

4-13-2017

## Perfectly Frank: A Reflection on Quality Lawyering in Honor of R. Franklin Balotti

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### Recommended Citation

Strine, Leo E. Jr.; Hanks, James J. Jr.; Olson, John F.; Sparks, A. Gilchrist; Veasey, E. Norman; and Williams, Gregory P., "Perfectly Frank: A Reflection on Quality Lawyering in Honor of R. Franklin Balotti" (2017). *Faculty Scholarship*. 1752.  
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**Leo E. Strine, Jr.**

**With a foreword by:**

**James J. Hanks, Jr., John F. Olson,**

**A. Gilchrist Sparks, E. Norman Veasey,**

**and Gregory P. Williams**

**Forthcoming in *Business Lawyer***

## **Foreword: Remembering Frank Balotti**

*By James J. Hanks, Jr., John F. Olson, A. Gilchrist Sparks, E. Norman Veasey, and Gregory P. Williams\**

Frank Balotti was well known and respected in Wilmington and Delaware, of course; but he was also well known and respected throughout the United States for his participation in many of the most celebrated corporate law cases of his time and, of course, for his and Jesse Finkelstein's multi-volume Balotti & Finkelstein on *The Delaware Law of Corporations & Business Organizations*. Frank's resume was long and crowded. He chaired the ABA Business Law Section's Business and Corporate Litigation Committee, served as President of the Delaware State Bar Association, and was a member of virtually every other organization related to the improvement of corporate law and the bar devoted to its practice.

Frank had a knack for explaining the complex, even the apparently mistaken, with a directness and a logic that clarified rather than belittled or demeaned. If he could not fully explain something, he said so, and it was reassuring to the listener to know that the proposition really was difficult and could be wrong.

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\* The authors are lawyers who have worked closely with the late R. Franklin Balotti in bar association, legal education, and community endeavors, and have litigated with and against him. E. Norman Veasey is a former Chief Justice of Delaware. Prior to that service, he was a long-time senior partner at Richards, Layton & Finger and participated with his colleagues in hiring Frank Balotti as an associate in the 1960s. Later, he and Mr. Williams practiced law together with Frank and others.

For some or all of us, knowing and working with Frank often led to other joint adventures—teaching, writing, speaking, the ABA Corporate Laws Committee, advising the post-apartheid Government of South Africa on revising its incorporation process and Companies Law, and teaching law together at Cornell Law School, his beloved alma mater. Whatever Frank did, he seemed to enjoy it most when he was doing it in collaboration with others.

Frank especially loved teaching. Teaching was as natural to him as law practice. Frank infected others with his joy of teaching by inviting guest lecturers to his classes and promoting the visiting professor from practice program at Cornell. He loved the age-resistant contact with younger people, the intellectual content, the challenge of conveying not just information but difficult concepts that bore competing, even conflicting, perspectives. Frank was a natural teacher. A one-hour guest lecture at Cornell was enough for students to demand many return engagements—and led to Frank’s driving between Ithaca and Wilmington for several semesters, earning a stream of traffic tickets along the way, to teach his always fully subscribed mergers and acquisitions course. After class, Frank would repair with his guest lecturers and students for a glass of fine Italian wine (Brunello di Montalcino was a favorite) at the Statler Hotel, accompanied by a seemingly bottomless trove of memorable stories and incisive observations.

Frank was a legendary litigator in both Delaware state and federal courts. Those of us who litigated against Frank found that he fought fiercely but always fairly, bringing out the best in us.

Frank also inspired generations of younger lawyers at Richards, Layton & Finger, to whom he taught the importance of preparation, skillful advocacy, ethics, and civility. He was adamant that young lawyers do whatever they could to build the firm’s practice and he demonstrated exactly how it could and should be done.

Frank was one of the smartest lawyers we have ever known. He was lightning-quick to recognize the seriousness and consequences of a client's thorny problem and the alternative strategies to consider in dealing with it. He was among the best of corporate counselors in thoughtfully and deliberately managing the complexity and high velocity of today's corporate practice and litigation. His advice, though prompt, was never impulsive or hasty, even when—or particularly when—the client was impatient and demanding.

Frank also taught his younger colleagues the importance of having fun. He loved to invite his litigation teams to his office for Friday afternoon “beach parties,” where R&B music blared, beverages flowed, and laughter was constant.

And, of course, there was Frank's irrepressible sense of humor, susceptible of breaking out at any moment, often accompanied by one form or another of insult. It was impossible—at least, most couldn't manage it—to respond in kind because Frank would almost inevitably deflect the arrow and disarm the archer by cheerfully ignoring the barb and unabashedly confessing, “you got that right.” It soon became evident that an insult from Frank was a gift—to be remembered, treasured, preserved—as an act of friendship, an admission to the inner circle of Frank's confidence.

In any event, it was impossible to put him down. One of the few who did, by many accounts, was Joe Biden. Frank was the emcee for Chief Justice Veasey's retirement party from the Court in 2004. Frank was in full form that night, roaring along with one or more insults for every speaker. When he got to Joe Biden, his introduction dwelt at length, and in hilarious detail, on the then-senator's well known propensity for long speeches and more than occasional gaffes. The future vice president absorbed it all cheerfully and, when at last Frank allowed him to rise and speak, he said, “Frank, you and I have known each other since high school. We played

football against each other. Nobody paid attention to you then and nobody's paying attention to you now.”

