

Mississippi College Law Review

Volume 35
Issue 2 *Vol. 35 Iss. 2*

Article 4

2017

The Legally Savvy Entrepreneur

Martin Willoughby

Follow this and additional works at: <https://dc.law.mc.edu/lawreview>



Part of the [Law Commons](#)

Custom Citation

35 Miss. C. L. Rev. 346 (2016-2017)

This Comment is brought to you for free and open access by MC Law Digital Commons. It has been accepted for inclusion in Mississippi College Law Review by an authorized editor of MC Law Digital Commons. For more information, please contact walter@mc.edu.

KEYNOTE

THE LEGALLY SAVVY ENTREPRENEUR

*Martin Willoughby**

I. INTRODUCTION

I love entrepreneurship, and I love the law. When I received a phone call about delivering this keynote address, I thought this would be natural, as I'm a graduate of Mississippi College School of Law. I am honored to be back and thankful for this opportunity. Today, I would like to share a couple of ideas with you. We have a mix of entrepreneurs and lawyers in the room, so, hopefully, I will speak a little to each audience, as these ideas are applicable to both.

II. EXAMPLES OF THE LEGALLY SAVVY ENTREPRENEUR

Today I want to talk about this idea of a legally savvy entrepreneur and the role the law can play in building or losing a business. I have a couple of examples to help us think about this topic and how businesspeople, even non-lawyers, can utilize legal tools and an understanding of the law to create business opportunities and value.

A. Joseph Wharton

The first example is Joseph Wharton. Wharton was the fifth of ten children born to a Quaker family in Pennsylvania. They were a hard-working family, and he was expected to join the family business of farming. However, Joseph chose a different path. At age nineteen, he decided he wanted to be an accountant, so he took an apprenticeship and learned the trade. Discontented with being an accountant, Wharton turned his focus to being an entrepreneur. His first venture was a lead manufacturing company. The business ended up being a smashing failure, but Wharton was not deterred. He decided to get right back in the saddle and try again, this time in the brick manufacturing business. Unfortunately, it was also stunning failure.

* Martin Willoughby is an attorney, author, entrepreneur, and business consultant with over 25 years of experience. He has started and run several businesses, including a law firm and a real estate company. Mr. Willoughby has served as Executive Vice President and Chief Operating Officer of Butler Snow Advisory Services LLC; CEO of Emergency Mobile Health Care; and currently serves as Senior Vice President and General Counsel of Bomgar Corporation. Mr. Willoughby has published numerous articles in accredited journals. Mr. Willoughby received his B.A. from Millsaps College and his J.D. from Mississippi College School of Law. Mr. Willoughby delivered the keynote speech at the Mississippi College Law Review' 2016 Symposium, entitled "Innovation, Entrepreneurship and the Law: The 'Real World' Effects of Law on Mississippi Business and Entrepreneurial Endeavors."

This article is written from the author's personal experience. In light of this and the author's expertise, this article does not conform to the traditional law review format.

I can identify with that. I participated in two very grand dot-com failures back during the Internet boom. But I'm proud that my resume highlights those failures because I learned so much from them. Someone said earlier, "If you're going to fail, fail fast and fail cheap." I tried to learn from that. You do not want your failures to be a deathblow. Thankfully for Wharton, his failure was not a deathblow, and undeterred, he decided to get into the zinc business. This time, he was very successful, and savvy legal negotiations helped him acquire a plant. He then decided he wanted to get into the nickel business, where he successfully lobbied for the use of nickel in coins. He finally had a huge business success on his hands!

Joseph Wharton's story demonstrates the power of lobbying and the ability of the legal system to effectuate change for business. Later on, when Wharton was a philanthropist and entrepreneur, he donated \$100,000 to the University of Pennsylvania to start the Wharton Business School, which was the first business school in the country. Interestingly, when he donated the money, he insisted the school have at least three required courses: finance, accounting, and, interestingly, law. Including a focus on law in his business school was important to him because he knew the value of being a legally savvy businessperson.

