of hiring a lawyer in and of itself, or perhaps of having the lawyer work up the case and draft a demand letter is going to solve the problem. But that is not the way the Process works. To exaggerate to make a point: The party who has and is enjoying the benefit of having your Value is not going to release that, say $100,000 in Value in response to a $2,500 case work up and demand letter. This idea is wrong as to both time and money. Rather, the parties will Follow the Money Rule and act accordingly until equilibrium[16] is reached. See Process §11, *supra*.

Another way of saying this is: "Maximum Benefit requires Maximum Input." If a party wants to recover the full $100,000 in Value, then he will need to continue in the

[16] A theoretical state or stage in the legal process where the Defendant's Costs, actual and perceived, equal the benefits.

case until he wins the case on the merits by trial or summary judgment. Proportionate gains require proportionate time and expense. Realizing this may cause one to evaluate the Process in terms of its time, expense and affect on quality of life.

30. ***Stick to Your Guns*.** In 1999 or so I attended a course in public instruction for lawyers at Harvard Law School called "Making the Deal in Organizing or Restructuring Closely Held Enterprises" with Professor H. (I called the course "Doing the Deal"). As you might expect, the course was challenging and required a fairly high level of knowledge, work and deliberation.

One assignment in particular – which was more or less the highlight of the course – was to negotiate the purchase and sale of shares in a hypothetical high-technology startup company which had a good story and trend line of talent, sales and earnings, but limited financial resources. The data, depending on what you considered important, e.g. the trend line, could support an argument for a price of $200.00 per share or a price of $800.00 per share. Between these extremes as I recall was a median price of near $480.00. My sales price was about $600.00 per share.

Like most of the students I had worked hard on my calculations and arguments, but I was not sure they were correct. So, on entering the Pound Hall classroom that Summer day I remarked in passing to the Professor that I was not sure if my previously mentioned share price number was correct – implying by my words and tone of voice that maybe I had missed something. Professor H. seemed just the slightest bit annoyed by my comment and replied to the effect that he thought I should stick with what I had said and have confidence in that. Over the years I have thought about the good Professor's reaction and what he meant by his comment. Was he saying …

1. I think you are closer to being right than some of the others and we need your answer in class.
2. Yes, you could be wrong, but you could be right. We'll see.
3. Stand by your analysis and conclusion unless you have an objective reason not to and make sure your hesitancy or change of heart is not due to a subjective cause, like insufficient diligence or confidence. Or,
4. Truth is uncertain; so in a large part the outcome will depend on what is boldly asserted and soundly maintained; that is, a function of the power of advocacy.[17]

[17] Law students learn this principle in law school: "Law is whatever is boldly asserted and plausibly maintained." Aaron Burr

Professor H. never stated his opinion of the "correct" share price and I will never know the exact answer (if there is one) to my ruminations about the meaning of his comment. So, any or all of the above answers could be what Professor H. was trying to tell me. But, I think the bottom line is something like this:

Truth needs an advocate and advocacy requires confidence, so unless you have an objective reason not to: *Stick to Your Guns*. Even if you are wrong people will respect you more for doing so.[18]

These are some of my "speeches" up to now. I am sure there will be others. I hope you can find them useful.

[18] For more on "law as advocacy" please see my article "Follow the Money: The Ins and Outs of Commercial Litigation." You may get a copy of this article on this Site (i.e. the firm website) or from the firm at thefirm@azbuslaw.com.