

**WHAT ENTREPRENEURS AND THEIR LAWYERS SHOULD KNOW
ABOUT EACH OTHER**

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Volume 3

2004

Number 1

The Kommerstad Center for Business Law and Entrepreneurship at the University of Minnesota Law School publishes the *Minnesota Journal of Business Law and Entrepreneurship* online at <http://www.kommerstad.org/journal/>. Hardcopy reprints are available for authors.

Submission requirements are on the Internet at
<http://www.kommerstad.org/journal/submissions.html>

Email: editor [at] kommerstad.org
Telephone: 612-624-5779

Minn. J. Bus. Law & Entrep.
ISSN (1540-3270)

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What Entrepreneurs and Their Lawyers Should Know About Each Other

RICHARD J. GOOSSEN*

Entrepreneurs will have disputes, misunderstandings, and miscommunications with suppliers, customers, and employees at various stages in the growth of their enterprise. The skill of entrepreneurs in resolving differences will affect the heart of the enterprise — the net income — the bottom line.

One way to settle differences is to adopt a law-focused approach, relying on the legal process as the primary means to resolve disputes. An alternative is to employ a business-focused approach, which addresses a dispute in line with the strategic objectives of a company. The legal process in this approach is one of several factors — not the only one — for the entrepreneur to consider in seeking a comprehensive solution. I believe that entrepreneurs will improve the profitability of their business by using a business-focused approach to resolve differences.

To use a business-focused approach, an entrepreneur must understand and manage four components of the legal process — the law, the legal subculture, lawyers, and litigation. Managing the legal process is of greater concern to entrepreneurs than to other business operators. They have scarcer resources and a fragile administrative infrastructure that is less able to withstand a significant drain on human or financial resources.

I. THE LAW: THEORY V. APPLICATION

It helps entrepreneurs to balance an understanding of the philosophical bases of a law with an appreciation of the application of a law. The law is a set of rules of conduct between individuals and groups created with the help of government and enforceable by government. The law binds the citizens of Western societies for the collective good — everyone submits to the legitimacy of the legal system.

There are several reasons for having a legal system. The law provides a means to protect persons and property without brute power. The law empowers government to act for the benefit of society in

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general. It enables individuals to make legally binding agreements among themselves which courts can enforce. The law is a complement of democratic rights, which lay at the core of Western societies. Everyone is subject to the law, including the government. Rules of law underscore the various rights of individuals, whether enshrined in a constitution or in judicial decisions. This legal infrastructure in which rights are clearly defined and properly enforced provides a stable framework for an entrepreneur's activities.

Apart from the core philosophical concepts of law, any individual or organization doing business in the U.S will encounter mechanical aspects of law as well. For example, the first step for an individual starting a business is to decide on the form of the organization for the pursuit of economic activities. It can be an unincorporated entity, a partnership, or a corporation. Next, the entrepreneur will experience the legal regulations of closing a property transaction or complying with tax laws. He will enter contracts with suppliers and customers and employees, while pursuing his economic objectives. The contract typically will provide a set of obligations. A court can interpret these obligations and award damages if something goes wrong.

Besides contract law, there is the ever-widening scope of tort law. A tort is a wrongful act done to the person or property of another. The most commonly known tort is negligence. The role of tort law is to compensate victims for harm suffered from the activities of others. Tort law identifies those actions that create a right to compensation. If an entrepreneur is negligent – carelessly injures to the person or property of another – there can be liability. One important element of establishing liability under tort law is determining what constitutes “reasonable” behavior by a defendant in a particular set of circumstances. This is not always easy to determine.

An entrepreneur may believe his conduct was reasonable – a judge may not. It will help if the entrepreneur is familiar with current judicial and jury notions of what reasonable conduct is and how aggrieved parties are compensated. Acts of the elusive “reasonable person” are always subject to interpretation. Legislation, private contract law, and tort law all require interpretation. The entrepreneur cannot view the law in a simple black-and-white manner or assume that regulations need only be read to be understood.

