



BOXALL BATTLES

PHASE 5 – CORE CONCERNS IN A BOX

Information for All Participants

1. Keith's Complications

Your client, Keith Nelson, is CEO and 50% owner of BoxAll. Originally founded and owned by his father, on the father's death BoxAll ownership interests passed through a trust instrument 48% to Keith, 48% to his older sister Dianne, and 4% to their mother. That 4% was divided equally between Keith and Dianne on their mother's death.

Keith has worked at BoxAll throughout his life, on weekends and summers before business school, and then as his first and only job. The father always said he was grooming Keith to take over when he retired, and that is exactly what happened.

You have learned that Keith's relationships with his sister Dianne and their mother were strained. Neither of the two women ever had any role in BoxAll. Keith admits his father wouldn't have tolerated it. Dianne has a degree in graphic design and briefly worked in marketing after college. She then married and raised her children. Dianne's ex-husband was a successful surgeon who also founded a medical supply company. She received a considerable settlement in their divorce. She has also received sizeable financial distributions from BoxAll. These were more modest when their father was alive and shortly after his death, when BoxAll went through difficult times. In the last several years, under Keith's management, BoxAll's revenues and profits have grown exponentially. Dianne, now fifty-eight, has considerable wealth, certainly in the tens of millions.

Keith's father's will and the trust provided that, after their mother's passing, her 4% would be divided equally between Keith and Dianne. Perhaps their father assumed the siblings would have worked things out by then? Unfortunately, that's not what happened. After the father's death, the relationship between the three became more toxic. Dianne repeatedly told their mother that Keith was "cheating and milking" BoxAll and that its other executives deserve credit for the high profits. After weekly lunches with Dianne, their mother would often call Keith to say that she was ashamed of him, he was cheating the family, and he shouldn't bear the Nelson name, etc.

Shortly after their mother passed away, Dianne stormed into BoxAll, when the Sales VP and the CFO were in the office, yelling and demanding to see ALL BoxAll books and records. She started rifling through cabinets, pulling folders from shelves, and tossing them to the floor. Keith called security and had her taken out. Dianne soon filed suit, alleging financial malfeasance and self-dealing, and demanding full access to BoxAll records. Her suit also claims damages for assault and battery and emotional distress when she was forcefully escorted from BoxAll that day. Though you are confident that Keith has operated BoxAll in an upright manner, you also know that, legally, Dianne is entitled to access its financial records. That's true within the discovery process and, without litigation, because she is a shareholder. You anticipate that Keith will resist.



Before you advise Keith as to the legal issues, consider which core emotional concerns would have been triggered in the underlying situation? Which core concerns were triggered by Dianne's recent actions, this lawsuit, and the document demand? What impact might these have on Keith? In light of all this, what might you do or say in the conversation with Keith?

2. Dianne Draws the Line

Your client, Dianne Nelson Sloane, is the 50% owner of BoxAll company. Her younger brother, Keith, also a 50% owner, is BoxAll's CEO. Originally founded and owned by her father, on the father's death BoxAll ownership interests passed 48% to her (four years) younger brother Keith, 48% to Dianne, and 4% to their mother through a trust instrument. That 4% was divided equally between Keith and Dianne on their mother's death.

Now 58 years old, Dianne is obviously highly intelligent. She obtained a degree in graphic design and worked in marketing after college. She then married and raised her children. Dianne believes her father always favored Keith – “his boy” – and had no interest in her or her artistic talent. Their father talked business with Keith from an early age, grooming him to take over BoxAll. Dianne felt shut out. Keith worked at BoxAll on weekends and summers before business school, then as his first and only job. He was appointed CEO on their father's retirement. Dianne never had a chance.

Dianne is adamant that, when she was much younger, she tried several times to suggest to her father that she could do graphic design and marketing materials for BoxAll products, but he wouldn't hear of it. Though she was mostly ignored, he once snapped at her and said: “We aren't a rinky-dink company, we work with real pros.” He didn't pay much attention to their mother either, except to criticize. Dianne and her mother were close but their relationships with Keith were always strained.

Dianne now has considerable wealth, certainly in the tens of millions. Shortly after college, Dianne married her now ex-husband, who became a successful surgeon and founded a medical supply company. After their divorce about a dozen years ago, she received a considerable settlement. She has also received large sums over time from BoxAll. These were more modest when their father was alive and shortly after his death, when BoxAll went through difficult times. In the last several years BoxAll's revenues and profits have grown exponentially. Dianne attributes the success a combination of luck and highly capable executives in BoxAll marketing and finance.

