

To the Forum:

I am a mid-level partner in a firm that is considered the leader in advising a particular industry. Across the relevant practice areas, the law as it applies to this industry is unsettled and developing, so our activity calls for a lot of judgment. Clients often rely on our advice almost as if our judgments were the law . . . which, of course, they are not, and that is the nub of my problem.

In particular, based on our long-standing advice and the strength of our firm's reputation, no one in the industry engages in a particular practice I will call "X." Last week, a new entrant to the industry ("Client") asked about "X," and when I gave the stock "no" answer, Client handed me a research paper written by another lawyer who has never had contact with this particular industry. I read the paper with some skepticism and discovered, to my surprise, that it utterly demolishes our long-held position and proves, conclusively in my judgment, that X is permissible.

My boss (whose name is on our firm's door) cannot find a hole in the newcomer's analysis but yet still insists that "we have our story and we are sticking to it." I am not sure whether he concedes that he has been wrong or refuses to consider that possibility, but his main concern is that our firm and those whom we have advised have too much invested in the status quo to consider a change. He points out that all the leading industry players have been able to operate successfully (though at some additional cost) without doing X, so there is little to gain in our telling everyone that we have been wrong all along. On the other hand, if we say yes only to Client, it will gain an unfair advantage over the others, and when word inevitably gets out we will look silly (or worse) and may lose a lot of business.

To complicate matters, Client insists that the reasoning that they

and the new guy on the block have adduced in support of X is their proprietary information, insofar as it represents an ability to do something lucrative that the rest of the market has missed. Client has prohibited us from disclosing that anyone believes that X is permissible.

My boss has instructed me to tell Client that their other lawyer is mistaken and has no feel for this very specialized industry, and given our firm's reputation that might well be the end of the matter. But that will not be the end of the matter for me. I am not comfortable giving advice that I honestly believe to be wrong or in participating in what appears to me to be a cover-up. I have three questions:

1. May or must I tell Client my opinion, regardless of the directive from my senior partner?
2. Is Client within its rights in prohibiting our firm from disclosing to others the fact that someone has concluded that X is permissible (regardless of what we advise Client)?
3. If I leave my firm, may I disclose this sordid mess at least to justify why I am leaving or have changed my views, or am I bound to respect the firm's confidences even if they constitute, in my judgment, intentional malpractice?

Sincerely,

Painted into a Corner

Dear Painted:

We sincerely sympathize with your predicament. This is the sort of situation that has come increasingly to characterize legal practice as it shifts from a learned profession to a business, albeit both a heavily regulated and self-regulated business, with unique traditions that we still strive to uphold. Perhaps it was never really as quaint as we might prefer to think – Abe Lincoln made a lot of money representing railroads – but we hope

you get the picture. And a general counsel of a company may have to face this type of pressure much more often than an outside advisor such as you.

Your first question – whether you may or must tell Client your personal opinion – turns in large part, in our view, on Client's relationship with you and with your firm.

If Client clearly relies principally on your senior partner's judgment or Client's main relationship is with another lawyer at your firm, your best course of action would be to ask that lawyer to convey the firm's position to Client. You do not have a duty to overrule the firm's consensus if you know that Client intends to rely on the firm's viewpoint as opposed to your own, but you also do not have a duty to be a shill for anyone. You cannot in good conscience be a mouthpiece for falsity, but as long as it is clear to you that Client is not

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asking specifically for *your* personal judgment, you can, if you want, pass the buck. We caution you that this may not endear you to your partners, who might see you as unwilling to “take responsibility,” and, in any event, you will have no control over how the communication is presented and whether Client infers or is told that this is *your* conclusion.

As a result, the approach set forth in the preceding paragraph may not be the one you want to take. In that case, and certainly if you believe that Client wants to rely on *your* judgment, you would be on solid ground to advise Client truthfully that the firm’s view is “no” but your personal view is “yes.” One way this finds expression in complicated areas like taxation is a formulation like, “It may be correct and reasonable advisors might so conclude, but as a firm we do not feel comfortable issuing that opinion.” You should not give in to the temptation to disclose why the firm’s view differs from yours or to denigrate your senior partner’s motivations, but you should feel free to tell Client that he can call your partners for further clarification. Obviously if you do this, you owe your partners and your firm the courtesy, if not the duty, of letting them know in advance what you intend to do so that they are not blindsided.

No matter how this plays out, you should be prepared for a potential showdown and for the possibility that you may need to find other employment rather soon. They may teach about that aspect of professional life in business school, but not in law school.

Turning to your second question – about who, in effect, owns the knowledge and the technology – we offer several observations. First, in view of the novelty of the conclusion that Client’s other lawyer has reached and the important commercial implications, we believe Client has a right to insist that you and your firm *not* disclose this information.

