

Contextual Ethics and Brand Value



Ronald F. Pol is immediate past president of the New Zealand Corporate Lawyers' Association, general counsel of a start-up software company, and serves on the Law Society's Governing Council. He also helps in-house and outside counsel, and welcomes comments at ronald.pol@teamfactors.com.

© Scott Dressel-Martin 2003

MegaBank processes thousands of loan applications annually. Standardized documents save costs and enhance financial controls, yet applications still take weeks to process.

Competitors promise almost immediate approvals. MegaBank's solution is to encourage customers to complete online loan applications, most of which would be processed within a few minutes, with the remainder sent to bank officers for assessment. Yet if only 10 percent of customers complete online applications, the remainder would still need to complete forms, which bank staff would then enter into the online system.

This solution is quicker than MegaBank's current process, yet no such software is available, so specification requirements are prepared for the bank's primary technology partner—BigTech—which approaches SoftwarePlod to build the application.

In the meantime, project manager Paul Manners is seconded to MegaBank from a subsidiary company to help assess options. Paul remembers a recent demonstration by FastSoftware, a specialist handwriting-recognition company. He calls Sophie Laramie, MegaBank's in-house counsel:

Paul: *We want to look at FastSoftware's product, with a view to licensing it. They're concerned about confidentiality of their intellectual property. I signed a confidentiality agreement a few months back, when I was employed by MegaBank's subsidiary. Can I tell FastSoftware that it still applies?*

Sophie (reading the agreement): Yes,

the terms require you to maintain confidentiality in relation to your employment by any MegaBank company.

Paul then arranges for FastSoftware to brief the product team. FastSoftware's product scans, reads, and sends handwritten responses directly to the online processing system. This would result in 90 percent of loans being approved almost immediately, far better than the product to be developed by BigTech and SoftwarePlod. Paul shows FastSoftware's product to a few big customers. They love it. Paul's keen to secure licensing rights.

At head office, there's concern about straining the BigTech relationship if MegaBank selects FastSoftware. A new person is appointed to help evaluate the product. Until recently, Steve Perry worked at SoftwarePlod. He recommends building a new product (with BigTech and SoftwarePlod) rather than licensing it from FastSoftware.

Some of MegaBank's project team are surprised by the decision. But they want the best product possible, so they change the product specifications to scan, read, and input handwritten responses directly into the online processing system—much like FastSoftware's product.

In the meantime, FastSoftware's CEO becomes concerned and seeks confirmation that its unique features will not be used in product development, as this would breach the confidentiality agreement and harm its market position. Steve Perry declines comment, referring FastSoftware to the bank's lawyers.

Sophie Laramie replies: *The project team assures me that we haven't breached and I have no reason to believe that there has been or will be a breach of confidentiality. You will appreciate that we cannot disclose to you the details of our arrangements with BigTech and SoftwarePlod. I've asked for all documentation provided by your company to be collected and returned to you, and for all information*

held in electronic form about your company to be deleted.

Even with lawyers involved, this example demonstrates multiple breaches:

- Showing the product to 'a few big customers' (none of whom had signed confidentiality agreements).
- Adding new specifications based on FastSoftware's product (seen under a confidentiality agreement).
- Deleting information relating to these breaches when a dispute occurred.

In-house counsel often become involved in transactions only from time to time, dealing with issues as they arise. Similarly, business unit managers may have an imperfect understanding of legal obligations. Almost invariably, employees try to get the best results for their employer and its customers, and few people intentionally breach other parties' IP or other rights, or deliberately destroy evidence of such breaches.

Yet if any company has infringed another's rights, it can only have done so through the actions or omissions of its people. For in-house counsel, this means not simply accepting assertions that there's been no breach. Of course people say this. It may be true. Yet it may result from seeking to evade responsibility, or a genuine misunderstanding of the issues.

Ethics too involves more than just giving good legal advice to specific questions. The value of a company's brand also transcends revenue gained from cutting corners or closing one's eyes to legal breaches.

Good legal advice, ethics, and brand value are also contextual. Even the most genuine belief may be mistaken, and failure to investigate with a critical, inquiring, and open mind will not remedy that. Sometimes you need to find out the bigger picture. It's not enough to say "we do the right thing"; responsible managers and lawyers should also ensure that the organization in fact actually does the right thing. 🗨️