

# California LITIGATION

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# LITIGATION V. TRANSACTIONAL WORK: WHO'S THE "REAL LAWYER"?

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Some age-old questions never seem to go away – and are simply fun to debate. Nature versus nurture? Should Washington, D.C. (or Puerto Rico) become the 51st state? Star Trek versus Star Wars? In the legal world, one such perennial topic is between litigators and transactional attorneys: “who’s the real lawyer?” A quintessential “¿quién es más macho?” legal smackdown. Both sides know they are right.



Among litigators, of course, there is a strong (natural?) tendency to think of their transactional brethren as something less than “real lawyers.” After all, a license to practice law is a ticket to the big show: the ability to represent clients in court. Transactional lawyers, on the other hand (being, of course, the more grounded), understand that their hot-headed litigation brethren are just propping up their fragile egos and that the real business of the law is putting deals together and helping their clients avoid the miserable black hole that is litigation.

So, let’s kick-off this debate and see where it goes! What follows probably mirrors conversations held through the ages at water coolers around the legal world since the creation of barristers and solicitors.

**Litigator:** Look, being a lawyer is all about representing someone else in a formal tribunal, i.e., “going to court!” That is what “true lawyers” do,

right? We even have a cool nickname: “Litigator.” You don’t. Tell me, when was the last time someone wrote a novel about drafting a private placement memorandum? What was the last blockbuster movie that grappled with the intricacies of a commercial lease? Let’s face it, what you transactional lawyers do is *boring*. We’re the ones who get to experience the thrill of combat – the ultimate exhilaration of prevailing on the field of battle. We’re the fighter pilots. The Top Guns. You guys aren’t anywhere near the front line.

**Transactional lawyer:** Oh please. You litigators are grunt infantry. Very little of litigation practice actually happens in the courthouse. Most of what you’re doing is “discovery” (*yuck!*). You’re reactive, not proactive; destructive, not constructive. Litigation is what happens when emotion trumps reason. It’s what happens when at least one party refuses to be reasonable and thoughtful, when rational minds fail to prevail and are dragged into court. Then what’s often needed is the application of force with a large blunt instrument. The best “lawyer” is the one who keeps you *out* of court! The proper use of the law is to accomplish a client’s goals and thereby better society.

**Litigator:** Not so fast. If you transactional lawyers were so good at producing positive outcomes, why are we so frequently called on to clean up

your messes? It's litigation that is the apex of problem solving. Two sides have a dispute so serious that they simply can't work it out, and thus have to resort to the ultimate dispute resolution system our society has established, our wonderful court system. It's "in court" where winners and losers are made. And it's in the higher, appellate courts where law is "made" that can affect everyone in the state or even the entire country. To the extent that law is about "justice," it's in the courts where justice is rendered. Litigation is newsworthy, and litigators are the playaaaaas!

**Transactional lawyer:** Litigation is wasteful, expensive, and ultimately nonproductive. A key transactional document can make a huge difference in the world. The Constitution you litigators love to quote? That's transactional work; nation building! Sure, sometimes a transactional document isn't written perfectly clearly (at least in the minds of a litigator), and so you spend years fighting over the meaning of a comma. That sort of gameplaying is for bottom-dwellers and gorillas itching for a fight. And general counsel always say that the best outside counsel is the one that knows your business. That's not you, Mr. Litigator! It's transactional lawyers who have the requisite business knowledge to form companies and entities that move societies and economies forward.

**Litigator:** You want to go there, do you? How much law do you transactional lawyers really know? When was the last time you did any true research, parsed through the case law, analyzed the issues? You just trot out your forms — your "precedents" — change the names and move around a few commas and semi-colons. We litigators are the ones on the cutting edge. We know the law. Do you even know your own bar number without having to look it up?

**Transactional lawyer:** What you guys "know" is called "procedure" (and, along the way, you might have picked up a few parlor tricks that you use to bamboozle overworked judges and jurors plucked off the street). But you don't really know the law. For that, you need to rely on real lawyers. The ones who spend the time learning what their clients do, navigating the statutory and regulatory minefields

in which they operate. For the most part, your understanding is about a mile wide and an inch deep.

**Litigator:** Oh yeah? Well, what do you transactional guys have to show at the end of your day? Some overwrought, overly complicated, impossible to read documents that are going to sit in a musty file cabinet and never see the light of day. That is, of course, until they need to be handed off to the real lawyers — the litigators! — to try to make some sense of them. And at the end of our day, we have results. We have finality. The problem that couldn't be dealt with by you transactional lawyers has been resolved. We have a winner!

**Transactional lawyer:** That is — par for the course — irresponsibly simplistic and misleading. Sure, you might have a "winner" who might be "happy." But, more likely, the prevailing party will just be relieved to have survived a miserable soul-sucking experience at not inconsiderable cost. The loser, on the other hand, is devastated. When my fellow transactional lawyers and I finish a deal, we both have happy clients. We can drive around town and point to tangible things that are the result of our efforts. What can you point to other than that trail of tears you've left behind?

**Litigator:** Ouch. I see you've picked up a few tips from me!

**Transactional lawyer:** Well, I'm not going to let you score any points on me, but, as the eminently reasonable person that I am, I'll suggest that maybe there is a place where we can co-exist. How about that? Perhaps we are both real lawyers.

**Litigator:** Let's not get too carried away.

**Transactional lawyer:** Agreed.

**Litigator:** See you around the water cooler.

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