



# Eat What You Kill

*The following essay was adapted from Eat What You Kill: The Fall of a Wall Street Lawyer, by Georgetown Law Professor Milton C. Regan Jr., published by The University of Michigan Press in 2004.*

**O**n Friday afternoon, December 12, 1997, John Gellene entered the federal courthouse in Milwaukee in the company of Mark Rotert. Rotert was a lawyer from the Chicago law firm of Winston and Strawn. The forty-one-year-old Gellene had been in many courthouses before as a bankruptcy partner at the prestigious Wall Street law firm of Milbank, Tweed, Hadley & McCloy. Milbank traced its roots to the year after the Civil War ended. For more than a century it had provided legal services to the social and economic elite, most notably the Rockefeller family. Gellene was regarded as one of the best bankruptcy lawyers in the country, and had worked on some of the largest corporate reorganizations in the world. The previous year he had earned more than \$600,000. He had a residence on the upper East Side of Manhattan, where he lived with his wife and three young daughters.

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Gellene had spent most of 1994 in this same courthouse in Milwaukee, guiding local mining tool manufacturer Bucyrus-Erie through a contentious reorganization in bankruptcy. Despite a bitter feud among creditors, Bucyrus had emerged in good shape. Indeed, its business outlook was so bright that it recently had been purchased by a large private investment partnership. The last time Gellene had been in the building was in April 1996 for a hearing to determine the

fees that Milbank should receive for its work on the bankruptcy. A month later, U.S. Bankruptcy Judge Russell Eisenberg approved the firm's receipt of \$1.86 million as compensation for the services it provided to Bucyrus. Gellene thus could look back with pride on much of what had happened in this courthouse from February 1994 until May 1996.

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Rotert was not Gellene's co-counsel; he was his attorney. On the other side of the table were not creditors negotiating how to divide the assets of a financially troubled company. Rather, it was the U.S. government, acting through Assistant U.S. Attorneys Steven Biskupic and Joseph Wall. Today was the day that Gellene would be arraigned on charges of committing three federal crimes. Today he would enter his plea in the case.

The basis for Gellene's prosecution was something that had happened in this very courthouse. In 1993, Gellene had been asked by powerful Milbank partner Larry Lederman to provide his services to Bucyrus because of Gellene's experience in bankruptcy and financial restructuring. Lederman had advised Bucyrus off and on for five years. He also had provided legal guidance for several years to investment banker Mikael Salovaara. Salovaara had furnished financial advice to Bucyrus over the same five-year period. He was a former Goldman, Sachs partner who had recently left the firm with a colleague to establish an investment fund known as South Street. In 1992, South Street had advanced \$35 million to Bucyrus in return for a lien on all the company's manufacturing equipment. As the company's major secured creditor, South Street would be first in line to be paid if Bucyrus filed for bankruptcy.

Gellene began working with Bucyrus shortly before the company

announced in February 1993 that it would no longer be able to make interest payments on its debt. Bucyrus hoped that it could obtain agreement among its creditors on a reorganization plan under Chapter 11 of the federal Bankruptcy Code. For most of 1993, Gellene helped negotiate the terms of that plan. Ultimately, Bucyrus gained

acceptance from all but one large creditor, Jackson National Life Insurance Company (JNL), who strongly opposed it.

In February 1994, Gellene filed a Chapter 11 petition on behalf of Bucyrus that laid out the terms of the proposed reorganization plan. JNL immediately contested it. At the same time, Gellene applied to the court for official appointment as Bucyrus's counsel during the Chapter 11 proceedings.

As part of this application for appointment, Gellene was required under Bankruptcy Rule 2014 to list his and Milbank's connections with

any party in interest in the bankruptcy. At the time, Milbank also was representing Mikael Salovaara on one matter and South Street on another. Gellene himself was the lead counsel in the South Street matter, although he had done very little work on the case. The work for Salovaara and South Street created a potential conflict of interest for the law firm. As counsel for Bucyrus in its bankruptcy, Milbank would represent a debtor that had a duty to treat fairly all parties with a claim on its assets. As counsel for Salovaara and South Street, Milbank might have an incentive to provide advice to Bucyrus that favored South Street over other creditors.

