A PROPOSED BUSINESS TRANSACTION of any type, even when the desired result is a combination of interest or activity, starts as an adversarial relationship with each side viewing the process as a means to address their own interests. Even where protocol or politics create the need for an aura of cooperation and collegiality between the parties, opportunities to increase the potential for tactical advantage can be gained through application of the First Rule of Engagement.

Trial counsel are retained to handle business disputes on behalf of others and thus, by definition, they should have no personal stake in the dispute and are supposed to remain objective throughout. As a practical matter, however, the level of aggression inherent in high stakes dispute resolution can permeate the actions of counsel as well as their clients. The First Rule of Engagement, therefore, and the first step towards winning a case, is to articulate and implement a strategic theme of the case that will place the opposing party – and at a minimum their counsel — on the defensive. A defensive situation increases the likelihood that the opponent will engage reactively, rather than advancing his own agenda, enhancing the potential for
achieving an advantageous result. Creating a situation where an adversary acts reactively does not necessarily require placing him emotionally in a position where his dislike of the proceedings causes him to walk away from arguments that could be advanced in the vanguard. Manipulating the exchange in a manner that results in the opponent adhering slavishly to a fallacious position or belief when better logic demands a tactical retrenchment can be equally effective.

Placing an opponent on the defensive, such that their ability to maneuver proactively is impeded, is not achieved by personal attacks or unprofessional behavior. Too often such conduct can backfire, resulting in an opposing party (and his counsel) becoming personally invested in winning merely to vindicate an aggrieved sense of honor, even where the merits suggest they would be better served by seeking an appropriate business solution to the dispute. A key to placing the opposition in a position where their tactical ability to implement an offensive strategy is limited lies in finding the pivot points to the case rather than attacking mindlessly, placing constant pressure on the opposing party in all aspects of the process, and finding a way to advance the positions taken consistent with the high moral ground.

Finding the high moral ground is not always easy and sometimes simply does not exist in the factual context of either a dispute or collaborative negotiation. In situations where it is difficult to find an emotionally appealing basis for the substantive positions taken by the client (or as required by the necessities of the business), helpful alternatives include turning the focus to the application of the substantive principles in the larger context (thus providing some separation from the existing facts), highlighting the importance of avoiding setting bad precedent, or demanding strict adherence to the good faith application of all procedural aspects of the process.

A classic example of the First Rule of Engagement arose in the context of a patent dispute between two publicly traded companies. My client had received a cease and desist letter from the lawyers for the other company, claiming that the software developed by my client infringed a number
of patents. The letter demanded an immediate cessation of all infringing activities, which included any sales of a suite of software tools that had been generating significant revenue for my client. As these cases are highly complex technologically, and can run in the millions in attorneys fees to litigate, finding a strategic theme through which we could immediately take the offensive and disenchant opposing counsel in the strength of their claim of infringement was essential.

After pursuing some barren leads, we were fortunate to uncover facts in the early stages of our investigation that suggested the same technology described in the patents had been developed first by my client. The surrounding circumstances, while sufficient to allow us to advance the argument that the other company was not the true and correct owner of the patents, was far from conclusive and the sound exercise of caution suggested waiting until the facts could be fully developed before pursuing that avenue and disclosing that theory to the other company. Applying the philosophy behind the First Rule of Engagement, however, we decided that the risk of providing our opponent an opportunity to regroup was outweighed by what could be gained should we proceed without further delay. Grabbing the initiative, even before the time had passed for us to respond to the cease and desist letter, we filed an action against the other company claiming that my client was the true owner of the patents. In that moment the balance shifted. My client now was the plaintiff and opposing counsel – who only days before were claiming the moral high ground of the party wronged – was faced with the need to mount a defense to claims of theft of intellectual property and his client was exposed to the potential loss of ownership of the patents upon which the company had based its initial valuation. For the balance of the proceedings we were able to maintain the moral advantage of the company wronged, and drove home a settlement that forced the other company to both address this moral imperative as well as provide significant financial benefits to my client.

Application of the First Rule of Engagement in the business context focuses on identifying the personal motivations and interests of the involved
individuals and isolating those motivations or interests from the core of the transaction or issue. For example, are the principals directly involved, or are they acting through intermediaries. If the former, are there ways to increase their emotional attachment to the project, such that reason and good sense can become clouded? Do they have a clinical approach, such that they can be placed on the defensive by implementing a strategic theme that highlights an emotional aspect? If the participants are representatives of the principals, do they have a lengthy relationship with the principals such that the need to protect that relationship will color their analysis, or are they likely to be in a “one and done” relationship?

The difference between these types of relationships will lead to very different pivot points in the negotiations. Constant pressure in this context requires immediate response times, both demanded and given, relentless attention to detail and rigid adherence to the standards of quality. To the pressure created by this approach one then adds a vigilant insistence in choosing the alternatives that leads to the high moral ground – however that ground is defined in the specific circumstance. While the First Rule of Engagement does not guarantee success by any measure, it helps create an atmosphere that can be demotivating to one’s adversaries.

To apply the First Rule of Engagement:

1. Articulate and implement a strategic theme that will place the opposing party – and their counsel at a minimum — on the defensive;

2. Find the pivot points to the case and a way to advance the positions taken consistent with the high moral ground;

3. Identify the personal motivations and interests of the involved individuals and create some separation of those motivations or interests from the core of the transaction or issue.