There also is the gap between the “law on the books” and the “law in action.” The “law on the books” is the law as is written. The “law in action” is the way in which these apparent straightforward laws are applied. One example is jaywalking, crossing a street outside the bounds of a crosswalk, illegal in many states. People rarely are charged with this offense, although they could be. This is very relevant yet difficult to comprehend.

An entrepreneur must understand the complexities and practical dynamics of the legal system. On the one hand, the law consists of a system of rules and procedures governing the minutiae of establishing and running a business. Many of these, such as the legal requirements for incorporating a company, may be applied predicatively. At the same time, there are many aspects of the law that are not always applied strictly according to the published laws. The entrepreneur must adopt an understanding that the rules in practice are more realistic than the rules in theory.

Comparing business to a game such as ice hockey, the laws are the “rules” of the game, providing the framework within which the game is played. Some elements of the game are clear and not challenged — the length of periods, the number of referees and the types of penalties. Apply the rules and clarity diminishes. Some infractions, while in the rulebook, are rarely or infrequently enforced by the referees.

Learning how the rules are enforced in practice takes place by watching or playing the game, not by studying the rulebook. Likewise, for entrepreneurs to manage the legal process, they must understand the law in practice.

II. THE LEGAL SUBCULTURE: A CLASH WITH THE ENTREPRENEURIAL MIND

The second component of the legal process to manage is the subculture of the legal profession. To manage it is to recognize, understand, and proactively respond to the subculture of the legal profession, which clashes with that of the entrepreneur.

Culture is the system of shared values and norms in a group of people that constitute a design for living. Values are ideas the group believes are good, right, and desirable. Norms are the social rules and guidelines based on values that prescribe appropriate behavior in particular situations.

Students of entrepreneurship accept the notion that there is an entrepreneurial mind or personality, and its values and norms constitute an entrepreneurial subculture. Similarly, there is a legal subculture. This is reflected in the objective of law schools to have their graduates “think like lawyers.” Because of the different subculture from which their perspectives emerge, lawyers and entrepreneurs have different ways of resolving issues.

The Differences Between Lawyers and Entrepreneurs

How They Think

The first difference relates to the nature of the thinking process. Legal training focuses on what can go wrong rather than what will go right. This leads lawyers to see the negatives in a business transaction.

I once sought the advice of a lawyer about the purchase of a business. I wanted help on a couple of issues. This lawyer, intending to be helpful, compiled a list of issues that took two hours over lunch to disclose. He divided his time equally among each one of the issues. Although he highlighted some additional points of concern, the likelihood of those issues arising was so remote that they were not worth considering.

The lawyer believed he was providing a useful service. For me, most of the efforts were misguided. This stark contrast between services expected and services rendered reflects one difference between the subcultures of the entrepreneur and the lawyer.

Lawyers can see what can go wrong, while entrepreneurs think of all that can go right. This is a variation of the glass-is-half-empty, glass-is-half-full adage. The entrepreneurial mindset includes a positive attitude, perseverance, and emotional management necessary to succeed against the odds. And most entrepreneurial education comes from the school of hard knocks. Entrepreneurial publications and general print and electronic media lionize the success stories, reinforcing the values and norms of the entrepreneurial subculture. This is true even when they do not reflect the entrepreneurial experience.

Entrepreneurial successes rarely occur in a methodical, linear fashion. While successful entrepreneurs will analyze and plan their business strategy carefully, there is always an underlying attitude of action-before-analysis. Few negative thoughts pervade the entrepreneurial project. At its heart, the entrepreneurial venture is a dream or a vision. As a result, the emotional lure of entrepreneurship will overshadow rational concerns — emotion and an adrenalin rush are part of the entrepreneur's stock in trade. Entrepreneurs gain sustenance from this psychological disposition, while lawyers are rooted in the technical aspects of their skills.

