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Tough Decisions—or Easy Ones That Half Your Colleagues Will Disagree With

Peter J. Winders

"Failure to decide is a decision, too."
"Great point. We'll pick that one."
—Overheard.

Following are a couple situations that I have found difficult, either because there are conflicting principles dictating what to do, or because the right answer is hard to swallow, or because there was no formal system in place to support or control individual decision-making. Many readers will find them easy, and will be surprised that the lawyers in the small (or large) group that every lawyer assembles for reality check purposes will come to opposite conclusions.

Client/senior lawyer destroying documents?

In the early days of a lawsuit, Associate is attending pre-production document review, with Senior Lawyer and House Counsel. House Counsel rips a 2 page document from a file, shows it to Senior Lawyer, tears it into pieces and throws them in the waste can. Associate is bothered by this. She has heard the stories about clients and their lawyers destroying documents. She knows that as a lawyer on the case she has some responsibility. She has also heard stories about the whistleblowers on such things and remembers reading about the professional nosedive that Mary Poppins (or whoever it was at Enron or Arthur Andersen) took. What should she do?

What she did do is retrieve the pieces of the document from the waste can and, averting her eyes, put them in an envelope, in her briefcase, so she could worry about it more at home. Eventually, at someone's urging, she asked me what to do. I had her send me the pieces, and had a paralegal tape them back together. Anticlimactically, it was some off-color joke that never should have been in that or any other file, and it was appropriate to extract it and throw it away.

What was hard about that? Nothing from my point of view. From Associate's point of view, it demonstrates the advantage of having a General Counsel to deal with such questions. What she did was about half right. She saw a problem (that is the half, or most of it). She could have asked Senior Lawyer about it and taken his word for it. After all, one of the things being checked for is that the files did not contain matters that should be in other files or not properly a part of what was requested, and a junior can in general accept the decision of her supervisor. Bring the document back until she figured out what to do was not all that bad, either. Asking her mentor what to do was contrary to firm policy to direct such questions to the General Counsel, but understandable, and that at least resulted in the appropriate consultation. If the document had been improperly pulled, we would have resolved that problem appropriately.

Confidential information conflicts.

Confidential information conflicts are among the most difficult and are particularly difficult to explain to firm management. When one of our retired partners was practicing with Dewey Ballentine in the 1950's, he was told by an oil company president, "Young man, these antitrust laws of yours are out of step with American Business." An ethics advisor will get a similar reaction more often in discussions about confidential information conflicts than most others.

A confidential information conflict is this: In representing Client A you learn something that would be vital to your representation of Client B. Your obligation to keep confidential any information from Client A prevents its disclosure to Client B without A's consent. A refuses to consent. Therefore you have information vital to B's representation that you cannot use. This puts a material limitation on your representation of B that requires withdrawal in the view of most (or many) commentators.

Lawyer A represented Client 1, a family company with a permitted environmentally sensitive business that is currently very difficult to permit. The representation had to do with a claimed license violation, and it is successfully concluded. Client 2, a long-time firm client in environment-oriented businesses wants to buy Client 1's facility or the entity owning it. Client 1, now a former client, is enthusiastic and is willing to waive any confidential information limitations and to allow the firm to represent Client 2 in the transaction. As General Counsel I knew something about Client 1 because I had been consulted several times with goofy client issues during the prior representation. I asked the lawyer who handled that representation what would be her first advice to Client 2 if we had the unfettered ability to advise all we knew. Without hesitation, "I'd tell them not to do business with these people. They are crazy, literally in the case of brother number one, and maybe the rest as well. Any decision they make, they back out of, and their best friends one day they suspect of fraud the next. No matter what deal they make, they will end up in litigation, both with the opposite party and with themselves as well."

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I explained to Management (who happen to be more or less coextensive with the lawyers closest to Client 2) that we could not represent Client 2 in an acquisition because of a confidential information conflict.

"But Client 1 will consent."

"Before we get the consent we will have to tell Client 1 what we will say about them: that they are unstable, unreliable and untrustworthy and that Client 2 should forget about the deal. I don't think we can imply that that disclosure is one Client 1 should consent to, even if they have separate counsel."

"Surely we can word a consent broad enough to cover what we have to advise Client 2, that will not be that explicit. We have imaginative lawyers. I have negotiated language like that many times."

"You have negotiated things at arms length in settlement agreements, broad language that would allow you to do what you want without telling the adversary exactly what you are thinking about, but here you are dealing within a fiduciary relationship where not only the words, but a full explanation of what they mean as a practical matter is required."

"How can I explain to Client 2 that we can't represent it even when Client 1 has told them they will consent? We are liable to lose the client. You are taking this too far."

"Tell them we have a confidential information conflict. Tell them what a confidential information conflict is. Tell them that I have concluded that the confidential information is such that we cannot ask for a waiver. Both the CEO and the CFO are very clever businessmen. They will probably understand."

Fortunately, I think, Client 2 backed off. The last recommendation was analogous to a "noisy withdrawal." Maybe Client 2 backed off because of it. Too much information? Arguable, I guess, but I don't think so. Client 1 is now in litigation with the follow-on purchaser, and Client 1's constituents among themselves. Client 2 still loves us. ■