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Too Hot To Handle?

How to evaluate a partner's wish to represent a controversial client—before taking on the case.

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How should big law firms decide whether to approve partners' representation of controversial clients? This is the significant question raised by the dustup between King & Spalding and former solicitor general Paul Clement over Clement's contract to represent the House of Representatives in defending the Defense of Marriage Act. (DOMA places the federal government firmly against recognition of same-sex marriage.) This question facing many general service firms will become increasingly important in our polarized culture: So many controversial cases raise divisive political, policy, and moral issues, and, increasingly, firms may be forced to say where they stand on the political spectrum in choosing clients.

In analyzing this question, however, it is important to indicate briefly what this selection decision (and this article) is not about.

It is not about standards for withdrawing from a case after agreeing to take it. This was how the K&S case was initially reported in the media, including *The New York Times*, which intoned, "King & Spalding had no ethical or moral obligation to take the case, but in having done so, it was obliged to stay with its clients, to resist political pressure from the left that it feared would hurt its business." But the *Times* apparently got its facts wrong. According to the firm, its Business Review Committee had not formally assessed the Clement representation, and therefore the "process for reviewing the engagement was inadequate." Regardless of whether this opaque explanation is disingenuous (some insiders have suggested that Clement had been assured that approval would be forthcoming when he signed a contract with the House), it nevertheless underscores that the case does not address how a firm should reason about controversial cases in the first place.

It is also not about a lawyer's individual decision to take a case. Oceans of ink have been spilled on debates about whether individual lawyers should give greater weight to the importance of the legal process or to the morality of the client's position. The question here is a related but different institutional one: When should a firm override the decisions of individual partners to take a case?

Finally, it is not about firms that have already decided to specialize in a particular kind of practice, or more importantly, on a particular side of a contested ideological divide. Firms may clearly po-

sition themselves as pro-plaintiff or pro-defendant—or as "cause" entities taking matters that promote specific interests, e.g., civil rights or civil liberties, property rights, or states' rights.

So how then should general service law firms decide, at the outset, whether partners may represent controversial clients? We believe that there are three broad and related considerations: deference to the pluralist views of partners; "principles" screening by firm management based on firm values; and "reputational" screening by firm management based on business considerations. (We assume the "hot" case has passed traditional screens; for example, it is not frivolous; there are no formal conflicts; the client, except in pro bono matters, is creditworthy.)

The partner pluralism consideration proceeds from two important assumptions. First, great law firms should have a diverse partnership across the political spectrum (and across race, religion, gender, and sexual orientation). This diversity maximizes the kind of internal, civilized debate and discussion on a wide variety of divisive legal, policy, and ethical issues that is at the core of the rule of law. Second, in the firm context, individual partners have the right to moral autonomy, to grapple with complex ethical decisions, and to choose their view of the role of the law and the types of matters they handle. Under this approach, firm leaders would defer to Clement to represent the House of Representatives because the next controversial case might be something personally important to one of them and occupy another point on the political spectrum.

The second consideration in client selection, "principles" screening by the firm's management, can invoke values important to the firm that override the individual partner's choice in controversial cases. The frequency of this approach will depend on the firm's view of itself as an organization. If the firm views itself as akin to a corporation, then, like a company, firm leaders need to define the entity by "corporate" positions on ethics and values to defend its business brand. But if the firm is simply a loose association of morally autonomous professionals, then firm authorities would defer to individual partners to make hard ethical decisions in virtually all instances. We believe that most general service firms occupy a space between these two poles, with conditional partner autonomy and a distinctive professional identity (similar to but different from a corporate brand). Under this "mixed" concept, a firm may, on occasion, have bedrock values that it does not want compromised by individual matters. For example, on certain core issues—nondiscrimination or freedom of expression and association—the firm may conclude that it will not take clients or cases with positions inconsistent with those values unless it is "the last lawyer in town" (not likely for firms) or unless it is asked by the courts to represent an unpopular client.

