Conclusion: 'If you don't pull up . . .'.

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by James J. White

The following essay is based on remarks delivered at the Law School’s Honors Convocation last May. It stems from the author’s belief that a lawyer’s zeal is sometimes best exercised by confronting a client and stopping him from doing something that the client will regret. Not only the client but the public is best served by the lawyer’s interposition.

Certain lawyer duties, like the duty to represent a client with warm zeal, are well known to every law student and widely celebrated in the popular culture. To act the part of David against Goliath is glorified in movies and in countless books and on television. I suspect that in your fantasy life some of you picture yourself as a fearless lawyer representing a poor criminal defendant against an overbearing prosecutor or a lowly employee against a large corporation.

Today I am going to talk about a lawyer duty that is just as important as the duty to exercise warm zeal on behalf of a client, but it is a duty that is unknown to the popular culture and rarely touched on in law school. That is the duty to say no to your client, to step in front of a client who is determined to do something stupid, or in violation of the civil or criminal law.

Even though this duty never appears by name in the popular culture, the New York Times, the Wall Street Journal, and every local newspaper carry stories almost daily that demonstrate the importance of the obligation. These are stories about Kenneth Lay and Jeffrey Skilling at Enron, about Martha Stewart and Maurice Greenberg at AIG. All were senior executives at major companies. The first two are under criminal indictment, the third has been convicted and served a term in prison and the fourth has lost his job and is facing the possibility of civil or criminal charges. Each of them did things that appeared to be in the interest of their shareholders or in their own interest that they now regret. What seemed clever and brainy, if a bit cunning, is now claimed to be a crime or a civil violation of the law.

Surely lawyers knew of and in some cases even participated in these transactions. If those lawyers had only had the knowledge and intelligence to see the criminal possibilities and had the will to confront their clients, the individual clients, their companies and their shareholders would now be better off.

At least three separate problems will confront you when you need to say no to a client.

First, you will need courage. Telling a good client that he may not do something that is in his economic interest and that he believes to be important is a risky business. These clients, Skilling, Greenberg, and Stewart are smart, confident, and strong willed. They will not welcome contradiction. I know of one young lawyer in a big firm who failed to get promoted to partnership because of such a confrontation. And the problem goes beyond your personal interest. If you manage to lose a client for your firm, you will put other lawyers out of work who are doing utterly routine and appropriate legal work for that client. You are not likely to be in the position of Clarence Darrow or any other successful solo practitioner who needs only to please himself. The economic fate and well being of others will also depend upon your performance. So you will need courage.

Your second problem is to have sufficient knowledge and intelligence to distinguish clever but legal acts from criminal or civil violations. The modern American commercial world is filled with driven and innovative executives who want to do well for their shareholders and for themselves. To earn money, they employ practices that were
unknown 10 or 20 years ago. Most of these are quite legal even if complicated and clever. A lawyer must be able to cull the minority that bear criminal or civil risks from the majority that do not.

How many of you would have understood that Enron’s contracts with related partnerships facilitated fraudulent accounting, or that writing an insurance policy to cover certain “defined risks” was, to proper accounting, a loan and not an insurance contract? And how many would have known that the long practice of rebating part of an insurance premium to high performing brokers would be illegal? These are not easy questions, but one needs to be sure before he confronts a client who sees it in his economic interest to do something.

And do not be fooled by the common law school wisdom that in law there are no right answers, no yes and no answers. When your client is prosecuted, the judge or jury will have a bi-modal answer — guilty or not. There will be no room for equivocation, and your client will expect you to have the intelligence and knowledge to advise him in the face of that cruel possibility. So you can never be too smart or too learned.

Your third problem is to deal with the client in an adept and persuasive way. How do you deal felicitously with a head strong client? Who will teach you the way to dissuade a client from foolish action without angering and alienating the client?

I wish I knew. Certainly you will not learn it in law school. No book will teach such a subtle and complex skill. Some of you have been born with the right instincts and others may have learned them elsewhere in life. Some of you will learn them by observing your senior colleagues in practice.

Let me stimulate your thinking by suggesting some ideas. First, your job is not to assert moral superiority over your client. In the cases that I am contemplating, it is in the client’s interest not to do what he proposes, and you need not and, in my opinion, should not pretend to have higher moral standards than your client exhibits. You need not say to Martha Stewart that it is immoral to lie to the investigators; you need not tell Mr. Fastow that you regard him a scoundrel. You need not even raise your voice. The message is a pure statement of fact, if you don’t, you are going to kill yourself.

You could do worse than to copy the LSO’s behavior. One might have said to Mr. Skilling, “If you continue to do these transactions that move liabilities off Enron’s balance sheet, you and Mr. Lay will go to jail.” Or to Martha Stewart, “If you lie to the SEC investigators, the U.S. Attorney will prosecute you.” Depending on your relationship with the client, there might be other things that you could do. If you have had a long standing and close relationship with the client (something that is less frequent in modern law practice than it used to be), you might be more direct. Sometimes you see “CONCLUSION”, pg. 64

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might even resort to profanity to express your opinion, "Look fool, stop doing that." Of course, the client has to be familiar enough that he understands that "fool" is a term of endearment.

In less extreme cases there are other possibilities. One is to explain to the client how he can achieve most or all of the economic gain that he seeks by a different means that does not violate the civil or criminal law.

In conclusion, I apologize for doing no better than I have. My suggestions are merely fragments of ideas and practices that might help you face these problems. I do not claim that they are comprehensive or coherent. The best that I can hope for is to get you started, to force you to consider how you will behave when you need to say no to a client. With luck, each of you will have the chance to learn by watching lawyers who are more adept at these things than you or I.

Good luck.

James J. White, '62, is the Robert A. Sullivan Professor of Law.

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