

My Two Bits

I’ve been accused of being a lawyer-basher; I’m not. True lawyer-bashers get upset with attorneys simply because attorneys do what they’re supposed to do to help make our “justice system” work. That system is based on advocacy, thus requiring lawyers – advocates – for each side of a dispute to stand before a trier of fact (a judge or jury) and put the best possible spin on their clients’ contentions. The trier of fact then decides which contentions seem most credible.

As essential as advocacy may be, I believe it is counterproductive when it comes to developing a contract. After all, a contract is a business agreement, not a business dispute. To be maximally effective, a contract should be balanced and fair, thereby achieving a reasonable business bargain for both parties. Advocacy in contract formation is out of place because advocacy is not about balance and fairness: It’s about doing everything legally permissible to achieve the best possible outcome for one’s client, usually at “the other guy’s” expense.

I have earned a lawyer-basher reputation because I often rail against those client-employed and client-retained lawyers who unwisely apply advocacy in contract formation without consideration of the negative impacts. As an example, consider those clients’ attorneys (especially those employed or engaged by owner/clients) who apparently believe they are duty-bound to recommend the use of onerous contract provisions; e.g., a broad-form indemnity that requires a consultant to indemnify the client for any damage the client experiences, even when the client caused it. Although such provisions seldom need to be implemented and their enforceability often is dubious, their mere presence in an agreement can be intimidating. As a result, broad-form indemnities – among other one-sided provisions – can cause many engineers to contort their approach to a project, often at the client’s expense; e.g., when they engage in “defensive design.” Which is why older and wiser attorneys explain to their owner/clients that striking a fair business bargain that imposes reasonable consequences for negligence is far more cost-

effective, because it leaves the engineer free to develop the most cost-effective design or solution. This is not to say that these older and wiser attorneys ignore the many harsh provisions available. They don't. They discuss them with their clients, but – when doing so – they also discuss their drawbacks. As experienced lawyers have explained to me, “My job is to explain the legal ramifications of what my client seems ready to agree to, and to verify that the business agreement they're ready to strike will be legally enforceable. Recommending the use of onerous conditions – e.g., requiring an engineer to provide no-fault insurance in addition to engineering services – is not appropriate when the purpose of contract formation is achieving mutual understanding, cooperation, and harmony moving forward.”

I get even more upset by those client-retained-or-employed lawyers who are “advocates without a clue”; i.e., who don't know what they're talking about but advocate it anyway. These attorneys are epitomized by those who insist that an engineer make the client – typically an owner/client – a named insured on the engineer's professional liability insurance (PLI) policy, even though doing so adds no protection whatsoever and actually may weaken it. Fact: PLI policies protect named insureds when claims are filed against them. As such, if they were named insureds, owner/clients that filed a claim against an engineer would be put into the position of making claims against themselves. For that reason, no PLI company of which I'm aware makes an owner or any other client entity a named insured on a policy. Despite that fact, some engineers agree to do what the client's attorney asks for, evidently hoping that neither the lawyer nor the client will check to verify that the provision is fulfilled. Those engineers and the client's attorneys should also hope the client doesn't have to file a claim, because, by agreeing to the provision, an engineer feasibly could set into motion a series of events that could result in the engineer's PLI provider being unwilling to honor the claim, even when fully legitimate.

So is that it? Am I saying that I'm not a lawyer-basher because advocacy is sometimes what's supposed to occur and I only get upset with lawyers who apply it when they shouldn't? No, that's not it. If I'm going to earn my “I'm-no-lawyer-basher” stripes, I'll

have to do far more than offer faint praise and blow off some steam. Which is why I want to address the true lawyer-basher’s comment that “The ----- lawyers run everything,” referring, in particular, to lawyers’ disproportionate representation in government. Why is that? And is it bad? You tell me.

When many young attorneys first step into private practice, their seniors tell them to bill X-many hours to clients and devote Y-many hours to community-based activities, to contribute to the public good and become known for doing so. Typically, the “newbies” get involved in one small nonprofit group or another, advance to leadership, and then move on to another group, often scratching out some additional time to support the local branch of a political party, moving to leadership there, too. Sooner or later, someone says, “Y’know, you should run for office.” And they do, which is a good thing, because, if we waited around for others to do so, we’d probably be waiting forever.

Should the people who design and build public works be involved in public governance – politics – to help shape effective policy? Of course they should, but they aren’t, leaving public works decision-making to others. This is not to say that lawyers who get elected are, perforce, paradigms of virtue. They’re not, but at least they don’t sit around and gripe about others who are trying to make things happen. In other words, the “----- lawyers” true lawyer-bashers refer to actually represent excellent examples of what the critics should themselves be doing: sacrificing “quality time at home” to get involved, speak up, and make things happen. I’m unwilling to cast that in a negative light, even when I disagree totally with the elected lawyer’s point of view. Face it: The world is run by those who show up. Lawyers do. Those who sit around and complain about it only run their mouths.

So, more power to the lawyers. Maybe one day engineers will get fed up enough to show up, too.