

WHAT WOULD YOU DO?

1. Rutherford was an associate in his firm's litigation section. He was deeply immersed in a document review, combing through thousands of documents recently produced by a corporate defendant that was adverse to a firm client in a major piece of litigation. While reviewing documents he came upon a memorandum that was marked CONFIDENTIAL and that had been drafted by his adversary's internal legal department. It was a clear case of inadvertent production of a privileged document. Rutherford immediately called Angus, the partner in charge of the matter. Angus came down to meet with Rutherford in the war room. As he started to review the memorandum he quickly realized that it addressed his adversary's legal defense strategy in the litigation at hand. He wondered—what should he do?

(The answer to this question and the other questions raised below appear at the conclusion of this article)

2. Hortense was a partner in her firm's business transactions section. She recently concluded work on a significant real estate project in the Dallas area. It was the end of the year and she was returning to Houston on a flight from Dallas. She was in great spirits. Her deal had closed successfully, the holiday season was upon her, and she had a wonderful issue to consider—how to invest her year-end profits distributions.

Sitting in the seats in front of her on her flight from Dallas were two well-dressed businessmen who were discussing a proposed corporate takeover their company was preparing to launch two days later. It was, of course, supposed to be hush hush—but the two businessmen had been served several cocktails and were speaking quite freely. They commented on the fact that the tender for the targeted public company was significantly above its current share price. Hortense had heard of the target and knew it to be a well managed company. In fact, she thought, her firm may have represented it in the past. It did not surprise her that it might be a target of a takeover bid.

Hortense's thoughts drifted back to the substantial distributions she was receiving at year end. Having learned of the proposed take over action, she wondered whether she should purchase a substantial amount of the target company's stock the next morning. What should she do?

3. Bernice was a partner in her firm's corporate and securities section. Recently, she was at the offices of Fairfax Corporation assisting the firm client with various regulatory issues. Bernice knew that other firm attorneys were helping Fairfax in an investigation the SEC had recently initiated concerning alleged violations of the FCPA.

While at Fairfax's office she overheard the CEO and COO discussing a severance package they were offering the company employee who was at the heart of the FCPA inquiry. He was the employee who allegedly made payments to a foreign official to obtain contracts favorable to Fairfax. Bernice overheard the CEO comment that the severance payments being made to the employee were well in excess of normal severance amounts and were structured to "buy" the employee's cooperation in the investigation. Bernice thought she heard the CEO say that the employee would be willing to say that he acted in a rogue manner to increase his sales and that company management was unaware of his illegal conduct.

Bernice was perplexed. Should she inform anyone about what she heard?

4. Cleitus was a long-time partner in his firm's litigation section. One day, he was at the corporate offices of Longstreet Corporation discussing a piece of litigation in which he represented Longstreet. Longstreet had a large in-house litigation staff and Cleitus was aware that the company hired numerous outside law firms to handle litigation matters.

While at Longstreet's offices Cleitus overheard several of Longstreet's in-house counsel discussing a lawsuit Longstreet was preparing to file against Hancock Corporation. Hancock was a client of Cleitus' firm, although Cleitus had never worked for them on litigation matters. The suit Hancock was preparing to file was in the nature of a pre-emptive strike through which a restraining order and other injunctive relief would be sought. The suit involved a failed project known as the Pickett Development. Cleitus believed that the firm had represented Hancock in that transaction.

Driving back to the firm's office after his meeting at Longstreet, Cleitus wondered whether he should discuss what he learned with anyone at the firm or at Hancock. Should he?

And the Answer Is —They should each contact a representative of their firm's General Counsel's Office immediately to discuss the issues. If their firm does not have a General Counsel's Department, then they should contact their supervising attorney.

The purpose of this exercise is to point out that while practicing law you will likely encounter situations, such as those discussed above, that Rutherford, Hortense, Bernice, and Cleitus confronted. As you would expect, there is no bright line, easy answer to any of the situations. Ethical issues and implications abound in each scenario and we do not have sufficient space here to discuss all the issues. While each of you are expected to have a good grasp and understanding of the ethical rules that govern the conduct of lawyers in the jurisdictions where you practice, you, in all likelihood, may not be aware of all the subtleties and nuances that arise from ethical issues such as those described above. Representatives of your firm's General Counsel's Office or your supervisor are, however, trained in those subtleties and are always available to afford you meaningful advice when serious issues arise.

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