Frank was a colleague, adviser, mentor and, most of all, a dear and valued friend. He was the best and most generous among us. Long after mourning his passing, we shall miss him.

## **Perfectly Frank:**

### **A Reflection on Quality Lawyering**

#### **in Honor of R. Franklin Balotti**

*By Leo E. Strine, Jr.\*\**

#### **INTRODUCTION**

No doubt because of my hairstyle, I was honored to be asked to present the first R. Franklin Balotti Lecture in Law at the 35th Annual Federal Securities Institute.<sup>1</sup>

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\*\* Chief Justice, Delaware Supreme Court; Adjunct Professor of Law, University of Pennsylvania Law School; Austin Wakeman Scott Lecturer in Law, Harvard Law School; Senior Fellow, Harvard Program on Corporate Governance; and Henry Crown Fellow, Aspen Institute.

The author is grateful to Christine Balaguer, Peter Fritz, Alexandra Joyce, Fay Krewer, and Peggy Pfeiffer for their help. The author also thanks Tom Allingham, Paul Rowe, Stu Shapiro, Greg Varallo, and Greg Williams for the excellent feedback and incisive comments on the speech.

This article formed the basis for the first R. Franklin Balotti Lecture in Law at the 35th Annual Federal Securities Institute in Miami, Florida, on February 7, 2017.

<sup>1</sup> And Frank's hairstyle is not entirely irrelevant to the subject of my lecture.

This lecture may be unique in honoring someone who spent a good deal of his professional and personal life coming up with insults for others. When I heard that Frank had died, I confess that one of the first things that came to mind were the words “fat Michael,” the nickname he had given to one of his closest friends at the Bar. This sounds cruel, of course, but when Frank said it, you could sense the deep affection and fondness it conveyed. To be picked on by Frank was to know that he cared about you.

I struggled a bit to figure out how to both do honor to Frank’s memory but also make my moments with you useful. Doing a lecture on deal protections, corporate governance, or the like did not seem fitting for the first of these lectures. Something more human, and more connected to Frank himself, seemed required.

For that reason, it seemed fitting to talk about the qualities I find most important in members of our profession who practice corporate and securities law. Although my lens on that question is obviously influenced by my direct interaction with litigation as a judge, I have tried to

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Frank understood what his colleague and dear friend, former Delaware Chief Justice Veasey, has steadfastly refused to acknowledge. To truly rank in the very first rank of Delaware corporate law judges and practitioners, follicle vanity must give way to duty. The gravitas of a bald pate must come before having bangs that match the color of your tasseled loafers. My friend Greg Williams long ago decided to put vanity above duty. My sense is that Chancellor Bouchard is weighing that choice now.

But think about it . . . Balotti, Seitz, Wolcott, Sparks, Ward, Allen, Chandler, Steele . . . coincidence?



surface more general qualities that are of value, regardless of whether you litigate cases or give clients advice on transactions. I thought this subject might do justice to Frank, because he exemplified so many of the qualities that I find to be most important. This is not to pretend that Frank always would have measured up, even to his own standards. As a devout Catholic, Frank would have been the first to admit that perfection and humanity can never be equated. But, those of us who were fortunate enough to practice against or with him, or to have him litigate before us, recognize that Frank succeeded in the striving, in his goal to set an exemplary standard.

My goal today is neither to be exhaustive, nor exhausting. I am sure that I have left out some important qualities of great lawyers. But, I hope to have identified some of the attributes that the best lawyers tend to have.

I am going to start with the most mundane, but also most fundamental one: are you willing to give what it takes.

### **THE BOX OF DOCUMENTS TEST**

The law is not a terrain safely traversable by shortcuts. Although I will not spend much time on this factor, the reality is that any great lawyer must sweat the details. As I approach a generation of judging, I have seen many law clerks come and go, and most have turned out to be excellent. But, even many excellent ones have struggled when taking the early test of a lawyer, what I call the box of documents test.

My law clerks typically got way more SAT points than I did. But, some of them, perhaps because of their native gifts, are used to putting in a perfunctory effort and still getting exemplary results. That is not how the real world of lawyering works. I don't care if you have a 180 IQ. If a

box of documents needs to be understood, and evaluated in the context of the relevant business dynamic, that IQ doesn't matter if you don't read the documents.

Clients and judges are good at asking a few questions and seeing how long it takes to get the blank stare, the look of someone who is trying to fake it. Much scarier are the senior lawyers who glibly try to get through situations on past reputation or using legal jargon.

And, for those of you who are younger lawyers, and that still includes junior partners, there is such a thing as a dumb question. It is one you have not reasonably tried to answer for yourself. When you try hard, you usually distill things down to the right questions and working through them will be something your colleagues and even clients will gladly do. But transferring your work to them will and should not impress.<sup>2</sup>

There are many ways to make more money with less work than by being a business lawyer. You are being paid to dig deeply into the key documents and information, assess their consequences in light of a complex legal environment, and give your client high-quality advice about how to move forward. You can't do that well without hard work and reflection.

Like bad habits, good work habits build on themselves.

