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Here Be Dragons ... Really?

Skills and Professional Development



Remember right after (and perhaps during) law school, when family members or friends started asking for your help with all sorts of things? Though critically important to them, no issue prompted them to contact a “real” lawyer before they asked you. It never really stopped, though, did it? Decades later, I’m still telling people that while I am a licensed attorney, I’m not qualified to opine on a complex family law matter that a friend’s cousin is facing five states away.

Perhaps the request was to write a letter “from, you know, a lawyer, so they know I’m serious.” Unfortunately, the desire for your help was not diminished when you explained that the proposed warning might not be backed by a valid cause of action. The purpose of your involvement was to create the impression of hazard, without regard to its reality — like a secretly mild-mannered Rottweiler on a thick chain, or the “here be dragons” warning that medieval cartographers put on the uncharted portions of old maps.

We may not have realized it then, but these were our first opportunities to shape the wider world’s perception about what lawyers are and what they can do.

I was recently reminded of this during CLE pertaining to noncompete agreements and confidentiality policies. The presenters surveyed the current landscape, addressing the particulars of our jurisdiction, and then turned to strategies and approaches for handling these in the workplace. Toward the end, sample language was reviewed onscreen, and a participant asked whether the language would likely be enforceable were it the subject of litigation. The presenter offered that it probably wouldn’t hold up in court but would nonetheless serve to chill most employees’ undesired behavior, seeing as they’re not well versed in the current law on the subject.

I restrained the urge to raise my hand. By this time, the session had run a couple of minutes into the

lunch hour, and I didn't want to risk being stabbed with a sponsor-logged pen by the seatmate whose stomach I'd heard rumbling for the past hour. Were I braver that day, I might've asked the speaker what he thought was an allowable amount of employee deception for in-house counsel to engage in on behalf of our clients.

Instead, I saved the topic for lunch. My impression from the mix of in-house and outside counsel at my table was that there was little appetite for soul-searching on this topic. Most acknowledged, and none disagreed, that the approach discussed was deceptive if it depended on the recipients' lack of legal knowledge. One pointed out that it was fair for an employer to seek to discourage such action by employees but stopped short of endorsing this approach as the means.

Deception was also the root of my longstanding gripe (see my Jan./Feb. 2017 column) about the stern language so many of us use after the signature block in our emails, despite the fact that the prohibitions are often unenforceable and can sometimes (as with blanket designations of privilege) produce a result opposite of what's intended.

We in the small law department setting, being more likely to work directly with employees throughout the organization, should be particularly attuned to the collateral ramifications of these tactics, even if we're comfortable that we're ethically in-bounds. When we create unfounded impressions of the negative consequences for those who would act adversely to the organization, we must either let our clients in on the ruse or allow them to get the same impression.

If we tell our colleagues on the senior team about the smoke and mirrors, what impression does this create about our veracity on other matters? It's like having an acquaintance who's a gossip; you may well listen to what he or she has to say, but you'll think twice before sharing your own secrets with them. Later, when we're working with groups of employees outside the senior team, at least a few of whom will see past the deterrence tactic, will we have their full trust when the time comes to guide them through an unannounced onsite investigation? Credibility is hard-earned, quickly lost, and nearly impossible to replace. Let's be mindful of every opportunity not to damage ours.

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