

CHICAGO LAWYER®

INSIDE OUT

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HAT IS THE DIFFERENCE BETWEEN THE RIGHT LEGAL ANSWER AND THE RIGHT BUSINESS

DECISION?

Martini: The right legal answer consists of taking a legal issue or problem that a client has and gathering facts, conducting research and analysis and reaching a conclusion. The answer is essentially reached in a vacuum, meaning that other considerations and factors beyond a pure legal analysis are generally not taken into account. Business decisions, on the other hand, take into account a wide variety of considerations that are of importance to the business, including the right legal answer as well as what the business is hoping to achieve, what is at stake, the other alternatives which are available to the business, the level of risk it is willing to take and how difficult it will be for the business to recover in the event the decision it reaches is not the right one, among other factors.

Susler: This goes to the heart of one of my favorite sayings — businesses don't have legal problems, they have business problems with legal issues. Sometimes a pure legal answer is all you need, for example, to ensure compliance with an [Security and Exchange Commission] regulation. In that case, the legal answer is the business answer. However, if we are talking about a contract warranty clause, then the legal answer is what the warranty means while the business answer is the risk we are willing to take relative to the legal exposure.

WHAT ROLE DOES THE RIGHT LEGAL ANSWER HAVE IN DECISIONS?

Martini: When I work with clients on assessing a particular issue, I generally recommend that we begin our assessment by figuring out what the legal aspects of the issue are and determining what the right answer is with respect to those issues. Once we figure that out, it becomes one of a number of factors. Once all of these considerations are closely examined, those individuals at the organization who are responsible for making the decision can then evaluate the options and determine the best way to proceed.

Susler: It is my job as in-house counsel to ensure that our business people understand the legal implications of their business decisions. For example, my company manufactures raw materials. Customers typically request warranty clauses that were written for finished goods. It is my job to help the business team understand the legal implications of the warranty clause as written and determine whether and how best to amend it. This



DO THE RIGHT THING

What to do when good law and good business conflict

By **CHRISTINA L. MARTINI** and **DAVID G. SUSLER**

requires consideration of such factors as whether the products our customer makes with our material is safety sensitive, the relative importance of the customer to our long-term business strategy, the dollar value of the deal and so forth. Through these discussions, we jointly determine the best business decision based on an understanding of the relative business and legal risks.

HOW CAN LAWYERS HELP CLIENTS MAKE THE RIGHT DECISION?

Martini: Lawyers should understand the client's business, so that when they are providing the client with their legal analysis they can do so within the context of the client's business. It is also helpful for lawyers to understand the client's risk tolerance, and the extent to which the client may have encountered similar issues in the past and, if they did, what decisions were made and how those choices played out. Having a strong understanding of who the key decision-makers are and how they think can also be very helpful in enabling lawyers to guide their clients to the right business decision.

Susler: A number of years ago, our VP of sales sent me a draft purchase agreement from a potential new customer that we very much wanted to work with, however, we both thought their contract contained a deal killer, a penalty disguised as a liquidated damages clause. I explained the legal implications of such a clause

and then asked him what would trigger this clause in the real world and to give me some applicable examples from his career.

The only example he could think of that would trigger the clause was something related to the shuttle Challenger explosion more than 20 years earlier. Based on that knowledge, we understood the risk and we did the math to determine the potential impact to our bottom line and what we could live with. We then spoke with the customer, explained our concerns to each other and ultimately agreed to a modified clause that would satisfy both companies. This allowed us to ultimately sign the contract and begin a years-long profitable partnership, rather than simply walk away before ever starting based on an initially objectionable contract clause. [CL](#)

Christina L. Martini is a practicing attorney, author and columnist. She is chair of the Chicago intellectual property practice group and the national hiring partner of associate recruiting at DLA Piper and sits on its executive committee. She focuses on domestic and international trademark, copyright, domain name, internet, advertising and unfair competition law.

Martini's husband, **David G. Susler**, is associate general counsel with National Material L.P., a manufacturing company primarily engaged in steel processing and aluminum extrusion. He has a general practice, providing advice, counseling and training to all business sectors and operation.

To submit a question for future columns, e-mail questions.insideout@gmail.com