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<sup>2</sup> For older lawyers, this question involves another element of the mirror test. Do you remain willing to do the work necessary to represent your client effectively? This is a serious problem with growing information flows. But, the best lawyers ask themselves it regularly and are aware of the hazards of rationalized short-cuts.

I started with the question of work ethic because without that you cannot be a great lawyer, even if you possess the other qualities I am going to highlight. And I am going to turn to these qualities now, ones that involve character as much as skill . . . .

### **STANDING BEHIND YOUR OWN ADVICE**

The best lawyers never encourage clients or judges or others to embrace an approach to a problem that the lawyer will not stand behind. This concept is easy to grasp this way. Imagine you are before a trial judge in a high-stakes case. It has some close issues, and both sides have written persuasive briefs. The judge decides an important issue for you on the theory you argue. At oral argument on appeal, one of the appellate judges seems to want to rule for your client, but on a different ground, expressing skepticism about the ground you won on below, which was in fact the ground you argued. Seizing the day, you latch on to winning. Not only do you easily accept the proposition that there is another way to win, you do not even attempt to defend the ruling of the trial judge who ruled for you—on your theory! If anything, you cozy up with the appellate judge about her concern. The appellate opinion comes out. You win, but the trial judge and arguably the law itself loses, as he is criticized for embracing your theory below and the appellate opinion notes that at oral argument your client did not seek to defend the trial court’s reasoning.

Now imagine the next time you are that trial lawyer and you are before that trial judge. And you are asking the judge to rule for you on a close question of fact or law. You are urging the judge to stake his reputation on you, by embracing your argument, and by relying on you to provide a proper defense of it at the next level. It would be rightly naive to think that the judge will not be far less likely to take a potentially risky step for you. Like most people, most judges are risk averse, do not take lightly action that could be controversial, and are most reluctant to do so in a circumstance when the lawyer who is asking them to do so cannot be relied upon to stand behind

his own argument down the line. You didn't have the judge's back the last time. Why should he count on you now!

This same dynamic exists in other areas of practice. When a group of lawyers—the “we”—give unified advice at a key stage of a transaction, and then something goes wrong, have you ever seen some of the “we” become somehow the “other” and someone who supposedly had privately harbored serious doubts before uses the setback to try to get more work from the client or a higher-profile role? The best lawyers do not do this. For one reason, if a lawyer really harbored doubts about a key strategy move, he should have had concern enough for the client to voice it when it counted, not after the fact. Similarly, he owed that to his fellow lawyers and advisors on the same side of the transaction. But, longer term, the reality is that better, wiser clients will soon find you out. You can make a mistake or give advice that goes wrong. But if you shift the blame to others or go sidewise, instead of being willing to person up, clients will not be able to rely upon you in tough situations, and your colleagues at the Bar and in related disciplines with which you must work, such as investment bankers, will not have confidence in you. When you are not around, you will be talked about, and when there is the chance to bring someone into a representation that is attractive and that matters, don't be surprised if you are not their go-to choice. In saying this, I am not saying you should be a lackey to your fellow lawyers or folks like investment banks either. I am saying that the best colleagues say what needs to be said in real time. If your doubt is serious enough that you will wish to express it later, you owe it to your fellow counsel, advisors, and your collective corporate client to force deliberation in advance of when the decision is taken, and to make sure the full range of reasonable options has been fully vetted with the clients and the risk-reward calculus made with care.

## **EMPATHY, OR THE ABILITY TO SEE THE WORLD FROM ANOTHER PERSPECTIVE, AND THE COURAGE TO ACT ON IT**

I now wake up in the morning and see in the mirror something that still startles me. For most of us there is an age we remember, when we suddenly became who we would always be, at least in our internal dialogue, and when the music, books, and ideas we had have permanent resonance. For me, that is when I was an early adolescent, a skinny, long-haired soccer- and hoops-playing kid, with bangs in his eyes, who always looked younger than his age. Now, every morning I see a bald-headed aging dude, struggling to get rid of that last 15 to 20 pounds, and with more circles under his eyes than a raccoon.

Well, just like we need to have a good sense of how others see us if we are to proceed with self-awareness, so do our clients. They need to understand how what they have done or intend to do will likely be viewed by those affected by their actions. But, this comes with a danger for the lawyer. We know that there is a class of lawyer and advisor who seeks to obtain business and to retain it by appealing to the client's sense of vanity or self-righteousness, who amplifies the client's self-justificatory impulses, and who expresses outrage that anyone could cast the client's motives in a dark hew.

But, when you think back on your life and which of your teachers, friends, relatives, and mentors helped you the most, it is unlikely that it will be the ones who told you that all your jokes were funny and that your hair always looked great. More likely, it will be the ones who cared enough about you to tell you the tough thing—the thing you needed to hear—at the right time and in the right way. Letting you know that they were on your side, but, that for you to succeed, you might need to change course or at least recognize some of the hazards that came with how you were conducting yourself.

This takes guts, and certainly that is so for a lawyer. Just as parents and friends fear risking affection through well-intentioned candor, most lawyers have to make a living. Telling hard truths might seem at odds with that need.

But there is no way to be among the best without having that courage. Clients who proceed without considering how others affected by their actions will view them put themselves at risk. As a lawyer, one of your duties is to represent your client's best interests. A word comes into this at times, which is the duty to act zealously within the bounds of ethics. I find this word disturbing, as I think it tends, rightly, to be associated with a passion beyond reason. A lawyer owes a duty to be selfless in providing a client with the most candid, well-reasoned advice, at the risk of his own future relationship with the client. Agreeing to pilot the client's ship on to the rocks is not professional excellence, it is malpractice.