How They Communicate

The form of communication is a second source of the differences between lawyers and entrepreneurs. Lawyers communicate in a detailed, technical matter, most often in writing — they are professional

wordsmiths. They analyze and interpret statutes and case law and write briefs for court – this is their lifeblood. Their battle cry is, “Get it in writing!” The starting point in the mind of the lawyer when advising a client is usually “How do we put the provisions in place which, in the event of a dispute, will assist in its resolution?” The lawyer then focuses on making sure the written agreement records the exact agreement between the parties.

Lawyers are comfortable communicating in writing and prefer a paper trail, as required in a court action. When a client appears on the doorstep of a lawyer, the lawyer typically fires off a letter to the opposing party or opposing counsel stating his client’s position.

Many businesspeople view this approach as counterproductive. Drawing a line in the sand, rather than causing cowering into surrender, more typically creates resolve to stand one’s ground.

Entrepreneurs prefer communicating in person. Most business people I have known over twenty years rarely write a professional letter. They prefer to meet in person and hash things out. The entrepreneur is often most comfortable in a coffee shop, on a job sites, and the factory floor – not in a reclusive corner for quiet reflection.

The entrepreneur is content to delegate details to a professional adviser, whether lawyer or accountant, and focus on the objective of how to make money and grow his business. The entrepreneur’s lifestyle is fluid, driven by the deal he is working on. His daily routine is not orderly and well structured. He focuses on macro-solutions to business issues. He is at the eye of the storm, dealing directly with various parties. The entrepreneur sees the big picture, which is tied to his vision for the company.

How They Focus

Lawyers are process oriented – they focus on getting their job done and get paid whether the deal comes off or not. They perform tasks or specific jobs for a client who is running a business. The commercial lawyer is compensating for completing a task rather than being paid if an agreement is consummated. If an entrepreneur enters a contract with another party, a lawyer may review the contract for \$5,000. He is committed to the task of reviewing the agreement and ensuring that his client is fully protected from potential issues.

Whether the deal closes or not, the lawyer still gets his fees. To the chagrin of clients, when a deal does not close, the lawyer gets his fees from the entrepreneur who receives nothing in exchange for his time and effort. Lawyers are often derisively referred to as deal-killers

because of they focus on the process and raise an endless number of what-ifs that the other side interprets as an unwillingness to conclude a transaction.

The entrepreneur is results-oriented — a deal-doer. Entrepreneurs are big-picture- and deal-oriented, looking to get something done rather than hearing how it cannot be done. But all the effort and expense is for naught if the deal is not consummated. The objective and the mindset of the entrepreneur focus on the business mechanics — whether the transaction will work. In other words, the concern of the entrepreneur is whether he will make money from the deal and whether it will lead to an ongoing relationship. The entrepreneur is a “deal junkie” working at putting together people, resources and prospects, those things at the heart of seizing opportunities.

Entrepreneurs often make the mistake of expecting others to buy into their dream. I once advised an entrepreneur who needed to refinance his operations in computer and parts distribution. His long-standing banking relationship was in jeopardy, but he had a restructuring plan. The margins were razor thin and his market segment was subject to fierce competition. He wanted to sell his bank on the business plan and get refinancing. Of course, the bank was not interested in buying into a plan but in seeing sufficient assets to secure the loan. The entrepreneurs did not have the assets and the bank did not extend the financing. The entrepreneur thought he could convince the bank to get excited about the deal — he could not. The bank was unemotionally following its lending procedures. There was a culture clash.

How They Find Solutions

By dint of their training, lawyers provide law-centric solutions to problems between their clients and other parties. When an entrepreneur seeks out a lawyer for advice, the proposed solution centers upon legal avenues of recourse. For example, if an entrepreneur goes to a lawyer about a dispute with his landlord, the lawyer will review the lease, consult applicable laws, consider the specter of litigation, and then possibly decide upon sending a letter. The letter will set out the legal position of his client, possibly suggest next steps, and even hint at the necessity of future litigation. This approach does not consider all the dynamics of the issue. Exceptions I have observed in the practice of law are lawyers with many years of experience, who absorb the lessons of business from their clients along the way. Too often, the lawyer does not consider the best way to solve the problem but how to employ legal techniques to solve the problem.