Gellene didn't disclose these Milbank ties to Salovaara when he submitted the affidavits that accompanied his application. Judge Eisenberg appointed him in March 1994 to represent Bucyrus in the bankruptcy. The judge eventually approved the Bucyrus reorganization plan in December 1994, capping almost two years of intense negotiation and litigation among the parties.

Two years later, JNL discovered Gellene's concealment of Milbank's connections with Salovaara and South

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Street. By then, JNL controlled Bucyrus. Milbank was forced to return the entire \$1.86 million it had been awarded for representing Bucyrus in the Chapter 11 case. Bucyrus also sued it for malpractice, a claim that the firm settled for an amount reported to be between \$27 million and \$50 million.

Finally, in December 1996 federal prosecutors in Milwaukee obtained a grand jury indictment of Gellene. He was charged on two felony counts of making false declarations in the affidavits he had submitted to Judge Eisenberg. He also was charged on one felony count for using a false affidavit under oath to claim that Milbank was eligible to receive payment for its work on the bankruptcy. Each of the first two counts carried a penalty of up to five years in prison and a \$250,000 fine. The third count was punishable by up to five years in prison and a \$10,000 fine. Any prison sentence over a year would deprive Gellene of his right to vote, his ability to be a teacher, his eligibility to hold public office, and the opportunity to practice law. He was the first lawyer ever charged under federal criminal law for violating Bankruptcy Rule 2014.

**W**hat happened? Why would Gellene risk all he had by withholding information about Milbank Tweed's connections to Mikael Salovaara and South Street Funds? To answer these questions we have to go beyond the conventional explanations that Gellene was fundamentally dishonest or that Milbank pressured him to break the law and then threw him overboard. Attributing blame to flawed indi-

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viduals or crooked organizations rarely captures the subtleties of how ethical misconduct occurs.

Focusing on both Gellene's personality and the circumstances that he faced helps construct an account of what happened that is more complex than the claim that Gellene was an ethical rogue or that Milbank was fundamentally corrupt. This account focuses on two questions. First, what pressures could have motivated Gellene to act as he did? Second, what rationalizations might he have used to justify his behavior to himself and, potentially, to others?

John Gellene's behavior was not as lurid as that of many of the actors involved in the legal and business scandals of recent years. He didn't loot a company of its assets or manipulate financial statements to mislead investors. There's no evidence that he withheld information from the bankruptcy court so that he could favor South Street over other creditors. Indeed, Bucyrus's general counsel had high praise for the quality of Gellene's work on behalf of the company. The absence of obvious explanations such as fraud or greed makes Gellene's story an especially good vehicle for analyzing the subtle but powerful forces that shape behavior in today's large law firms. The failure to disclose a conflict of interest in bankruptcy court in Milwaukee may seem light years away from the high-profile combat of Wall Street law practice.

This book argues, however, that they are linked in intricate and fundamental ways.

**T**o begin with, consider some of the influences that may have moved Gellene to act as he did. First was his own personality. Throughout his academic and professional career, Gellene was widely regarded as brilliant. He skipped two grades in school, finished high school at age sixteen, graduated summa cum laude and Phi Beta Kappa from Georgetown, and cum laude from Harvard Law School. He served as a clerk on the prestigious New Jersey Supreme Court. He made partner at Milbank against the high odds facing any incoming young lawyer. Comments from other lawyers in the firm regularly praised his work in the highest terms. Larry Lederman, an especially demanding high-profile partner in the firm, described Gellene's work as "absolutely brilliant." One partner noted the view of a client that Gellene was the best bankruptcy lawyer in the United States.