Now, what do I mean by empathy? I mean it in the sense of trying to see and feel things from another's perspective. To be concrete and perhaps helpful to those of you who do transactional work, take this question. From whose perspective is it most important to consider the world if you are representing a public corporation board that is considering a sale? Is it your client's? I would say no. Is it the Delaware courts'? Certainly not.

The most important perspective to understand if you are to help your clients fulfill their duties to the corporation and its stockholders is the perspective of the potential buyers of the corporation. Are you focusing your clients on their unique and critical perspective? If not, how will your clients design a sales process that accomplishes their business duty to get the best price for the company. That means thinking about things like the effect of insider voting power and management talents on private equity buyers, or whether a private equity buyer will come in after another buyer has a signed-up transaction, even with a go-shop. That means thinking about the

high costs to strategics of having to jump a signed deal, the need for regulatory and other due diligence, and so on and so forth.

It can take chutzpah to be heard on issues like this. Some directors and managers will consider you to be naive, or unduly risk averse. Forms of self-interest may influence the pushback, signals that may be disconcerting but that call on you to remember who your real client is—not the directors and officers personally. Now, recognize that none of the issues I raised are related to some legal standard of review in a fundamental sense. Rather, they involve the lawyer representing a business fiduciary and helping the fiduciary recognize his duties to exercise business judgment. By focusing the client on his fundamental business objective and by asking the client and the advisors if they have considered the task before them—a potential sale of the company—from the critical perspective of the potential buyers, whose willingness and ardor to participate is key to business success—you bring out the best in them and simultaneously minimize their legal risk.

The role of the corporation's managers is not to be lawyers, their role is to be faithful, skillful business people. But, they are in a high salience situation, one that many of them will not be as familiar with as you, and they will have personal concerns that you will never completely understand. Demanding, through the right kind of counseling, that they go through the deliberative process that one would expect them to go through if they were selling their own house—thinking about how to balance risk and reward—is ultimately the best way for them to be before the court in a posture that is easily defensible. The reason for that is simple. *If* all of their actions are reasonably explained in terms of how to best achieve a favorable sale, by taking into account the

real world factors that would influence whether bids were made, then they will satisfy their legal duties and their explanations will ring authentic, because they will be.<sup>3</sup>

This way of seeing the world has utility in most dimensions of corporate advisory practice. When you take a board through its annual determination of who is an independent director it is useful to ask the directors to think how they would perceive things from the outside if they were an investor (or even how they perceive things when they read the *Wall Street Journal*, the *New York Times*, etc. and are reading about another company). What are the relationships and factors that they view as important to human beings and are they taking them into account? When in a company's life cycle are ties between fellow directors or directors and management most likely to

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<sup>3</sup> A respected practitioner noted that empathy toward the clients themselves is especially important when the clients are inclined to be difficult. In order for the clients to “hear you” about how others view them, the clients need to understand that you understand and care about their own perspective, even if it is one you might seek to broaden or alter. As this outstanding lawyer put in his own words:

It's true that there are a lot of clients who want us to act like assholes, and flay their adversaries in public. But talking them down from those counterproductive desires can sometimes be easier when we empathize with the client's (unpleasant and unconstructive) instincts, because if the client sees that you understand his desire—even if you don't think it's the right course—[it] can go a long way toward persuading a client that she should trust you. A different flavor of empathy, perhaps, but still a useful one?

The answer to his question is, of course, yes.



be salient from the perspective of investors? By getting the board to think about these things in advance and with self-awareness, you best position the directors to make good decisions, to plan for how the company might deal with things like a derivative suit, or the consideration of a going private transaction in a way that is well thought out and designed. Will this involve you pushing them to disclose some information about themselves that is uncomfortable? For sure. But if you are reticent to do that when the Klieg lights are not on, you are not shielding them forever. Rather, you are just creating a risk that material issues will arise that were not known to all or most of the board until it is most risky—in the course of litigation, a proxy fight, or a government investigation—and when the ability for the board and corporation to address those issues has been materially compromised.

As you may have noticed, I have not harped on how plaintiffs' lawyers or the courts will see things. That is not because that perspective is irrelevant. But, it is because it is the last-most relevant form of empathy. And too often, it is those lawyers who are most unwilling to risk saying what needs to be said early and in the right way, who resort to this sort of counseling as a primary tool. For certain, it is a lawyer's job to keep a client from breaching positive law. That is fundamental. But in most areas of business counseling, the fiduciary has discretion. Within that discretionary realm, there are often several courses of action that can pass equitable muster.

If, instead of focusing the client on seeing the world from the perspective of those who must be understood to do right by the corporation and its stockholders, you instead talk about standards of review, how to position the board to get a cheap settlement with a lay-down plaintiffs' firm, etc., you are not really bringing out the best in your client. You are not encouraging clients to use their business judgment as loyally and skillfully as possible, you are encouraging them to

follow your lead, not on a path to value maximization or some other business objective, but on the narrow, self-serving path of their own personal risk reduction.