B. Asa Candler

Dr. John Pemberton owned a small pharmacy in Atlanta, Georgia, and that is where he came up with the original formula for Coca-Cola. Asa Candler came along in 1888 and bought the formula from Dr. Pemberton for \$550. Candler, a very savvy marketer, was able to grow the Coca-Cola brand by selling it on the tap.

About ten years into selling Coca-Cola, Candler had created a major success. At that time, two individuals approached him: Joseph Whitehead and Benjamin Thomas from Chattanooga, Tennessee. Both of these men were lawyers and wanted the rights to bottle Coca-Cola. Whitehead and Thomas drove from Chattanooga down to Atlanta and convinced Candler to sign a contract essentially giving them the bottling rights to Coca-Cola. Candler didn't see the value in bottling. In his mind, the only way to drink Coca-Cola was from a fountain. So he signed the contract and gave over the bottling rights.

There are a couple of key things about this contract worth noting. First was the exclusivity language; the contract stated: "For the sole and exclusive right to use the name Coca-Cola upon bottles and receptacles containing Coca-Cola syrup and the right to vend such preparation in all of the U.S. except six New England states and the states of Mississippi and Texas." Another key provision was the term of this contract. What do you think it was? A couple of years? Five years, maybe? Ten years? Did you catch the sole and exclusive part? That is a perpetual contract. Finally, there is the price: one dollar per gallon. Yes, Asa Candler was paid one dollar to give up the right to bottle Coca-Cola in perpetuity. Rumor has it he never even collected the dollar. After signing the deal, Candler told the two men he had little confidence in the bottling business, and they shouldn't come crying back to him if they failed. He genuinely thought the whole thing was a farce.

My main point is in discussing this fascinating history is that this contract was disputed for decades. Litigation over it ensued repeatedly as prices changed over time. But courts consistently upheld the contract as a valid and for the sole and exclusive right to bottle Coca-Cola. Some people have called it the best bad contract ever entered into in the history of business negotiations.

C. Sumner Redstone

My next example is Sumner Redstone. You may recognize that name because of his relation to Viacom. After law school, Redstone briefly served as a prosecutor. He then began working in a large law firm where he specialized in anti-trust law. At the age of thirty-one, Redstone decided that he wanted to focus on being a businessman, so he went to work for his family theater business. Redstone was very successful in growing his family's business, ultimately expanding it to include many familiar brands such as MTV, VH1, Showtime, and the Movie Channel (TMC).

Time Warner was both a competitor and customer of Viacom. Time Warner had the market in New York City and eventually decided it wasn't going to allow Viacom to air in the New York City market. In response, Redstone sued Time Warner—his biggest customer—for \$2.4 billion. After extensive litigation, they ended up settling, and Redstone got his way. Later on, Redstone specifically noted that if they had not brought the suit and broken that barrier, Viacom would have ceased to exist.

D. Bill Gates

One more interesting example—whether you love him or hate him—is Bill Gates, the king of legally savvy business entrepreneurs. I am going to tell you a few quick stories about him. The reason I am sharing these with you is because it is easy to look at these success stories and think about the importance of great products, marketing, and talented people, but you do not always see the fabric of the law in all of this, and how the law is a key part of an entrepreneur's success.

As you may know, after Gates dropped out of Harvard, he partnered up with Paul Allen, as they were both interested in working with computers. One of the first home computer models that came out was called the Altair. They started toying with it and contacted Ed Roberts with a company called MITS. They told him they thought they could build software for this new computer that would make it a hobbyist's dream. Remember, they had not yet created a line of code for this software. This was the original "vaporware." But the two confident young men thought they could pull it off. They ultimately had to, because Roberts took them up on their offer. The contract they entered into had a few interesting provisions. First, there was a provision providing a ten-year license for the software. Second, the contract placed a cap of \$180,000 on royalties. Third, the contract required MITS to use their "best efforts" to market the product. Finally, there was an arbitration clause.

Needless to say, the software—Basic—was a huge hit; everyone started to use it. But Microsoft needed more cash. They had maxed out on the royalties and were not going to get more thanks to the cap in the contract. But then Gates

claimed MITS had violated the best efforts clause by sharing the software with competitors instead of actually marketing it. They went to arbitration, and Microsoft won. Think about this: If MITS had won that case, you might have had MITS running on all your computers instead of Microsoft. But Gates's father was a lawyer, and Gates even thought about going to law school himself. So it's no surprise that he was able to think about creative legal strategies to solve his business problems.