By contrast, the entrepreneur wants a solution, and for him, the law provides only part of the problem-solving equation. The entrepreneur often has only herself to blame if he goes to a lawyer before exhausting all avenues of resolving an issue.

How, then, can a multidimensional approach solve an issue that an entrepreneur might take to a lawyer? In the landlord example, the best approach to solving the issue might be for the entrepreneur to arrange a meeting with the landlord. When two parties meet, they often can go a long way to understanding each other's perspectives and work toward a solution. A lawyer's approach often will lead to less communication between the parties and more communications between the lawyers.

For the entrepreneur, there are a host of factors to consider in a business solution — the importance of the relationship, extenuating circumstances of the other side, the possibility of miscommunication and the possibility of a genuine misunderstanding. There may be a situation where the other party is in a genuine cash crunch — perhaps some short-term flexibility could lead to long-term payments and an ongoing relationship.

Lawyers are risk averse in their legal practices and their investment endeavors. They have little interest in rolling the dice and they are not skilled at assessing risks. In fact, the nature of the profession fosters individuals who are risk averse. As one lawyer friend of mine puts it to his entrepreneurial clients — "I don't get paid to take risks — you do. I am not here to buy into your dream. You just pay me for what I do." The lawyer does not make money from invested capital but rather from an investment in himself.

Lawyers bill for their time and are under considerable time pressure. They provide value by selling their services. A lawyer's bills his daily jobs according to the time he spends. As a result, lawyers value time, orderliness, and a predictable return on their investment. A byproduct of this subculture is a lack of respect, even disdain, for those who do not conform to these norms. Entrepreneurial clients embody the antithesis of this approach.

Entrepreneurs embrace risk as a byproduct of their existence. They are in the game to make a considerable sum of money. With the chance of gain comes the ever-present specter of colossal failure, and there may be a fine line separating success from failure. From the outside, the entrepreneurial life may appear turbulent. To the lawyer, for whom organization and structure are important, the entrepreneur often is "flying by the seat of his pants."

Entrepreneurs live in a world replete with risk. They may not be cognizant that others, particularly their professional advisers, view their methods of conducting business as high risk. For entrepreneurs, they're in an arena where they're going for the big score and trying to keep all the plates spinning in the air while their deal comes together. Entrepreneurs see themselves as risk assessors rather than risk takers. From the confines of a cozy, well-ordered office of a professional adviser, this may be a reckless proposition.

Legal and entrepreneurial subcultures differ in several ways and their approaches to resolving issues vary considerably. At a large law firm where I worked, the greatest insult one lawyer could hurl at another was, "He is more of a businessperson than a lawyer." An entrepreneur must be able to distinguish between the legal expertise offered and the bias that accompanies it.

III. LAWYERS: MANAGING OR MANAGED

The third aspect of managing the legal process is the relationship between the entrepreneur and his legal counsel. Despite the differences in the entrepreneurial and legal subcultures, the entrepreneur will need the services of a lawyer at some time. But the entrepreneur will undermine the profitability of his business if he does not manage his legal counsel.

Know What You Need

Entrepreneurs can manage their legal counsel by understanding the differences among the types of legal advice they need. Preventive? Ongoing? Remedial? Preventive advice assists the entrepreneur to avoid issues. An area where this makes the most sense is tax advice, which will assist an entrepreneur before entering a transaction. One lawyer friend of mine is a tax specialist who is worth every penny of his \$400 an hour. With fifteen years of specialized training, he can save his clients hundreds of thousands of dollars.

But lawyers *always* recommend that a client see them before they enter *any* transaction. This may be a worthwhile approach in theory. In reality, most entrepreneurs cannot afford to do so, and a lawyer's involvement at an early stage can increase the entrepreneur's cost of doing business.

Lawyers also can provide advice as part of the corporation's steady activities — maintain corporate records, review contracts, or

handle property transactions. But most lawyers can do this legal work. No specialized expertise is required, so the hourly fees can be less.