Gellene was well aware of this perception of his intellectual ability. He admitted that it was a crucial element of his sense of self-worth. "[N]ot just for my adult life but before that," he has said, "I've been recognized as a person with gifts of my intellect and my ability to deal with problems." Gellene was not alone among lawyers in the importance of

intellectual achievement to his self-image. Some studies suggest that those who attend law school have a particularly high need for academic accomplishment and come from families in which performance in school

Adding to the burden was a sense that perhaps Gellene did not deserve the admiration that he seemed to evoke. “For many years before I even learned that Bucyrus-Erie existed,” he observed, he acted as if his supposed

believe. His habits continued when he joined Milbank Tweed. In 1993 and 1994, for instance, he billed about three thousand hours each year while immersed in the Bucyrus bankruptcy and other matters.

This portrait of perfectionism and anxiety is not uncommon in the legal profession. Some research suggests that those who choose this career path may be especially prone to be highly self-critical and anxious about performance, as well as to project an image of self-containment that eschews assistance from others. The result is that many lawyers may be propelled by a “never-satisfied drive for success” that places a premium on controlling one’s environment. Yet law practice in modern large firms is perhaps more competitive and turbulent than ever before. Those for whom this drive is a crucial component of identity may channel their insecurity into even greater efforts at control, rather than rely on others for support.

This brings us to another significant potential source of pressure: the competition within major law firms. Between the time when Gellene joined the firm as an associate in 1980 and was named a partner at the end of 1988, Milbank Tweed had embarked on an ambitious effort to transform itself from a genteel

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is strongly valued. Lawyers thus may have an especially pronounced “need to compete against an internal or external standard of excellence.”

An intense orientation toward intellectual achievement can lead to significant professional success. It also, however, can be a burden. Gellene acknowledged that he was afraid to admit that he had made any errors in law practice, out of fear that this esteem for him would evaporate. “When I am confronted with a mistake,” he said, “it is very difficult for me to stand up and say I did a stupid thing.” He was, he acknowledged, someone “who feels that he had to be perfect because that is where I’ve gotten my view of myself. That is where I’ve gotten satisfaction. That’s where I’ve tried for better or worse to have meaning in my life.”

gift was “an affliction, something that I had to reject, something that I suppose I wasn’t worthy of.”

Such anxiety about his stature prompted Gellene to be extraordinarily hard-working. Those who knew him in law school recall someone who seemed driven to prove himself, who put in exceptionally long hours even in a universe of unusually prodigious students. This compulsiveness may have been fueled by the fear that he might someday reveal that he was not as smart as others had been led to

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old-line Wall Street firm to an efficient and aggressive business enterprise. The firm modified the compensation system to place more emphasis on “rainmaking”—bringing in clients and revenues. As a result, some partners suffered a reduction in earnings. More dramatically, the firm asked some partners to leave because they lagged behind their colleagues in hours billed and revenue generated. The firm also set about to lure partners from other firms to Milbank, such as Larry Lederman, who could increase its visibility in high-end corporate work. Gellene’s workaholic habits thus likely were reinforced by a firm that began to focus more explicitly on productivity—as have many firms in recent years.

By others’ accounts, and by his own admission, Gellene wasn’t and apparently didn’t expect to become a rainmaker who brought clients to the firm. His personality was not well suited for the role, and it’s difficult for bankruptcy specialists to build up a book of clients with repeat business. This meant that Gellene’s fate in the Milbank competition depended on developing good relationships with rainmakers who could provide him with regular work. The arrival at Milbank of Larry Lederman provided him an opportunity to do just that. Lederman offered the potential for access to a large roster of corporations and investment banks that would provide a steady stream of work for Gellene.

