

What Divorce Court Teaches About Trade Secret Litigation

June 28, 2017 by James Pooley

I still remember the day I decided never to do another divorce case. My client called to tell me that her ex was taking the kids to his mother's house where she would look for holes in their socks and then rip them with her fingers. This surely was grounds for a restraining order! No, it wasn't, I insisted.

Back then we accepted any kind of case that involved a courtroom: accidents, real estate, criminal, contracts, and "domestic relations." It was the divorces that often involved the worst behaviors, seeming to require more therapy than legal advice.

These were also the early days of Silicon Valley, and it wasn't long before commercial litigation, and trade secret cases in particular, came to fill up my calendar. Hardly a week went by without a group leaving to do a start-up or join the competition, provoking a lawsuit. After thirty or forty of these, a common theme emerged: somebody always had done something foolish, like overheating the photocopier or bragging about how they were going to destroy their old employer. So it seemed to me that if people just understood the rules, they would never get into these scrapes. But the same kind of mistakes were made even by experienced, sophisticated actors, and the lawsuits kept coming. I was baffled.

Then I married Laura-Jean, who is a psychotherapist. When she learned about my trade secret cases, it was immediately clear to her what was going on. These people were distracted – and sometimes blinded – by their emotions. And that's when it hit me: trade secret disputes were a lot like divorces, and if you could understand the emotional forces at work, you could do a better job for your clients. The analogy wasn't perfect, because people choosing to end their marriages were often consumed by their feelings to a level that didn't usually apply in a business context. But the parallels were striking, and illuminating.

Laura-Jean pointed out that all my trade secret cases involved a relationship of trust. In a start-up, a sense of common purpose forms the framework – a band of disrupters fighting against the entrenched

incumbents. And even in large companies, internal teams develop their own organic sense of loyalty to one another, fueled by the challenge of designing breakthrough products. Team members come to rely on each other, and their bonds are, to some extent, emotional.

So when a relationship like that is sundered – particularly when it involves competing against former colleagues – passions take over. Anyone dealing with trade secret litigation needs to understand this dynamic.

Let's start with the ones left behind. Unless the company has had plenty of advance notice, the shock of learning about the disruption evokes primarily feelings of betrayal, not unlike the discovery that a spouse has been unfaithful. At a superficial level, the affected managers will be disappointed and frustrated, but often their behavior will reflect stronger reactions. They have been deceived. They – and frequently the co-workers too – feel abandoned. Just like the kids who don't get picked in school sports, they may have feelings of jealousy toward those who have left for the exciting new adventure.

Often, the accused turncoats are also startled by what has hit them. In denial about the effect of their putting important information at risk, or even of just their leaving the team, they tend to justify their actions by thinking that they had been treated poorly, or that the company didn't want to pursue that line of technology anyway. The accusations sting, and they may feel hurt and bullied, scapegoated by managers who are just looking for a substitute explanation for their own personal failures. The lawsuit can also provoke fear or even panic, as they see their dreams and fortunes fading.

Both sets of players experience some level of anger, and may be inclined toward revenge, again distracted from the risk of digging deeper into the fight. Ironically, each side can feel victimized by the other, seeing whatever they do as a reflection of their more righteous position.

These emotions aren't just clues to an abstract understanding of the actors in the drama that is your trade secret case. They are drivers of behavior, including the way that the facts are recalled or reported.

As many judges will confirm with a sigh, you can frequently see the emotional content of a trade secret dispute reflected in case filings. This often begins with a complaint that is drafted to read like a combination spy

novel and press release, suffused with pejoratives directed at the defendants. It can continue with tit-for-tat motion papers filled with invective. If you think this means that counsel have become part of the problem, you would be right. Recently in San Francisco a trade secret case was dismissed as a sanction for unprofessional conduct by one of the lawyers, who threw a cup of coffee at her opponent during a deposition. Laura-Jean tells me this is a consequence of what psychologists call “identification” or “merger,” in which lawyers mistakenly believe advocacy requires adopting their client’s emotional state as well as their legal position.

Third parties can feel the effects, too. Customers don’t like being dragged into a fight over their business relationships, and sometimes the annoyance leads them to flee both sides.

Giving free rein to emotions in trade secret cases can make them very hard to settle, certainly in the early going. The whole idea of trying to preserve and improve a relationship is lost on combatants who seem committed to batter it. When settlement arrives, as it must in most cases, it is often the product of exhaustion rather than sober assessment of the risks and opportunities.

As I have often told my students, the human drama that characterizes trade secret litigation can be attractive. After all, there’s something to be said for disputes that have a real moral dimension, grounded in the noble tort principle of finding fault. But although these cases are fascinating for their story lines and ethical themes, they come with a special obligation on legal counsel. This includes acting professionally and not throwing coffee at a deposition. But it also means helping our clients by recognizing where their emotional reactions might not be serving them, then guiding them toward a perspective that is more closely aligned with the goals of their business.

After all, these cases aren’t about tearing holes in socks.

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