As we have discussed many times before in the *Forum*, Rule 1.6 of the

New York Rules of Professional Conduct (RPC) prohibits disclosure of confidential client information without the client’s informed consent. Specifically, Rule 1.6(a) of the RPC states that “[a] lawyer shall not *knowingly* reveal confidential information, as defined in this Rule, or use such information to the disadvantage of a client or for the advantage of the lawyer or a third person . . .” (emphasis added). As defined by the RPC, confidential information “consists of information gained during or relating to the representation of a client, whatever its source, that is (a) protected by the attorney-client privilege, (b) likely to be embarrassing or detrimental to the client if disclosed, or (c) information that the client has requested be kept confidential” but “does not ordinarily include (i) a lawyer’s legal knowledge or legal research or (ii) information that is generally known in the local community or in the trade, field or profession to which the information relates.” *See id.*

Without even reaching the question of whether Client has a proprietary right in an item of intellectual property (the way Client might frame this), your discussions with Client, including his revelation to you of what the other lawyer had concluded, seem to be well within the scope of what is deemed “confidential information.” *See id.*

Second, if your firm discloses and criticizes the other lawyer’s conclusion, observers may come to think of your firm as a bully and question its motives. No private actor, regardless of how influential, should wrap itself in the mantle of “the system” and think that it has a duty to police what others do that overrides ethical and professional constraints.

On the other hand, no one “owns the law.” If you happen to have had occasion to think about the law, for any reason, and another person asks you a question, you are free to answer it as you believe is correct. So, should your partners reconsider or if you free yourself from the bonds that connect you to them, you are well within the

bounds of ethics and professionalism to give what you believe to be correct advice. But be vigilant not to cross the fuzzy line between answering a question when it is posed to you or is inherent in an analysis that you have been asked to do, and, on the other hand, volunteering information or inducing people to ask you that question.

Finally, the matter of confidentiality as to the legal conclusion and analysis, but still not as to details of your discussions with Client, will evaporate if and when there is general public awareness that someone says X is permissible. Our advice that you and your firm still tread carefully continues: fair comment, yes; calling out the attack dogs, no.

Your third question concerns the intersection of duty to clients and duty to partners. The answer is not all that difficult, though you may not be happy with it. Until the public becomes aware of the specifics, as noted in the preceding paragraphs, you cannot disclose the details to promote yourself or even to explain your departure. Depending on what actually happens, you can say something along the lines of, “I found myself disagreeing with my partners’ professional judgment or risk evaluation on one or more matters,” or even “I was forced out because I refused to counsel a client in a way that was contrary to my best professional judgment.” But beware that it is a cold world out there, and in our experience it is far from certain that people will not think of these as self-serving statements. There is really not much else you can say without actually accusing your firm of malpractice, and the life of a whistleblower is lonely save for the excitement of potentially having to defend a defamation lawsuit.

Do you remember “The Game of Life” in its original form, before the advent of political correctness? There were spaces marked “Revenge,” and with one spin of the wheel you could instantly win the game as a “Millionaire

Tycoon” or go to the “Poor Farm.” If you are prepared for long odds, consider how significant a breakthrough this is for Client. If you believe in each other and Client is prepared to provide enough business to anchor a practice, then hang out your own shingle, run with the innovation and grow with Client. Others have done worse in situations like this.

Sincerely,
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**QUESTION FOR THE
 NEXT ATTORNEY
 PROFESSIONALISM FORUM**

A classmate of mine from law school (Anna Associate) works at a firm that

focuses on plaintiff’s side employment litigation. Her firm filed a complaint in New York State Supreme Court on behalf of a client against his former employer only. The claims asserted were for discrimination, retaliation and wage violations. Anna told me she advised her boss that they should be bringing claims against the company’s principals, but, she said, he ignored her suggestions even though the law was clear that principals should have been named in the suit.

The defendant-employer moved for summary judgment and the court dismissed the action. The statute of limitations has apparently run out on the claims which could have been asserted against the company’s principals.

Anna told me that she was incensed by the conduct of her boss and felt terrible for the client. She told me that she had evidence of her boss’s failure to acknowledge the well-settled law that supported her position that the individual principals should have

been defendants to the lawsuit. Her plan is to reach out to the client and assist the client in a potential malpractice case against the firm. After initially contacting the client, Anna threatened to destroy the evidence of malpractice to get the client to acquiesce to the financial recovery in the malpractice claim. She negotiated a 50% contingent fee as compensation for her efforts and because her testimony would require her to leave the firm. And to make matters worse, Anna and the client had apparently engaged in a brief romantic affair which began when his case came to the firm and ended shortly after the case against his former employer was dismissed.

The client is threatening to take both Anna and her firm to the Disciplinary Committee.

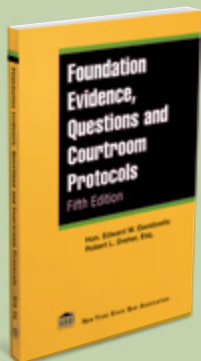
What ramifications would Anna face because of her conduct as described here?

Sincerely,
 Not a Fan of Vengeance

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