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A third consideration in client selection is screening by firm management based not on morality and values, but on the controversy's impact on the firm's reputation and business. The firm might, for example, object to a DOMA defense, not because of a moral "firm" view about same-sex marriage (the partners may differ), but because its reputation would suffer with some firm members, with certain advocacy groups, and with corporate clients who are, themselves, advocating equality for gays and lesbians and who fear protests against them because they use a firm defending DOMA. (We recognize that concern for gay and lesbian members of the firm community and elsewhere in society might be a "moral" reason under the second approach noted above.) Similarly, firm management might conclude that a highly complex pro bono case costs too much or that there is a "soft conflict" between existing clients—e.g., brand-name drug companies—and other potential clients—e.g., generic drug companies. (But "soft conflicts" should not be overused to block representations, as in the pro bono area, which might cause some concern among existing clients.)

Although all of these considerations highlight legitimate concerns, we believe that there should be a strong presumption for partner pluralism in general service law firms based on the moral agency of individual lawyers and the need for internal diversity of views and civilized internal debate. However, we also maintain that the same concerns for pluralism and individual moral choice require that lawyers in the firm may, as a matter of good-faith personal conscience and without harm to their career, choose not to work on a particular controversial matter that the firm does take.

Both of us have spent substantial parts of our careers arguing that lawyers should consider carefully the moral dimensions of the work that they do. Yet our support of a presumption of pluralism in law firm client-selection proceeds, in part, from recognition that others may, in good faith, arrive at different moral outcomes than ours in deciding what clients and cases to take. It also proceeds from rule 1.2(b) of The Model Rules of Professional Conduct, which states that a "lawyer's [firm's] representation of a client . . . does not constitute an endorsement of the client's political, economic, social, or moral views or activities." The Model Rule does not mean that lawyers and firms should disregard the moral dimensions of client selection. Rather, it underscores the importance of having law firms that can separate their own moral concerns in the selection decision from the moral aspects of clients' views or activities—at least so far as this gap does not threaten the firm's own core interests and values.

Given this framework, how would we analyze the specific DOMA representation if it had come to us early as members of the K&S Business Review Committee? Although we would have begun with a strong presumption for partner pluralism, we would nevertheless be inclined to decline the case at the outset for two reasons, based on publicly reported facts. First, the engagement contract required by the House prohibited any "advocacy against DOMA by any lawyer affiliated with the firm," including the exercise of free speech outside a legal forum. This overbroad "advocacy" prohibition contravenes the fundamental commitment to the moral autonomy and freedom of lawyers within the firm upon which the presumption of partner pluralism is based.

But even if this prohibition had not been included, we would have still argued against accepting the case under the "principles" consideration because we believe the principle of nondiscrimination on the basis of race, religion, gender, national origin, or sexual orientation is and ought to be a core commitment of our society and of our law firm. We would not have approved a representation and put the weight of our firm behind a law which, in our view, contravenes this most fundamental societal principle (knowing that the House would have no trouble finding outstanding counsel, possibly with a different view of what was at stake). Because the second consideration is dispositive, we need not reach the third "reputational" consideration, although the firm would surely receive serious criticism whether it took or rejected the case (which K&S did—the National Rifle Association and state of Virginia publicly dumped the firm after it refused the DOMA representation). In any event, if K&S had declined the case before a contract was signed and the matter made public, the firm might have avoided this confused controversy—or at least been able to defend its position forthrightly on the substantive merits.

But we also recognize that this position overriding presumptive partner pluralism inside the firm can have other undesirable consequences. Would Paul Clement have resigned from the firm if the decision not to take the case had been private and if he hadn't made a public commitment to handle it? Will firms become gun-shy about hiring prominent lawyers from one part of the political spectrum or another for fear of being drawn endlessly into firm decision making about controversial cases that such lawyers will inevitably bring to the firm? Will the polarization of our politics lead to the polarization of general service law firms—which either duck all controversies or position themselves as "liberal" or "conservative" (while somehow retaining their corporate clients)?

These issues are not new. But the K&S–Clement problem has thrown into high relief the need for general law firms, in this polarized era, to reason within a balanced framework as they are faced ever more frequently with decisions about whether to take controversial matters.

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