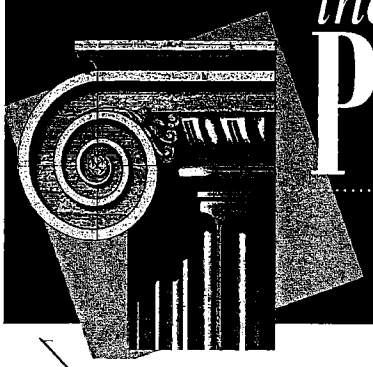

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Tests for Making Difficult Decisions

Peter J. Winders

In trying to put together a piece about difficult decisions, I found more often than not that a firm benefits from a formal decision making structure, and I realized that in its absence, the better decisions are those informed by the experience of carrying the book bags of the good lawyers of the generations before. Like the hatchling who follows the family spaniel, lawyers are imprinted by the lawyer they follow around for the first couple of years of practice. Those less fortunate who are told "how the game is played" by lawyers who think it is a game may require retraining. The fortunate learn easily from great lawyers of high principles. If those great lawyers with high principles could have been organized, things would be easier and better.

Here is a list of tests that I find somewhat helpful in making decisions in the course of the practice of law. Of course, you still have to decide what tests apply to the problem. Picking up an EPT will not help you figure why the azaleas aren't blooming. So far as I know.

Some of the decisions we have to make daily in the practice and in the business and administrative aspects of the firm can be difficult. They may be difficult because they are unique, because they involve consequences to people for whom we are responsible, because they may affect us monetarily, because they may cause pain to one person or another, or because the consequence of the decision may affect positively or negatively the reputation of the firm or an individual. Or they may just be very hard to figure out, either intellectually, or in terms of identifying the premises from which to reason, or because they have to balance all of the above.

Here are some tests that may be helpful. All tests are not applicable to all decisions. But if a possible solution does not measure up to an applicable test, it is probably not the best one.

1. Does It Follow Or Consider All Rules?

Legal ethics does not simply consist of doing the right thing; it also consists of following the Rules. Usually, following the Rules is the right solution. Sometimes, though not very often, the Rule answer and the right thing to do are inconsistent. If a departure from the Rules seems necessary, it should always be treated and justified as such—the Rules may not be ignored. There are some case-law exceptions for particular problems, and on occasion a court can be persuaded to give guidance where the spirit of the Rules should allow certain actions in particular circumstances where the words argued otherwise.

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2. Does It Advance a Decision on the Merits?

Not infrequently, a client or other person may suggest or demand a course of action, not illegal, that is distasteful or seems wrong. As a touchstone, remember that your job as an advocate is to prevail on the merits. It is not to terrorize, bankrupt or humiliate the opponent and "prevail" in that way. Litigation is stressful, and that cannot be avoided, but stress on the opponent is not an end in itself. If the course chosen does advance the goal to win on the merits, it is worthwhile. If not, it should be discouraged or refused.

3. Does It Accurately Inform the Decisionmaker?

In representing your client, your job is to inform, then persuade. I once heard an appellant answer one of the judges, "Your Honor, I know that is not the answer you want, and that the problem would be easy if my client had done what your question suggests, but we don't get to make up the facts. I am trying to persuade you that the actual facts should still have the same result." Specific rules cover some of this. You are required to inform the court of controlling authority, but you may argue for an exception, a refinement or extension, or a change in the law. In ex parte matters you must inform the court of all the material facts, not just those favoring your position, but you then argue the inferences favorable to your client's position. You may not be untruthful in dealing with others, except for the conventions of horse-trading during settlement negotiations. Otherwise, inform, then persuade. In addition, when dealing with a client, the fiduciary overlay means that you have to not only inform, but also explain sufficiently that the client understands.

4. Does It Balance the Duties to Client, to the Court, to the Profession, to the Firm?

To some lawyers, the touchstone of their practices and the excuse for their behavior is "zeal" or "zealous advocacy", which they define with the Zealot of the first century (and with the Berserkers of the 9th), and for which they ignore or downplay the other obligations of the Rules. This single-minded thinking is wrong. We build our reputation over a hundred years for integrity and professionalism, and no client is entitled to call on us to trade on that by cutting corners. Or stated the other way, all our clients are entitled to expect us to maintain the credibility so established. Every difficult decision should enhance our reputation if objectively viewed.

5. Where The Proposition Is Justified Because Another Firm Does It That Way, The Proper Response Is, "So What?"

Or less inelegantly, "What is their thinking?"

Almost always, the reasons behind one firm's choice do

not apply to every firm. "The Smith firm doesn't have a business intake or practice group system like ours—they say that any partner in a firm this famous should have the judgment to take his own matters." True. That is their philosophy. They do not try to anticipate and avoid problems, they respond to them. They even brag about it, and they have even managed to get some favorable coverage from an unknowing press for doing the 'right thing' (cutting the rogue partner loose when he is caught and paying money) once the scandal breaks. But they have paid restitution in the tens of millions of dollars, not for malpractice but as restitution for frauds or knowingly aiding and abetting client frauds. That firm does not condone or encourage such conduct; they just let their partners run unwatched. They are not ashamed that their primary goal is to make money, and the philosophy fits that goal. A philosophy of loss prevention, risk management, and core values such as ethical conduct and a "one firm" approach make the comparison inappropriate. There are different ways to do things, but the "grass is greener" argument must be treated with *very* great suspicion. Or with another firm "They get along fine without requiring their practice group leaders to review opening paperwork." No they don't. Their Loss Prevention Partner envies our system and has asked how we are able to get the Practice Group Leader ("PGL") to take the time to do the job, which he very much wants to implement. We can and they cannot because they have an eat-what-you-kill compensation system, which would punish the PGL for taking the time. If they see the value of management contributions, they are unwilling to pay for them. Different premises; different philosophy; different core values. If it turns out to be a good idea tested against our agreed premises, well and good. But "Johnson does it this way" is no better argument than that "{fill in the local lawyer who is the biggest jerk} does it this way." Test the idea, not the source.