This is not to say that the law and the plaintiffs' bar are not an iron fist you will need to deploy at times. Of course you will. But if you do it first, you will obscure the most critical counseling points. In the last resort, you can revert to *Revlon* by saying: "I have tried to discuss this with you many times, but let me put it bluntly. You are selling in a going private. Management has a conflict of interest. There is no tomorrow for the public stockholders, and the law expects you to try to get the highest price for them. Your concern for Pete and Doug's future is admirable, but they are the ones proposing to buy—yes, buy—the corporation from the people you represent." But before you get to this stage, one would hope you would have gone through the business dynamic, the material interests at stake, the perspective of buyers and investors on the situation, and helped the board recognize what its job was, and to call on the directors to use their business experience to plan a process that was above board and well designed to get the best price for the stockholders.

And having a board focus on managing to a standard of review can lead to not only legal, but business embarrassment. It makes no business, fiduciary, or ethical sense for a board to "avoid *Revlon*," unless that is a cosmetic judgment by someone with the bad taste not to like Cindy Crawford. Avoiding *Revlon* is not a business objective that serves stockholders. If what is best for stockholders involves a change of control transaction, that is what a board is supposed to do. Likewise, if it is not best for the corporation and stockholders to compromise with an activist or to take some other action that might be momentarily popular and more convenient for the directors' in terms of their desire to remain in the good graces of certain interests, the directors are supposed

to put their duty to the corporation and its investors first, not their own private interests. The finest lawyers bring out the best in their clients by focusing their clients on the client's own job.

### **HAVING THE SELF-CONFIDENCE TO CALL TIME-OUT OR CHANGE DIRECTION**

Being a business lawyer demands that you regularly board moving trains. To switch metaphors, even sometimes with your closest clients, you are called into the kitchen when the cake has started to bake. Sometimes, and too often with Delaware counsel, the timer has already run for a critical period.

In M&A transactions in particular, this is a hazard. The first forty-eight to seventy-two hours of an M&A dynamic often set the tone for the rest of the process, and take an outsized role in future litigation and market dynamics. Is there a need for a special committee and who should comprise it? What is its mandate? Who should advise it? Has management started the process with a foot foul or worse, by getting out ahead of the board? What do we do about that?

Having the judgment and poise to call time out is often vital, but difficult. Again, though, looking at it from a business perspective and talking to your clients—say the outside directors or some segment of them—in that business-focused way is essential. If, for example, the proposal is an MBO, and the MBO group wants an exclusivity period and a rapid negotiation phase to a signed-up first deal . . . . of course softened by the promise of a go shop . . . . what do you say?

Do you have the poise to discuss with the outside directors whether they had set up a protocol with management for the use of confidential information and the pursuit of an MBO? And whether if there was such a protocol, was it breached? And if there was not, whether the outside directors now recognize the reasons one might have been useful, and consider why they should be rushed if the CEO and management had not: i) told them that sale of the corporation was advisable; ii) encouraged the board to engage advisors to make sure that a sale was pursued that would

maximize interest from all buyers; and iii) admitted that they might be interested in an MBO and recognized the need to provide all credible PE buyers with a chance and the need for the board to address management conflicts? And, if in fact the CEO had expressed confidence in the company's business strategy at the last retreat, had not signaled a change in direction, and this is the first the board has heard he supports considering a sale, how is the board going to address that breach of trust to them? And, even if the CEO had mused with the board before about a sale, you might ask, on what basis should the directors be rushed by HIM AND HIS MANAGEMENT TEAM, who work for them, into a sale. What is the CEO's rush, now?

Similar issues can arise even when things have been orderly. If you come on to the scene when things have already started happening, it will not be uncommon for there to be weaknesses in a special committee's composition, its mandate, or the timeline it was given. Are you willing to stand up and point out the business realities and to right the situation?

Deal momentum is hard to slow, but it often has little rationality. When a deal, for example, is subject to a serious threat of a "second request" or other regulatory barriers, haste is often counterproductive and exposed as rather obviously so in hindsight. But, business people are often impatient with what they see as school marm, risk-averse lawyers telling them to dot I's and cross T's.

But there are business reasons why a special committee must have the expertise, mandate, and independence to protect public investors when management has a conflict. The law does not require this for no good reason. It demands it because that functional capacity is required as a business matter for investors to get the business judgment they deserve.

Likewise, when the best lawyers urge buyers to do due diligence, expose risks, and consider carefully whether to proceed, they are not asking their clients to focus on "legal issues." They are

asking the managers to take the time to make a solid business judgment, because the corporate client is considering “owning,” for good and bad, all of the target. The time for a buyer to use caveat emptor is before it signs up a deal. But it is often the buyer who departs from rational business-like thinking in an almost romantic fervor for consummation—that is known as “deal heat.” The best lawyers make business people understand and address the business risks they are taking up front.

Of course, it is not just at the early stage of a transaction or a litigation that lawyers must have the poise to change direction. Even when a transaction or litigation strategy has been designed with the lawyer’s advice taken, things can happen that no one anticipates, or where it just turns out that the judgments made were not optimal. That happens to the best of us, as we are all human.