Another form of advice is remedial – fixing something that has gone wrong. The lawyer may think that his entrepreneur-client is constantly getting himself into a pickle. But for the assistance by their legal counsel, untold misfortune would rain upon him. And this is true.

The only time the lawyer sees the entrepreneur client is when he needs assistance. The lawyer might think “I told you so” and “Why didn’t he talk to me before he entered this transaction?” No matter how much preventive and ongoing advice lawyers may recommend, they render far more remedial advice.

Entrepreneurs are better able to manage their legal counsel and assess the value and need of the advice when they can determine whether it is preventive, ongoing, or remedial. Like insurance or preventive medicine, preventive advice needs to be judiciously used. Ongoing advice is needed – one needs to maintain corporate records. Remedial advice is needed to devise comprehensive solutions.

Know Your Lawyer

Entrepreneurs must assess the advice they receive. The competence, personality, and motivation of their lawyer will always affect their legal matters. Often a client will blissfully state, “My lawyer said . . . ,” as if the pronouncement came from the Oracle of Delphi.

Clients often think that since they paid for the advice, it must be infallible. This misses understanding that the lawyer will provide his interpretation of the issue. The lawyer may not even be competent. And, if he is not, how will the client, who is relying on the lawyer, know? The reality is that a lawyer may not be good at his chosen specialty. State bar membership does not equate with experience in the type of law where you require expertise.

Further, the personality of your lawyer will affect your case. Is he a dignified bully or a skillful conciliator? A bullyboy approach can bring out the worst in all the parties. An unskillful conciliator may not extract the best settlement.

Another factor to consider is the motivation of your lawyer. Your lawyer may be juggling 10-20 cases – is yours a priority? An entrepreneur has to bear in mind that no lawyer is as interested in his file as the entrepreneur himself. A lawyer may even lose interest, depending upon how the case is proceeding and how he is being

remunerated. I once had lawyers represent me where partial payment was shares of a publicly traded company. As we proceeded toward trial, the value of the shares of the company dropped dramatically and so did the lawyer's interest in pursuing the matter.

Because of these foibles, a lawyer can mismanage a case. The likelihood of this increases when the entrepreneur does not do what he can to manage the file. An entrepreneur who keeps the lawyer accountable serves his own legal matter well.

Don't Give Away the Process

An entrepreneur must manage the role of his lawyer in communications with an opposing party. Having lawyers communicate with one another is dangerous for several reasons. It can be an expensive process — the client will be pay for all phone calls, correspondence, and meetings. There will be little opportunity to assess the value of the communications. The client will not know whether time is being well spent and will get the lawyer's spin on the value of this communication. The cost of the communication process can be dramatically heightened through posturing or personality conflicts. Some lawyers have a need to demonstrate their expertise at the expense of their clients.

The communications may focus on all imaginable issues, not just on the relevant ones. Lawyers will anticipate issues and consider all the ways those issues might be dealt with if they occur. Lawyers will keep asking questions, coming up with every last contingency. This is when the clients may begin to question the value of their relationship to each other. Reviewing all the details is important in one-off transactions where you are not likely to run across the party again. By contrast, where you are likely to have an ongoing relationship, the nature and extent of the questioning may be too much for the relationship to bear.

The entrepreneur must be clear on what advice he wants from legal counsel. Interestingly enough, many law firms present themselves as "business lawyers," to convey that they are hybrids between lawyers and businesspersons. In certain industries, law firms may present themselves as kindred spirits, such as some law firms in Silicon Valley that mimic their high-tech clients.

More experienced lawyers can add value in creative problem solving, having gained business knowledge throughout their legal careers. These firms are the exception, because underlying any superficial attempts to identify with clients is the underlying legal culture. What do lawyers know about business? In my experience, very little. And why would they? In a similar vein, do business people profess

to advise others about legal matters, simply because they have observed lawyers in action? The legal profession would not allow this, of course.

When I was an articling student (intern), I heard a senior real estate lawyer ask a client whether he was sure he wanted to buy a property, as the market was in the dumps. The client did a double take – this comment was coming from a respected professional. He went ahead with the purchase, despite this veiled advice, and the market turned upwards in a four-year cycle.