One other quick story on Gates involves DOS computing. When IBM decided to get into the personal computer business, it didn't have a good operating system. So they went to Gates and asked him to build one. Gates didn't have one at the time and directed IBM to Gary Kildall with Digital Research. So IBM representatives went to see Gary Kildall. When they arrived, Kildall was out flying his plane, so they met with his wife. They pulled out a Non-Disclosure Agreement, but she refused to sign it. Since Kildall was not there, the IBM representatives left and went back to Gates. Gates ultimately agreed to build an operating system for IBM. Gates went to Seattle Computer Products, which had a system called QDOS—Quick, Dirty Operating System. Gates paid \$10,000 for the license to QDOS and agreed to give Seattle Computer Products a \$15,000 royalty for each sale. Arguably, Gates had only planned to make one sale, to IBM. But as Gates began to think about it, he undoubtedly began wondering what would happen if the product took off. So he and his partners went back to Seattle Computer Products and bought QDOS for \$50,000.

Gates could have stuck with the original contract, but he was legally savvy, so he came back and negotiated to acquire the whole program. He then turned to IBM and worked out a deal where IBM paid Gates \$430,000 to use QDOS, a program for which Gates only paid \$50,000. Now, Gates did not include any royalties in that deal, which one might consider a bad move. But the absence of a royalty clause did not defeat the most important piece of that contract: The contract did not give IBM exclusive rights. So after IBM put DOS on their computers, everyone else came running, wanting the same. And what did Gates do? He charged a royalty fee on all computers with DOS from there on.

III. ATTRIBUTES OF THE LEGALLY SAVVY ENTREPRENEUR

When you think about business strategy, the law is often an overlooked aspect. The old adage is true: "Someone is going to make the rules, and the question is who." To me, this emphasizes the importance of being legally savvy. What does this mean to be legally savvy? You want to understand your legal terrain. You want to understand the marketplace. And you want to work strategically with your counsel.

I believe there are four attributes of what I would call the legally savvy entrepreneur. Whether you are an entrepreneur or work with entrepreneurs, these are things I would encourage you to think about.

A. Taking Responsibility

The first attribute of a legally savvy entrepreneur is taking responsibility. I find there are clients who, when something legal comes in, just hand it off immediately, only wanting to hear about it if there's something they need to do. These people delegate all things legal because they do not want to think about them. It makes their brain hurt. But this is not a proactive way to think about your business.

I believe the best entrepreneurs are those that get into the weeds and understand the legal issues facing their business. I also believe that great entrepreneurs read their documents and take responsibility for knowing what is in them. How many times has a businessperson complained that their counsel didn't tell them about something in a contract and then balked when told they should have read the documents? The excuses go on forever: "Well, they were too thick. It was all of that legalese, mumbo-jumbo stuff up in there. How do you expect me to read all that?" You've got to read the documents pertaining to your business. If you are doing a deal, and the person on the other side of the table has read the document and you have not, good luck with that! I have seen people called out by their business counterparts for not knowing the ins and outs of a document. Take responsibility. Do not defer that. If you are the entrepreneur, if you are the CEO, all things legal do not get delegated out; they are your responsibility.

B. Proactivity

The second attribute is proactivity. You have to be proactive in your business, especially with the complex legal system and regulatory environment. The law runs through the fabric of everything in the life cycle of a business—the confidentiality agreements, operating agreements, shareholder agreements, investor documents, intellectual property documents, and employment documents, just to name a few. We do not always think about whether we are being savvy and strategic when it comes to those documents. But legally savvy entrepreneurs do; they think about it constantly and early on.

Any lawyer can probably attest to this: Entrepreneurs sometimes go out and negotiate their business deal, and only *at the very end* turn to their lawyer and ask for the blessing to close the deal. For lawyers, that is not an ideal situation. You have no context or idea of what's going on, but you're asked to give it a seal of approval just by glancing at the paperwork. How can you be of value in this situation? The other little trick some clients will play is to work up the entire deal and then go to their lawyer, not with details of the deal, but with a very specific question. They want the lawyer's blessing, a yes or no answer on which to hang their hat.