But, the law of sunk costs, despite being a sound economic concept, is difficult for business people and business lawyers to put into practice themselves. There are real face issues involved. Nonetheless, dropping the shovel is often a key first step in getting out of a hole. The best lawyers know this and recognize their duty to their client to help. If the lawyer owns up to his role in the decisionmaking but puts the hard facts of life on the table and offers up a new path, one that is less scenic than originally hoped for, but less deadly than the one the client is now careening down, the lawyer best positions the directors themselves to come to grip collectively with the need to change course. As with the other situations explained, this is when having the board think like businesspeople, evaluating the risks and rewards of various courses of action without regard to personal self-interest, will most pay off. It will never be easy, but a lower-cost exit, well explained, is likely to be better for the corporation, its stockholders, and even the directors and managers, than “sticking to your guns,” “doubling down,” or whatever trite metaphors can be associated with a stubborn adherence to a prior course of action in the face of materially changed circumstances.

## **FACE, AND THE IMPORTANCE OF MAKING OTHERS LOOK GOOD AND FEEL RESPECTED**

Face is a concept that is incredibly important in the business world and in legal practice. In many business situations, getting to the optimal outcome requires making the other side of the deal look good. Even if you have strong leverage, you are likely to do better in the long run if you wield it with respect toward your negotiating counterparty, do not do end zone dances in his face, and act with grace. This is even true within transactions themselves, as deal dynamics change, and some of the leading deal break cases were inspired in part by a failure of a party during the original negotiating process to recognize this and to treat the other side with appropriate respect and candor. When that kind of conduct occurs, and the leverage dynamic changes, as it can in every transaction, these rifts in trust can inspire counterparties to walk away and litigate rather than to seek out good-faith compromise because they no longer have the confidence that you will be a good partner.

For lawyers working in multi-advisor situations, face is especially critical to understand. In-house counsel, regular company counsel, the financial advisor, etc. all often have had perspectives on a situation and played a role in addressing it. If you are part of the team, especially a newly arriving one brought on because of your special expertise, you have a basic choice to make. You can be the “special one,” whose uniquely valuable perspective will shape up the process and approach, and guide it forward to triumph. And maybe that will work. Maybe you are that special. And maybe the client sees you as such. Or maybe not.

Or maybe you are actually so special in fact that you can bring your expertise to bear to help the client optimize its results, while simultaneously respecting and making your colleagues look good. Can you be special enough to kibitz with them about the options early, to noodle on a possible variation in approach, and a slightly new path forward? Can you consider how to present it to the client, perhaps by having the idea come out of the mouth mostly of inside counsel or

regular company counsel? When you speak, can you make clear how useful it was for you to noodle on the problem with them and to surface a potentially more valuable method of proceeding?

This is a subject I particularly associate with Frank himself. As most of you know, Richards, Layton and Finger has an extremely impressive client list, but that list is, in reality, comprised of many of the most distinguished law firms in our nation. Throughout his career, Frank was the go-to guy for great and not-so great lawyers (all major firms have both), and one of the main reasons was that he was not seeking to upstage anyone. Although Frank had a natural charisma and verve, his goal was never to be the star of the transactional or even litigation show. It was to help the team charged with the collective responsibility to help the client maximize its potential. He wanted the clients to come out having done their business duty, having served the stockholders well, and having suffered as little legal and reputational harm as possible. And he wanted all those who served the client with him to come out looking good, having had a professionally valuable experience, and feeling that they played an important role in producing a favorable outcome.

The top lawyers set an example that brings out the best in other advisors. When the banker sees a partner at a major law firm doing what is right, that encourages the banker to be counted. When the lawyer and the banker and in-house counsel have each other's back in the right way—allying to make sure the board focuses on its core duty of loyalty and exercises business judgment on behalf of the stockholders—they have a collective effect that can never be matched by a single special one.

#### **POISE AND JUDGMENT, AKA, AVOIDING THE HAZARDS OF THUMB-DRIVEN VELOCITY**

Frank transitioned from active practice before the height of current Blackberry, iPhone, and other PDA-driven idiocy that now characterizes legal practice. Too often, difficult legal

questions are posed in an off-the-cuff way by means of an email. Lawyers feel obliged to provide an answer.

Often these are questions that would have been the subject of a formal legal opinion in decades past, after a serious deliberative process and review by an opinions committee. Now, they are sent off by thumb, out of fear that some other lawyer will take the business if you are not accommodating.

This type of practice is hazardous and counterproductive. As with the situations discussed earlier, it will typically be the case that the consequences of a course of action will long persist, and if that is so, that it is far more important that time be taken up front to decide how to proceed than that an answer be given immediately. The best lawyers refuse to give impulsive or hasty legal advice, and try to slow their clients down.

Emails are rarely a format where a client will address all the material issues you need to give them accurate advice. Moreover, unless you are the special one, it may be that your advice would be wiser if it reflected a process of deliberation with your colleagues at your firm and even wrestling with the problem yourself over a night's sleep or a run.

When you skip these critical steps—and heck, what about a little legal research? Just to be old school!—you put your professional reputation at great risk. Even more, you do not do justice by your client. Whether your clients want to hear it or not, they need to hear that it is dumb to formulate impulsive legal advice. You will give them prompt advice, you should say, but that requires you understanding the precise business dynamics involved and any potentially troubling information.

