

Negotiating Bankruptcy

John Gellene, a bankruptcy lawyer at the law firm Milbank Tweed, worked directly under Wall Street attorney Larry Lederman. In 1994, Lederman asked Gellene to represent mining equipment company Bucyrus-Erie (BE) in a reorganization bankruptcy that became increasingly complicated.

In an attempt to initially ward off bankruptcy, BE had, pursuant to the legal advice of Milbank Tweed and the financial advice of Goldman Sachs, accepted a \$35 million infusion of cash from an investment fund called South Street. In exchange, BE gave South Street a lien on all of the company's manufacturing equipment, putting it ahead of other BE creditors, including Jackson National Life (JNL). JNL was BE's largest single creditor, but was unsecured. BE had posted no collateral in return for JNL's loan, so JNL was in line in bankruptcy court behind all of BE's creditors that had demanded collateral. South Street was controlled by Mikael Salovaara, a former Goldman Sachs banker who had previously provided financial advice to BE and was advised by Lederman.

When Gellene filed a Chapter 11 bankruptcy petition on behalf of BE, he was required to ask the court to appoint him and Milbank Tweed as BE's counsel for purposes of the proceedings. At that time, he filed documents under oath that were supposed to disclose any potential conflicts of interest that Milbank Tweed had in the proceedings. For reasons unknown, Gellene did not disclose to the bankruptcy judge (who would appoint counsel) the fact that Milbank Tweed was representing both South Street and Salovaara regarding various matters.

Legal scholars and attorneys reflecting on this case years later have speculated as to why Gellene did not disclose what might seem to be obvious connections that could be potential conflicts of interest for Milbank Tweed. Lawyer Steve Sather suggests that the lack of disclosure may have been inadvertent, or that Gellene did not see the connections as inherent conflicts, among other possible reasons.

Regardless, Gellene did successfully guide BE through the reorganization process. The failure to disclose was not discovered until years later by JNL, which then sued Milbank Tweed. Criminal charges were filed against Gellene for three felony counts of making false statements under oath in regard to Milbank Tweed's ability to serve as bankruptcy counsel. Gellene was convicted and sent to prison for 15 months.



Discussion Questions:

- 1) What concepts from the video *Intro to Behavioral Ethics* are apparent in this case study?
- 2) Why might the connections among Milbank Tweed, South Street, and Salovaara be conflicts of interest? Why not? Explain your reasoning.

- 3) Does it seem irrational for an attorney who has a very promising legal career to not disclose potential conflicts of interest? If you were in Gellene's position, what would you have done? Why?
- 4) At sentencing, the prosecutor in the Gellene criminal case said that he had prosecuted many bad people over the years, but admitted "John Gellene isn't a bad guy." The prosecutor said it made him nauseous to see how hard Gellene had been working and suggested that Gellene was "overstressed and overworked." Is that an explanation for Gellene's actions in the BE reorganization? Why or why not?
- 5) Gellene had opportunities to correct his errors before they came to light, but did not. How would you evaluate the following statement from Gellene:

"I've been recognized as a person with gifts in terms of my intellect and my ability to deal with problems and I've been very good and very competent at the kinds of problems presented [by] my clients in the practice of law... And that is I think such a part of me and who I hold myself out to be and who I am that when I am confronted with a mistake, an act of inadvertence that is stupid that I'm—it is very difficult for me to stand up and say I did a stupid thing."

- 6) What do you think of the following statement by the judge in the Gellene criminal case:

"I have a substantial amount of contact with my colleagues in law firms to appreciate that there are incredible pressures in this area that, frankly, sooner rather than later are going to have to be addressed or we are going to see more cases of this nature being prosecuted for criminal conduct because lawyers are so focused on other matters... [W]hen they become so focused to the exclusion of ethical considerations, that is when the entire system breaks down, the public at large is ever more distrustful."

- 7) Based on the two statements above, where do you think the blame primarily lies and why? With Gellene individually, or with the system within which he operated? Explain your reasoning.

Resources:

Blind Spots: Why We Fail to Do What's Right and What to Do About It

<http://www.worldcat.org/title/blind-spots-why-we-fail-to-do-whats-right-and-what-to-do-about-it/oclc/679940661>

Behavioral Business Ethics: Shaping an Emerging Field

<http://www.worldcat.org/title/behavioral-business-ethics-shaping-an-emerging-field/oclc/654316608>

Milbank, Tweed Is Accused of a Conflict

<http://www.nytimes.com/1997/02/28/business/milbank-tweed-is-accused-of-a-conflict.html>

Eat What You Kill: The Fall of a Wall Street Lawyer

<http://www.worldcat.org/title/eat-what-you-kill-the-fall-of-a-wall-street-lawyer/oclc/649743120>

Confidence Games: Lawyers, Accountants, And The Tax Shelter Industry

<http://www.worldcat.org/title/confidence-games-lawyers-accountants-and-the-tax-shelter-industry/oclc/861966361>

Obstacles to Ethical Decision-Making: Mental Models, Milgram and the Problem of Obedience

<http://www.worldcat.org/title/obstacles-to-ethical-decision-making-mental-models-milgram-and-the-problem-of-obedience/oclc/809926073>

The Sad Case of John Gellene or What It Feels Like to Get Hit By Lightning

<http://stevesathersbankruptcynews.blogspot.com/2006/07/sad-case-of-john-gellene-or-what-it.html>

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