This type of behavior serves neither the entrepreneur nor the lawyer well. A legally savvy entrepreneur wants their lawyer to understand their business and what drives its value. That is the way to unlock the true potential of the lawyer-entrepreneur relationship and be proactive about challenges your new business will face.

C. Collaboration With an Entrepreneurial Lawyer

The third attribute of a legally savvy entrepreneur is collaboration with an entrepreneurial lawyer. An entrepreneurial lawyer does not necessarily have five businesses in addition to their law practice. Being entrepreneurial is a mindset. I would argue that the lawyers who will be most successful for their clients over the long run are going to be entrepreneurial lawyers. And the reason for that is this: It is very easy to say no, to be a deal breaker instead of a deal creator. What is challenging is thinking strategically about how you can help your client solve their problems.

Many times I find non-savvy entrepreneurs are completely deferential to their lawyers. I'm not saying don't listen to good advice, but just because your lawyer says it does not mean you shouldn't challenge them. You want to collaborate with your counsel. For example, a piece of litigation is ultimately a business problem to be solved. Even if you hate litigation, turning a blind eye to it is not going to solve the problem. Engage with your counsel. Entrepreneurs that do this get things done, resolve problems for their companies, and then are able to move forward.

D. Knowledge of Your Terrain

The last attribute of a legally savvy entrepreneur is knowledge of the terrain. Knowledge of the business and legal landscape is important for both entrepreneurs and their counsel. One of the largest barriers facing entrepreneurs is a mental block, this idea that they don't like to read the legalese or want to get into the details. But they need to understand these legal issues, and they need help understanding them. Lawyers need to write and speak in plain English. Contracts that start off with "now therefore" or "witness this" cause clients to just shut down, even if there is something very important after that.

Both lawyers and the entrepreneurs have to work on this. Both parties need to learn the language and concepts of the other. If one doesn't take time to understand the other, they will have a hard time accomplishing their goals and objectives.

IV. THE STRATEGIC LAWYER

Ultimately, the secret to entrepreneurial success is partnering a legally savvy entrepreneur with a strategic lawyer. That is what achieves real success. We've talked a good bit about the legally savvy entrepreneur, so I want to leave you with a few thoughts on the strategic lawyer.

First, great strategic lawyers listen more and talk less. If you are doing all the talking, then you are not learning and thus not understanding your client's business or perspective. Second, strategic lawyers take the time to invest in their client's business by understanding it. Ask your client about the business model, the business's primary source of revenue, its target market. You will get more work in the end from that client because they know you care and can add value.

Third, strategic lawyers think creatively to help their clients. Just because you work creatively to get the deal done does not mean you are violating ethical

principles. You are not cutting corners; you are thinking about how you can add value. Strategic lawyers are much more than just technicians of the law; they use life experiences to help their clients. When you've seen business after business after business, you learn a thing or two. You can share that with clients and consequently add value in strategic ways. But there's another part to that equation. When it comes to your clients, you have to be humble but also candid. Shoot them straight. This can be difficult sometimes, as the client is the one paying the bills. But as the lawyer, you have to be candid. But approach it with a sense of humility.

Finally, a strategic lawyer models the kind of excellence their client aspires for their business. If you are in business, you are trying to operate with excellence on a daily basis. If you are a lawyer who is not operating your practice with excellence, then a businessperson is unlikely to feel that you're the kind of lawyer who will take them to the top. The strategic lawyer rises with the client and models the excellence the client wants to achieve, all while being a resource to help them get to the top.

V. CONCLUSION

To the entrepreneurs, I hope that you will think about and be committed to being a legally savvy entrepreneur. I cannot guarantee that you will achieve the same results as Bill Gates, but I promise you this: If you will consider the points previously discussed, you will fare much better on the inevitable day when you encounter a legally savvy entrepreneur on the other side of the table. For those of you that are lawyers, I hope that you will continue to strive to be an entrepreneurial, strategic lawyer, one who adds long-term value for your clients. Thank you again for allowing me to speak today.