Entrepreneurs need to be vigilant that they are getting what they are paying for and not show the lawyer undeserved deference. Lawyers tend to render business advice, deliberately or inadvertently, in a context of intellectual leverage.

IV. LITIGATION: AN UNPREDICTABLE & COSTLY PROCESS

Entrepreneurs must approach litigation strategically, going beyond legal considerations. Entrepreneurs, often small business operators, may be tempted to use the legal system to enforce their rights. But the role of the law in dispute resolution, compared to its role in ordering one's business or personal affairs, can be an unpredictable and expensive process.

There are the obvious financial costs, including the lawyer's billable hours and disbursements such as filing fees. As the path to litigation proceeds, there is the cost of discovery. There are non-monetary considerations as well – time, effort, energy, and foregone opportunities.

First, the entrepreneur must view the specter of litigation with pragmatism and not principles. A decision to litigate involves strategic review. As one of litigator friends put it, you "should prepare for war but hope for peace."

A good litigation lawyer borders on being a master psychologist. They have no illusions about the frailties of human nature. They realize that individuals do not honor agreements. They find clients who think otherwise to be painfully naive.

Litigators realize that true character emerges when money is involved. The potential for litigation increases in proportion to the amounts of money involved. Key to resolving a matter are understanding human nature and settling based on pragmatics, not principles. A strategic-thinking lawyer will settle to your best advantage rather than fight to your long-term disadvantage. The entrepreneur may

think he wants the aggressive litigation glorified on TV, but is not a practical way to function in commercial litigation.

The entrepreneur is offended when he believes he has gotten the short end of the stick. But doing what is best often means moving on to future opportunities, putting the past behind him. Being chained to the past will limit his upside potential.

The best litigators are like pacifists, trained to fight but preferring to settle. Their best approach is to demonstrate problem-solving skills privately and not engage in an adversarial process through the courts. Only in rare instances is a resort to the courts needed.

There are unreasonable and stubborn people in the business world, and occasionally we run into them. One consolation is that the other parties will later reap what they have sown. To those with principle, pragmatism in commercial litigation may seem like a Faustian bargain. But the entrepreneur's own best interests are almost always served by a fair settlement. By focusing on the overall picture of the effect on his business, the entrepreneur will decide wisely.

Second, if the entrepreneur decides to litigate, he must realize that courts make mistakes. Unlike on television, the just party does not always win. The legal system does not always find the truth through evidence, witnesses, and legal arguments. In our adversarial system, the mutual exaggeration of arguments does not always lead to the truth, just as bargaining for a blanket on the beaches of Acapulco will not always establish a fair market value for an item.

Individuals can be wrongly convicted. One high profile case was that of the boxer, Rubin "Hurricane" Carter. He was acquitted after the reversal of several bad decisions. But the same dynamics apply to every level of the court system, including commercial litigation. The lower the court, the greater possibility for a wrong decision. Your case could be one of the cases that are not properly decided.

The resources of the parties also affect justice. As Napoleon well understood, sufficient resources are required to successfully wage war. In litigation, if you do not have the resources, you may lose the battle. There may be delays in getting a date in court. There are the practicalities of enforcing a judgment — there is no point winning the legal battle unless the other party has the means the pay.

Related to the issue of insufficient resources is the risk that the legal system may become your adversary rather than your ally. The system may be used as an instrument of legal extortion — the threat of litigation to coerce a party into a settlement. Looming financial and time costs of litigation can cause a party to settle, regardless of the merits of their own case.

I have worked with biotech companies that have been subject to legal extortion. A smaller company with an innovative product tried to wedge into a market with one of the larger players. The larger player may either sue the company based on a bogus infringement of their own patent or copy the patent of the small company and allow themselves to be sued. In either case, the larger company knows they will win the economic battle regardless of which party is right or wrong. Their strategy? Either bankrupt the other company or drive it into its arms.