**T**he desire to sustain his relationship with Lederman therefore may have been a third influence on Gellene’s decision not to disclose Milbank’s connections

to Salovaara. Lederman, of course, was the partner who had tapped Gellene to work on the Bucyrus bankruptcy. As an elite corporate lawyer, Lederman was typical in having an elaborate network of connections to corporations, investment banks, commercial banks, investors, and other parties. Involvement in such

for a more sharply focused discussion of the issue. Ambitious subordinates often anticipate what their superiors wish them to do rather than wait for explicit direction. Waiting to act until one has received such direction can be seen as a lack of initiative, which can be fatal to prospects for advancement. Gellene might have feared

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networks holds the potential for conflicts of interest, but corporate clients often are willing to waive objections to this because of the access that well-connected lawyers can provide to key parties. It’s possible that Lederman relied instinctively on a transactional lawyer’s approach to conflicts and assumed that Milbank’s dual representation in the Bucyrus bankruptcy was not a major problem. Alternatively, he may have known better but implicitly signaled that he did not want bankruptcy rules to stand in the way of Milbank representing both Bucyrus and Salovaara.

In either case, Gellene would be bright enough to infer that he should not disclose the firm’s relationship to Salovaara. He may have acquiesced in this tacit message rather than press

that if he concluded that disclosure was necessary, or waited to act until after consulting Lederman, the senior lawyer might regard him as too cautious to play an important role in future major corporate matters.

**G**ellene’s personality, the competition at Milbank Tweed, and the desire to preserve a good relationship with Larry Lederman all may have inclined Gellene to withhold information from the bankruptcy court. They probably would not necessarily have moved him to do so, however, unless he could at least implicitly rationalize that he was not engaging in misconduct by doing so. Like most people, at a minimum Gellene had to neutralize the moral significance of his choice so that he

could convince himself that he wasn't acting unethically. Perhaps he could even fashion an interpretation of the situation that allowed him to conclude that he was acting virtuously.

Gellene had at least two possible bases for constructing such a rationalization. The first was large law firms' perspective on how literally conflict of interest rules should be applied in major corporate bankruptcies. Because such firms have thousands of corporate clients, most are always at risk of having conflicts that would disable them from representing debtors in these proceedings. Stringent application of conflicts rules, they maintain, without regard to the likelihood that representation will be compromised, serves only to prevent corporations in complex bankruptcies from hiring the law firms best able to handle this

percentage of corporate bankruptcy cases, have been sensitive to these concerns to some extent. Even when a potentially disabling conflict exists, these courts are amenable to handling it by appointing special counsel to handle matters as to which the debtor's counsel has a conflict, or by requiring a firm to establish a screen between lawyers working on the bankruptcy and those working for parties in interest on other matters. Neither measure is explicitly permitted in the bankruptcy code, but each appears part of the rules in those jurisdictions.

As a result, a bankruptcy lawyer in a large firm may conclude that there is less risk in these states than in other jurisdictions that full disclosure will result in what the lawyer regards as disqualification based on a "tech-

no danger to its representation of Bucyrus—and that it would be unfair to disqualify him because of it.

A second basis for rationalizing withholding information about the conflict may have been the dynamics of the Bucyrus bankruptcy. The proceedings were, in a word, acrimonious. The company's major creditor, JNL, felt that it had been wronged by the company and Salovaara, and raised objections virtually every step of the way. Members of the Bucyrus team came to view JNL as unreasonable and obstreperous. They feared that continuing delay would jeopardize millions of dollars in potential tax benefits for the company, and undercut its competitive position in the industry. Gellene must have anticipated that if he revealed Milbank's tie to Salovaara, JNL would vehemently oppose his appointment to represent Bucyrus. Since Gellene had worked with Bucyrus on its potential reorganization for more than a year before it actually filed for bankruptcy, he might well fear that events were too far along for Bucyrus to have to bring new counsel up to speed. Disclosure thus could give JNL powerful leverage over Bucyrus's fate. For the client's sake, then, best not to disclose the conflict.

A plausible narrative of how these factors interacted is one in which Gellene was motivated not to make full disclosure and then rationalized that this was the best choice under the circumstances. Gellene wanted to avoid disqualification because he was anxious about his future in a competitive law firm. He wanted to cultivate a relationship with an important partner who he anticipated

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work. Furthermore, large firms argue, disqualification motions based on alleged conflicts too often are used for strategic purposes, rather than to further the underlying concerns of the bankruptcy code. The ability of parties to do so is enhanced by some degree of unpredictability and inconsistency in how bankruptcy courts apply the conflicts provisions.

