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To Avoid the IEDs, Mind the Ethical Touchstones

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TO AVOID THE IEDS, MIND THE ETHICAL TOUCHSTONES.

George Kuney¹

With lots of respect for divergent opinion, I will say that Joan's presentation makes you not want to get out of the bed in the morning and practice law. The road is filled landmines. Anywhere you step you are going to get your foot blown off. I might as well just go serve in Iraq.

I have a little bit of an opposite opinion, but I share the same concerns. I just do not think the IED's are that easy to trip over if you keep your wits about you and keep your mind on a few basic touchstones, competency being one of them.

If you are not competent in an area, you need to be able to associate with somebody who is. You want to have enough competence to recognize that there may be a tax issue and you want to get a tax person involved in a deal. That is just an easy example. Developing a network of colleagues both in and outside of your firm or company is key, and one way of doing this is through bar association activities and similar networking opportunities.

I have practiced law all over this country, mostly in the reorganization and insolvency context, and I always go with local counsel. They do not do the heaving lifting, but they do serve as a guide for me when I enter unfamiliar territory. They help with introductions, local rules, local practices, and local legal culture. For example: In a series of Chapter 11 cases in the Twin Cities (Minnesota), I wanted to use a technique in a particular case that would be seen as appropriate in New York or Los Angeles, but I was told by local counsel that it was not the kind of thing that they do up there in the land of Lake Woebegone, so we changed our

¹ Lindsay Young Distinguished Professor of Law, Director of the Clayton Center for Entrepreneurial Law, Director of the L.L.M. in United States Business Law. This article is adapted from the comments made at the Business Law: Connecting the Threads Symposium at the University of Tennessee College of Law.

tactics. Accordingly, competency and associating with someone who is competent is critical.

Another touchstone that we bring up in law school but that gets passed over a little bit in practice sometimes is the “who is the client” issue. Are you representing the entity, the founder of the entity, or your client contact? Is there a conflict between the two, especially when you have limited partners or minority shareholders and the like? You need to keep in your mind who your client is at all times and make sure that you are serving that client. If there is a problem with the person from whom you are receiving instructions, asking you to do things that are not in the best interest of your client, you need to seek other contacts within the organization in order to clarify the position that is being taken and to make sure that the governing board have been apprised of your advice and you are advising them not to follow a certain course of action. You need to be prepared to say something along the lines of, “I can’t represent you in that. I may not have to disclose anything to the third party, but I just can’t go down that road with you.”

I certainly remember the first time I had to say that to a client. I was a junior associate and I had been sent down to do a § 363 sale of a business in a Chapter 11 case, and low and behold a competing bidder showed up at the hearing and offered a bid that was substantially higher than the bid that had been previously submitted. The principal of my client, the debtor, turned to me and said, “I don’t want to take that bid.” We had to have a lengthy discussion during an intermission from the sale hearing in which we finally figured out, he did not tell us right away, the original purchaser had offered him a high-dollar, multi-year employment contract to secure his cooperation in the sale. I turned around, and I remembered what I had been told in my professional responsibility class, and said “I’m going to have to go into court and say that ‘I need to withdraw from representing the debtor and I can’t state the reason for this withdrawal.’ That’s going to create a real problem for you and for the court. In fact, it will probably mean that a trustee will be appointed in this case.” We worked things out—but it was not a very comfortable situation. You sort of plant your feet squarely, look them in the eye, and make your lips go through the motions.

Another area where problems arise is “bit work,” as I call it. I do not mean bits and bytes, I mean when a client calls you up and wants you to do one very, very small part of a transaction and not take over the large transaction. Favorite clients of mine in the past have sent me single pages of 50- and 60-page contracts and they just want me to read that page and tell them about it. At that point, you have to insist upon understanding the context of what you are doing. At times, that requires you to say “I’ll write off the time. I won’t bill you for it, I just need to understand what I am being used for or else we can’t do business.” Focusing on your fiduciary duties to the actual client in the context of the whole deal gets you a long way. That is the cornerstone or touchstone of avoiding committing fraud: making sure that the client has adequately documented its due deliberation even if it chooses to go down a path that you do not necessarily recommend for business reasons as opposed to illegality reasons.

I will close with a little look back at the past. What disturbs me about the way the profession and the business of practicing law has changed over the last 30 years since I got involved with it, is the speed and informality that has taken over the profession. When I got into practice, the legal opinions that firms would ensue were very, very limited. This was back in the ‘80s. These opinions covered things like validity, and enforceability of corporate documents, loan documents, those sorts of things. Firms were very leery of issuing opinions and sought to limit them whenever possible. Firms formed opinion committees made up of seasoned partners who were not partners in your office, and who were not partners with billing credit or origination credit with regard to the matter, so that you separated the financial incentives from the decision of whether the firm would issue it. The opinion committees were very, very conservative. They would get the tax partners on the committee and they would also include everybody who sees IED’s everywhere. People who would say “We can’t issue this opinion. We need to narrow it down and make it as unactionable as possible.” Joan would be a great member—and I mean that as a compliment. (I always found it funny in the bankruptcy context, because we would be issuing an opinion in the bankruptcy context and then we would say in there that nothing in this opinion is given with regard to bankruptcy or civil laws. It was a classic, on the one hand we opine, and it looks good to you, but we took it away

with the other hand.) A lot of that formality and the checks and balances that it put in place are gone. There is much more of a hit and run notion of opinions now. Opinions are dictated by banks and other financing sources. They say firms do not have a choice, this is nonnegotiable, the deal has already been syndicated so just go about being a scrivener and the like. I think that is where there is a lot of danger in committing either malpractice or an ethical violation because you are being given something and you are being asked increasingly to act as a scrivener and to not exercise professional judgment.

Bottom line: I think you have to go back to the basics and exercise your professional judgment even if you have to write off some of that time. A hint to those folks who are not as seasoned in practice, if you write off time, put it on the bill and show the client "no charge." Nobody ever knows it was done if you do not write it down. You can use your own diligence to be a marketing tool for future business. You can also use your billing to make a record of your analysis and even your advice on a certain point. The more you try and think of it that way—as opposed to thinking if I do not meet the demands of this client I am never going to get any more work, and if I do not get any more work I will not be able to put food on the table, and I have a tuition bill to pay—the more you will keep yourself out of a tight spot.