This strategy is routinely deployed by the largest players in the marketplace. It shows that litigation is an imperfect mechanism to resolve disputes and will not always achieve justice.

Third, entrepreneurs must carefully review the value equation of litigation. Entrepreneurs cannot afford a Pyrrhic victory. I once rented a small commercial property to a company that trained security agents. Over a couple of years they caused some damage to the walls of the space, beyond reasonable wear and tear. They denied their liability self-righteously! I took them to small claims court and after 18 months received a judgment in my favor and the money required to repair the damages. But the time and effort involved in the process negated the value of the judgment. An entrepreneur will not enhance his business efficacy with hollow victories.

A practical analysis of whether to pursue litigation is always helpful. Your litigation counsel may advise you that no matter how good your case, it is better to settle for 50% now than to fight for two years to get 100%. Analyze the risks, the costs, the time, the aggravation, and the opportunity costs.

Bill owes John \$100,000. Bill refuses to pay even though he should. Bill offers \$25,000 and a mutual release agreement. John is irate. When he learns the cost of litigation and is advised to take what he can get, John agrees to take \$50,000. John lost \$50,000. Bill won since he saved himself \$50,000 (and can afford to pay his lawyer). The logic of the litigation lawyer is to have you think about what is likely, not what you think you should get.

One aspect of the value equation of litigation is the opportunity cost of your time. An unfortunate irony is that the more your time is worth, the less the value in pursuing litigation. The less valuable your time, the more willing you may be to fight for a victory through the courts. For example, a dentist or doctor making \$300 an hour will lose money defending himself in court. As a result, some parties will settle a case because of nuisance rather than merit. Business people know that many individuals live by the life-is-too-short principle – better to resolve a dispute promptly rather than waste money and cause aggravation by fighting. One entrepreneur's approach to another party's

unwarranted demand for shares from a high-tech company was simply, "Can't you throw some shares at her?" In short, give her something to make him go away. The bottom line — experienced business people and lawyers recommend to settle and move on.

Fourth, there are risks associated with the litigation process. Justice is usually equated with getting what you think you deserve. This may be different than what the courts think you deserve. There are always two sides to a story, the issue is never black and white, and there is a chance the court will find against you. What may be a clear issue to you, which has become even more clear in your recounting the facts to your friends, becomes muddy when exposed by the arguments of the other side. The opposing party typically will deny everything frivolous, vexatious, and without merit. As the case proceeds to trial, your litigation adversary will attempt to obfuscate matters as much as possible proposing competing explanations and theories.

For example, you may simply not be able to prove your case. It doesn't matter if it happened — it matters whether you can prove it happened. Your judge may not have sufficient experience in your subject matter. He may not be able to discern the credibility of witnesses. Studies have shown that judges are no better than anyone else at determining the truthfulness of witnesses.¹ Some people are good liars and will successfully lie in court. In short, you may lose your case for reasons apart from whether you are "right." If too much money, time, and energy are required to achieve justice, the process may not justify your involvement.

To succeed, entrepreneurs must manage carefully the decision to pursue a remedy through the courts. Even an apparently convincing case may not yield a just result. For the entrepreneur, litigation is a costly and unpredictable process, and the costs are even greater for smaller businesses with fewer resources.

Litigation and other legal costs reduce the net income of the business — they come directly from the bottom line. Legal expenses are best invested in corporate housekeeping. An entrepreneur can increase profitability by managing the legal process through a business-focused approach to resolving differences.

A business-focused approach, managed by the entrepreneur, can incorporate legal considerations into a broader strategy by integrating several business considerations:

¹ Smyth, J.E. et al. *The Law and Business Administration in Canada* (10th Edition). Toronto: Pearson Prentice Hall, 2003, p. 204-5.

- Available human and financial resources
- Opportunity cost
- Corporate morale
- Reputation in the marketplace
- Impact on profitability
- Impact on future business development

A business-focused approach to resolving disputes that incorporates managing the legal process will allow entrepreneurs to achieve the true win of increasing profitability and operating a thriving business. Without it, they may have no more than the hollow victory of a successful legal battle.