Bankruptcy courts in New York and Delaware, which hear a large

nical," rather than genuine, conflict. The judge in the Bucyrus bankruptcy, for instance, pointedly admonished Gellene at one hearing: "New York is different from Milwaukee . . . [P]rofessional things like conflicts are taken very, very seriously. And for better or worse, you're stuck in Wisconsin." As a result, Gellene may have rationalized that Milbank's representation of Salovaara was only a "technical" conflict that posed

would prefer that he not disclose the connection to Salovaara.

Gellene was thus motivated to treat Rule 2014 not as an absolute ethical command, but as a rule that called for the exercise of his discretion. He was able to rationalize this approach to the rule because he believed that strictly applying the bankruptcy conflict rule to large law firms was unfair and did not always serve ethical purposes.

**Were Gellene simply an amoral actor indifferent to ethical demands, the tale might be more graphic but less instructive. The ambitions and anxieties that motivated Gellene's decision, however, likely mirror those of many lawyers in major law firms. Furthermore, the influences that lent support to his rationalizations are pervasive in the world that these lawyers inhabit.... Lawyers are especially adept at constructing rationalizations in support of certain preestablished positions.**

Once Gellene justified weighing the costs and benefits of disclosure rather than automatically disclosing all connections, he was able to reach the conclusion that he preferred. He could convince himself that Milbank's ties to Salovaara were only a "technical" conflict that raised no serious concern. The benefit of disclosure thus would be negligible. At most it would serve the abstract purpose of promoting the integrity of the bankruptcy process, while resulting in a disqualification that served no significant ethical end. The cost of disclosure, however, would be substantial. Disqualification would be highly disruptive to

Bucyrus, threatening its ability to emerge successfully from bankruptcy. It also, of course, would mean the loss of fees for Milbank, deprive Gellene of a client, and perhaps strain his relationship with Lederman.

Given his motivation not to disclose, Gellene may have underestimated the likelihood that his violation would be detected. Even if it were, however, he could rationalize

that courts tended to be lenient about disclosure violations. Nondisclosure thus was a calculated risk that could pay off even if it were discovered.

None of this necessarily occurred on the level of conscious thought. Indeed, rationalizations generally are effective to the extent that they aren't recognized as such. Furthermore, while it may be useful to portray the process as relatively linear, in reality it is much less systematic. Nevertheless, the phenomenon of relying on self-serving biases in making judgments is well established. People strongly motivated to reach a certain outcome often are able to rationalize why that

outcome is the most reasonable under the circumstances. In Gellene's case, there were several reasons why he might prefer to conceal Milbank's tie to Salovaara, and plausible ways that he could justify doing so.

To the extent that this scenario captures the dynamics of what occurred, it offers an account that is more sobering than the story of a self-conscious wrongdoer who deliberately hatched a scheme of misconduct. Were Gellene simply an amoral actor indifferent to ethical demands, the tale might be more graphic but less instructive. The ambitions and anxieties that motivated Gellene's decision, however, likely mirror those of many lawyers in major law firms. Furthermore, the influences that lent support to his rationalizations are pervasive in the world that these lawyers inhabit. Finally, lawyers are especially adept at constructing rationalizations in support of certain preestablished positions. Indeed, this is a highly valuable trait for someone engaged in representing clients.

The way in which these forces came together in John Gellene's life is of course unique. No other lawyer will ever come to the same end in quite the same way. It would have been impossible to foretell all the influences that ultimately resulted in his conviction. At the same time, it's too comforting to attribute his fall simply to defective character or a corrupt law firm. Far better instead to see it as a cautionary tale about the ethical landscape that highly accomplished lawyers in powerful law firms must navigate at the dawn of the twenty-first century.