6. Is This a Decision That The Client Should Make? Is The Client Fully Informed and Equipped?

Keeping the client informed (and **document!**), and assuring that the client makes client decisions (and **document!**), are basic ethical obligations. They are so basic that it is sometimes overlooked that the client may not realize its obligations, and if the roles are properly assigned and discharged, decisions sometime become easier. To document is loss prevention, the rest is basic legal ethics.

7. Does The Decision Measure Up To Applicable Core Values?

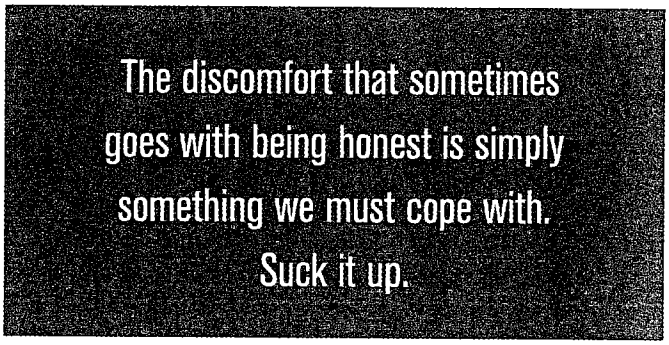
The core values are something every person joining the firm buys into. In combination, they are part of what makes the firm work. But they are most useful when they are treated not only as aspirations, but also as premises from which to reason, or part of a framework that our actions should fit. Suppose a firm has adopted a "one firm" policy—that all clients are firm clients rather than 'belonging' to an individual, and that competing ideas are to be resolved in the way that is most beneficial to the firm, rather than on the basis of the influence of the advocates. Asking ""Does this solution measure up to the 'one firm' premise?" may result in an altered solution. As may beginning a discussion "Let's reason from the premise of the 'one firm' core value. What is the result as to each of the competing ideas?" Think about it.

8. Have We Involved Others If the Decision Would Benefit Drom So Doing?

With my personality problem, I am frequently amazed when others whom I greatly respect disagree with me, and am even more surprised when a very good idea isn't mine. But a better decision can evolve from discussion of fresh problems. Try it. It will be a source of continuing wonder.

9. Does It Consider Persons Without Compromising Core Values?

We do in fact encompass a wide array of personalities. But we do not tolerate unacceptable actions from even the most productive. The stereotype of the firm that tolerates harassment by the senior partner with the most business simply does not apply. We can get such a person help for his behavior, but we cannot suspend the core values and be the firm we envision. We can and do practice what we preach. As a corollary, we have a number of published policies encouraging and making easier the reporting of suggestions or problems. I have told the story before about a situation that festered for months, with many people upset that "the firm" was not doing anything about it. But nobody informed management until someone mentioned it to me. I immediately informed management,



who were surprised, and the problem was resolved in a week. A number of people had erroneously and cynically assumed that management was ignoring the problem; instead, they should have used our multiple easy and anonymous ways of reporting. Please take the firm at its word and inform those who either can do something about a problem or one of the Ombudsmen who will pass the message along. All problems are simply not obvious to everyone.

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Tests for Making Difficult Decisions

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10. Has The Firm Analyzed and Accepted the Risk?

Please note that we do analyze and accept risks, but that (a) risks are analyzed separately from ethics, and (b) risk-taking and analysis is a firm decision, not an individual one. Suppose we have a clear conflict of interest, but we are convinced that if we accept the new matter, we will not be faced with a motion to disqualify, and we know that the old client will not consent—clear ethics violation/no risk. We will not violate the ethics rules just because there is no risk of getting called on it. Suppose, instead, we have a situation where an opponent contends we have a conflict of interest if we take a matter, but our analysis says we do not—probably no ethics violation/risk. We can take the matter if we want to. Other factors may make us want to: the opponent is not trying to protect a legitimate concern, but employing a tactic; the client has significant money invested in us. Will we take it at our expense? Sometimes we will forgive the bill if we lose, whereas if the issue arises at the outset, we will ask the client to decide whether to avoid the expense of the disqualification motion by hiring another firm. Similarly in other situations, we analyze the ethics issues first, regardless of risk. If permissible, the risk analysis is pretty much independent. But for the protection of all of us, the firm makes the decision. In general, start at the practice group level.

11. Internally, Does It Promote The Good Of The Firm, Fairness, Core Values, Willing Teamwork, Mutual Respect?

In another context, I have written of the "twin evils of generosity and greed." It does the firm harm if lawyer A turns down a very significant matter because she knows it would interfere with the effort of Lawyer B to continue to represent a sometime client of importance to him but not so important to the firm; it causes just as much harm if B challenged A's acquisition of the new matter with an "over my dead body" approach. The right decision, of course, is the one of greater value to the firm. But the decision must be fair, and must be fairly administered. Only in a firm that has a very large subjective element in its compensation system can B be recognized for giving up "his" client opportunity for the greater good. And only in such a firm can we maximize the efforts to assure that the whole is greater than the sum of its parts.

To illustrate this test in another context, the lawyer who fails to give a brutally honest evaluation harms both the underperforming associate and the firm. An honest evaluation may lead to a correction and improvement; a failure to do so is not only wimpy, but also unkind and perpetuates risk to the firm and the bad habits of the individual. The discomfort that sometimes goes with being honest is simply something we must cope with. Suck it up.