If you give off-the-cuff advice, there is no way to avoid the potential for an “oh by the way” conversation down the road. Those are very painful, especially if you have done something



like file a complaint that omits obviously material facts, which were clearly known to your client, not told to you, and then become a source of embarrassment when the defendant points them out publicly and in court. Exhaling, person-ing up and telling the client that you will get her an answer rapidly, but after a thoughtful process that involves deliberation within your firm, serious research, and a probing examination of the material facts with the client itself, is something the best lawyers do all the time.

With this mindset also must come the skill to get through the moment, of course. You must instill confidence in the client that you grasp the dynamic they are conveying, and then confidently explain why the client will be best served by not demanding immediate action, but proceeding in an expeditious, but professional manner to get to the right answer.

### **REMEMBERING THAT YOU AND YOUR CLIENTS MAY ONLY BE ABLE TO SELL YOUR REPUTATIONS ONCE**

Reputation, for good or ill, is a hard thing to shake. The best lawyers know this. And they help their most difficult clients to realize it, even if it risks the clients seeking new counsel. If you take action on behalf of a client that is ethically edgy, deceptive, or otherwise dodgy, you are selling a part of yourself that will matter the rest of your career. If the client is willing to pay you enough so you can retire after you help them be skeevy, I guess you might consider it. But, that is not usually what they are offering. They are just paying your ordinary fee but with an unreasonable request attached that, if you accept it, means you are suffering a severe and long-lasting discount.

For most of you who practice, you are in a recurring game. If you are a transactional lawyer, you will come across many of the same lawyers repeatedly. Screw one of them, and it will get around. You will get known as someone who can't be trusted, who should be met with skepticism and verification of the most probing kind.

That is especially true in litigation. Except if you engage in deceit or tricky behavior, it is not just other lawyers who will harbor doubt about you. So will the court. And does it matter whether the court trusts you? Sure it does. There are stages and moments in most litigation that can turn on the credibility of counsel, and that is most true in the most closely balanced cases.

The best lawyers know something else about conduct of that kind: which is that corporate clients who are tempted to engage in that sort of conduct are almost always risking long-run harm, if not disaster, for the corporation. Like lawyers, corporations get reputations, with not just potential business partners and industry rivals, but with regulators and even the judiciary.

Often, when a corporation wishes to take unseemly action, there is a conflict between the corporation's best interests and those calling for that action. In most such situations that is because the managers of the corporation have themselves engaged in the very conduct that has put the corporation in an awkward spot, and they wish to protect themselves by not coming clean about it. Self-interest can cloud good judgment, and corporate managers may conflate their own interests with that of the corporation. And the facts they wish to conceal or obscure may involve conduct that they took in pursuit of profit for the corporation. And, for sure, it could be the case that if it was effectively concealed, the corporation would be better off in the short term than if it were dealt with forthrightly.

But, acting on that premise ignores the historical reality that rot tends to smell and ooze out into view. And that one cover up that is successful will encourage further edgy conduct and a culture that is adverse to the stockholders. Even more, the bottom line for corporations, at least in Delaware, is that they are allowed to conduct lawful business by lawful means. They are not permitted to seek profit by illegal means. It is *ultra vires*, to use the Latin, and *ultra unethical*, too.

The best lawyers remind their clients to think long term, and remind corporate managers that it is the corporation to which duties are owed, and that the corporation cannot be a lawbreaker, and that if the corporation is seen as one that is unethical, deceptive, and untrustworthy, it will pay long-run costs in terms of lost business relationships and deals, greater regulatory and judicial scrutiny, and substantial legal costs from a greater incidence of regulatory investigations and litigation. And even for the corporate managers themselves, they need to consider how much of their reputation they wish to risk for one corporation.

The tone that the best lawyers set encourages corporations to conduct themselves in a way that inspires trust in all their constituents, and that involves owning up to issues early and before they metastasize.

This also involves reminding clients of the larger consequences of short-term actions, even when those actions might not technically be unlawful or unethical. Here is an example that has been on my mind a lot lately.

For several years now, the corporate community has expressed dismay over the prevalence of meritless suits against unconflicted, premium-generating sales transactions. These suits were brought solely to benefit the lawyers involved and their friends at certain institutions. Why? Well, none of the suits brought any benefit to the stockholders, as the suits were all basically settled for meaningless disclosures and the stockholders got the same deal as originally proposed. The plaintiffs' lawyers got a fee, and the defendants got a release. The reason for this dynamic was forum shopping, and corporations facing suits in more than one forum at once, not just the state of incorporation.

To deal with this, the corporate community proposed exclusive forum bylaws, arguing that they did not mind being held accountable in the state of incorporation, but did not wish to face

unreasonable litigation and uncertainty costs that put pressure on them to pay off plaintiffs' lawyers because it was too costly and unpredictable to fight the suits. Sue our butt off in Delaware, they said, and we will take it. Delaware, they said, and they were accurate, would impose steep remedies when warranted, but would also dismiss meritless cases.

Well, what has started to happen since forum selection bylaws were validated and have become more common? Some corporations have started to collude with the very lay-down plaintiffs' lawyers who they have been condemning. These corporations have "waived" their forum selection bylaw and agreed to settle for attorneys' fees, a release for themselves, and no benefit to their investors in another forum. And they do this in part to get around important precedent in Delaware that has limited the ability to approve settlements with no value to stockholders.

