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Get mad, then get over it.

-- Colin Powell

I enjoy controversy. I deal with mad people frequently. I like the nature of a good fight, the psychology, the strategy, and the often off-balance positions you have to face and address in the heat of the battle. My first pre-law school job was with the IRS as a Revenue Agent.

And, after 20 years of experiencing numerous long and expensive trust and estate disputes among family members, I have concluded that a vast amount of wasted time and expense in these disputes, particularly the substantial cost of litigation, arises from the following factors: (i) poorly drafted estate planning documents; (ii) failure to reduce the threat of Will contests; and (iii) unbridled bitterness.

This last factor about bitterness centers on a quite realistic and costly "Don't get mad, get even" element -- the opposite of what Colin Powell expresses above.

As to each of the above three points, first, a vast number of trust and estate disputes arise simply because of poorly-drafted documents. This is where the document lends itself to differing interpretations or due to lack-of-clarity leaves open some unanticipated question that sits unanswered. A court then must provide the answer.

These weaknesses in the documents also provide a chink in the armor that gives a disputing party significant leverage to force the document into the litigation arena.

Second, is a failure to reduce the exposure to Will contests. Of the disputes I handle, Will contests are among the most problematic and costly. This is where a disgruntled family member or beneficiary (or excluded beneficiary) challenges aspects of a Last Will and Testament with the goal of overturning the Will so that it is no longer the controlling document for the estate.

An effective way to greatly reduce the threat of Will contests is to use a revocable living trust as the core estate planning document (sometimes called a "Declaration of Trust") rather than using a Last Will and Testament.

Third, if a dispute arises, is the cost of unbridled bitterness. My discussion on this point is an attempt to convey a warning about the expensive fallout of this type of bitterness.

To frame this third point I make a distinction between the bitterness element versus the effective, forthcoming and discerning use of anger as a means of staying more directly focused on the merits and facts in the dispute.

As to the bitterness, it can create unnecessarily an ancillary battle among the family members where -- in addition to the dispute at hand -- the parties become immersed in a fight shrouded with rhetorical questions such as "I can't believe he (the opposing family member) is doing that?"; "Why can't they (the other side) simply see that they are wrong?"; or "He has real nerve to be doing this to us."

When the bitterness factor really gets stoked, clients will take the position, for example, "This is a matter of principle, I don't care how much

this litigation costs", or "I might end up not getting anything from mother's estate, but I want to make sure my brother gets nothing" or "I am willing to take a scorched-earth approach and we all lose if necessary." To the contrary, clients need always to be aware of the cost of these disputes.

I am not suggesting that we can rid ourselves completely of bitterness. But, being well aware of the bitterness factor helps us keep a closer check on the extent to which it is driving our view of a situation and the related expense of the dispute.

Here are some practical aspects of this bitterness element:

One, don't let the other side pull you into the bitterness role. An excerpt from the ancient military treatise *The Art of War* by Sun Tzu includes the following point that I have always liked: "If your opponent is of choleric temper, seek to irritate him. Pretend to be weak, that he may grow arrogant." Let the other side fall prey to its own bitterness.

Two, in my view this bitterness effectively adds another dimension, and related level of expense, if the client is spending a great deal of time focusing on finding a way to propel his or her bitterness. This takes away from a more-objective and direct approach to the dispute, particularly if the above *Art of War* factor can be applied against the other side to your advantage.

Three, the bitterness factor can cause a client to become blind to the cost-benefit considerations of the dispute.

Four, the lawyers involved need to help their clients be aware of this bitterness factor rather than merely advancing the case with a blind eye to this factor, particularly as it may affect the cost-benefit of the case.

Litigation is highly competitive. We want to win. Opposing lawyers are often inviting

targets in the fight. A litigation arena can become a battle of egos. But this type of fighting, when heavily overlaid with the bitterness factor, is not always in the client's best interest.

A much better alternative in my view is an effort to engage the anger directly within a more candid and forthright dispute. This better provides an opportunity for the family members to address and express whatever misunderstandings, disappointment, hurt, pent-up feelings, or other concerns they have, without being sidetracked with festering and unspoken bitterness.

This anger (versus bitterness) topic is a part of my DNA. My father practiced law in Atlanta for 45 years. He did not shy away from controversy nor from anger. As a result, he discussed frequently with me and my brothers the notion of developing a balance with anger of what he called "firm, but friendly".

Although I never saw my father resort to physical expressions of anger, in his earlier days as a young lawyer he no doubt was finding his way on the spectrum of anger. In other words, he did not begin his lawyering career possessing a fully developed balance on constructive use of anger (nor do most lawyers).

As an example, the late Judge Elbert Tuttle, with whom my father practiced law for many years, told of being given a drive home by my father (who was a relatively new lawyer, age 26 or so at the time), when the driver of another vehicle and my father commenced a heated exchange. The two drivers drove into Piedmont Park (Atlanta), disembarked and, as Judge Tuttle remarked, "proceeded to beat the bloody hell out of each other." Judge Tuttle and the passenger in the other vehicle looked nervously at each other, wondering if they were expected to participate. When the combatants no longer had the strength to strike, they returned to their cars. Judge Tuttle said my father drove him home, never mentioning the matter again.

Now, as an example of an older, more fully developed response on the spectrum of anger,

a friend of mine (age 50) recently said that his many years of karate training helped significantly with his ability to make choices about whether and when anger is necessary, rather than merely responding impulsively.

Karate taught him, for example, that he may one day be faced with a threatening situation where he has to make a split-second decision: "Do I merely need to break this guy's leg" or "Do I need to kill him." The key point here is that my friend's karate helped train him to choose a response, rather than merely reacting blindly to the situation. This is an excellent example of a direct and discerning use of anger as a tool for a particular situation.

I end here with a quote from the political figure Theodore Roosevelt: "Speak softly *and* carry a big stick". The goal I speak of in this newsletter is attainable if done in the same manner of diplomatic efforts during wartime. A family dispute over a Will or trust is a war.

Forthright, candid, and diplomatic efforts by the family members to move toward a successful and more direct resolution occurs best within the shadow of a big stick.

But, even with this goal of a more forthright approach, in some instances the other side will remain entrenched with its effort to keep the bitterness factor stoked. If this is the case, let the other side become its own enemy.

And, finally, there will be times when you simply have an unreasonable and overreaching jerk as the opposing party. Even these warlike fights that warrant your fullest range of hard-hitting tactics (including the Art of War techniques) need not be subsumed by the additional burden of unbridled bitterness.

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