This conduct is, of course, exactly contrary to the argument that was made to mainstream institutional investors—such as mutual funds—when the corporations sought to employ forum selection bylaws in the first place. These investors are skeptical of both plaintiffs' lawyers and of corporations seeking to insulate themselves from liability. Think how this recent conduct will affect their mindset. Think how this conduct will hurt those corporations that are committed to playing it straight, and enforcing their forum selection bylaws in all cases, and not as a manipulative tool.

This current example is just one of many that regularly confront business clients. The best lawyers encourage their clients to step back, consider an immediate situation with a long-term lens, and act only with due consideration for the long-term costs. When the action that is tempting is at odds with the corporation's stated values, that clash has to be carefully considered. Rarely will conforming tactics to the corporation's larger values be excessively costly. Usually it will be the

opposite. Cutting a corner for a situational advantage will almost always be a poor cost-benefit analysis.

And here is a final word of practical advice. If a client is asking you to help it be dodgy and suggesting that others are available and prepared to do so, you might ask this: Why do you think someone willing to do so for you thinks you are so special that they haven't done it for others before? And if they have, have you considered that other businesses, lawyers, regulators, and courts know that and discount their credibility? And if they are prepared to be dodgy for you, are you going to trust their word that they are trusted by those you need to believe in your actions?

The best lawyers know that their clients should only get into grey legal areas when their motives for doing so cannot reasonably be the subject of suspicion. In other words, you only enter the grey when you are certain that it is in the best interests of the corporations' stockholders and does not pose any genuine danger to the interests of other corporate constituencies and the public. But that kind of grey is rare, and notably does not involve any grey about what the corporation is doing. In that kind of grey, the best lawyers know that candid disclosure is the most vital, as you wish the regulators and judges who might be asked to review that conduct to understand why the corporation engaged in it and why it should be considered permissible. When the conduct at issue is of the kind that corporate managers do not wish to be the subject of public disclosure, the best lawyers know that is a strong signal that it is against the corporation's best interest and push back to protect the client from its own managers.

**YOUR CURRENT ADVERSARIES ARE NOT YOUR ENEMIES**

You can be a great litigator or negotiator, believe it or not, without treating your adversaries as the enemy.<sup>4</sup> In fact, I am not sure that a truly great lawyer can view the other side of transactions or lawsuits as the enemy. If you do so, you will never be a great lawyer.

You get to be a BLANK effectively a few times at most, at least at the top level. Now, I know what you are going to say, \_\_\_\_\_ and \_\_\_\_\_ have been high-level BLANKS for a long, long time. And I am sure they have.

But, think about that. Do \_\_\_\_\_ and \_\_\_\_\_ represent the clients that have had the most success? Or have they succeeded in representing clients who are drawn to their particular form of bravado, machismo, deception, etc., the ones who actually are attracted to someone who is, well, a BLANKING BLANK. The ones who think it is great when their lawyers engage in

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<sup>4</sup> As one of Frank's most distinguished protégés told me:

A few things pop to mind. Frank was always the one to go to the associates on the opposite side of the courtroom and tell them that he thought they had done a nice job on the brief. He really taught us around here that you can, and SHOULD, get along well with the lawyers on the other side of the case. At the height of their Ali-Frazier like battles, he and [distinguished corporate litigator] Gil [Sparks] would vacation together. Frank knew [Potter Anderson corporate litigator Bob] Payson's secretary well, and would call over asking for "Bobby Lee." There was no case worth making an enemy. Once I remember, as a young associate, drafting a letter to [respected plaintiffs' lawyer] Joe Rosenthal that was a little too snippy. He chided me, told me to make my point but soften it.

speaking objections and misconduct at depositions. The ones who think it wonderful when their lawyer shouts at the other side in a negotiation. Such clients exist.

We judges know it. I remember vividly one of my best colleagues coming out of court and telling me about an amazingly ineffective, outrageous, and rude bit of lawyering that had just occurred in front of him. The judge noted that when the lawyer was acting like a BLANK, his client's key representative was visibly enthusiastic and almost proud that he had the biggest effluent hole in the room on his side.

When the decision came out and the corporate defendants lost, no doubt their lawyer fulminated against the judge and the world in general, and claimed there was a cosmic unfairness.

The best lawyers don't let their clients get to that stage. Precisely because they treat others with respect and their word can be trusted, they are positioned to help clients come out of situations head high, and even when on the losing side, at an acceptable cost. And it is in no small part that, because their adversaries on the other side know that regulators and judges and others respect them, these lawyers are able to secure settlements and other resolutions more favorable to their clients. The reason for that is simple: credible and respectful counsel can persuade regulators and courts in close cases because they take positions that make sense and because they are known for winning cases in the right way, not by sharp, obnoxious, or deceptive practice.

### **HAVE SOME FUN AND LAUGH**

And here is a final point. The best lawyers know that it is okay to have some fun. You are allowed to laugh with your adversaries, and that you should not laugh at them. Even better, be willing to laugh at yourself. A truly excellent corporate litigator who won and lost many cases against Frank said with the highest praise that he liked litigating against Frank because Frank was "fun." By that, he by no means meant Frank was not a tough adversary. To the contrary, he thought

Frank was superbly skillful. He just meant that Frank understood that there is no conflict between being a good guy and a formidable competitor. In fact, over time, good guys and good businesses win out.

And Frank was a great guy and a great lawyer.