Their father's will and the trust provided that, after their mother's passing, her 4% would be divided equally between Keith and Dianne. Perhaps their father assumed the siblings would have worked things out by then? Unfortunately, that did not happen. After the father's death, the relationship between the three became even more toxic. According to people Dianne knows, Keith and his CFO occasionally drop little comments (usually when drinking) at various events, about, “inside exec ultra-bonuses” and “the loan terms I gave myself.” Dianne became convinced that Keith was milking the company and cheating her and her mother by hiding and taking funds for himself before distributing profits.



Dianne is adamant that Keith should get more than his share. No matter how many times Dianne has asked politely, Keith has never shown her the BoxAll books. After their father died, the family would all go out to the best restaurant in town as the “annual meeting.” Keith would offer a toast to BoxAll profits, hand her a check, and say, “this should answer all of your questions, right? You really don’t want to bother with the boring spreadsheets, now do you?” Dianne would be embarrassed, look at the check, see that it was larger than the year before, and decide not to make a scene. And so it went from year to year.

At some point, Dianne became fed up. Their mother had just passed away. Dianne saw a documentary explaining how business executives often hide financial shenanigans. She decided that if she gave Keith any warning, he would start hiding evidence. So, she went directly to Keith’s office suite at BoxAll, and asked to see the BoxAll books and records. Keith refused. He started in a patronizing tone with “now, Dianne...” That was enough; she saw that she would just have to look for herself. So, she started going through filing cabinets and folders on shelves. Keith had the nerve to call for security guards to take her out of the building she half owned. It was completely humiliating. In front of the VP and CFO, they dragged her out and put her in the guard booth while one of them got a van. One man took her car keys drove her car about a mile off the BoxAll property. The other man drove her there to get her own car. (You suspect that Keith’s and the security guards’ version of the events may be different.) Based mostly on Diane’s recounting of Keith’s bragging comments, you sued for financial malfeasance and breaches of fiduciary duties and demanded shareholder access to BoxAll records. The suit also claims damages for assault and battery and emotional distress when your client was forcefully escorted from BoxAll.

As part of defending against the emotional distress and kidnapping claims, Keith’s attorney has requested records from Dianne’s psychotherapist and her physician. You know from the filings that Keith described Dianne as “unhinged and destructive” when she came into BoxAll; Dianne is adamant that isn’t true. Still, that’s why the lawyer is seeking information about medications, or other incidents involving police or public or private disturbances. It won’t be easy, but you will eventually have to explain to Dianne that they may indeed be entitled to these records. Before you advise Dianne as to the legal issues, consider which core emotional concerns would have been triggered in the underlying situation? Which core concerns were triggered by Keith’s actions, the defenses, and the discovery demand? What impact might these have on Dianne? In light of all this, what might you do or say in the conversation with Dianne?

BOXALL BATTLES

Core Concerns in a Box

Teaching Note

These two vignettes draw from the plot line in BoxAll Battles, but they imagine a discovery dispute that doesn't flare up in the BoxAll Battles negotiation sequence.

They could easily be used as stand-alone exercises focused on the challenges of explaining unwelcome legal obligations in litigation that are likely to provoke clients' emotion and resistance.

Having said that, one could certainly use it in conjunction with the more elaborate BoxAll sequence. After the first lawyer-client interview meeting and the initial lawyer-to-lawyer communication, the instructor could simply say: these lawyers have been successful in explaining to their clients that relevant documents must be exchanged in litigation. That's not always so easy. Let's step out of sequence and work on strategies for a lawyer to discuss the expectations of the discovery process with his or her client. Or, after the second meetings, you could ask students to imagine that documents were not exchanged informally in pre-litigation communication, and litigation has commenced. Dianne Nelson and their mother have sued Keith Nelson for various types of malfeasance.

In whatever context used, the vignettes are designed to draw upon the "core concerns" model first introduced in R. Fisher and D. Shapiro, *Beyond Reason: Using Emotion As You Negotiate* (Penguin 2006), as applied to the lawyer-client context in chapter 4 of M. Aaron, *Client Science: Advice to Lawyers on Counseling Clients through Bad News and Other Legal Realities* (Oxford 2012).

As is often true, one can find any of these core concerns operating in the vignette if you try. Having said that, I think the most salient of the core concerns for the parties are "autonomy," "affiliation," and "status" in both of these. The autonomy trigger is clear: neither party wants to be *forced* [by some judge] to turn over documents for the benefit of the other. There's inevitably an affiliation core concern in play, given that these two are siblings: how could my sibling do this to me? I also see a status trigger in both vignettes, as both wish to have their status recognized and respected by the other, and by the legal system. Arguably, status rings stronger for Dianne in the second vignette as she has long resented her brother's higher professional status as CEO of BoxAll.

Generally, I put students into small groups to discuss the core concerns they view as most salient. I then facilitate a plenary discussion of which core concerns seem might have been triggered – in the interaction and in the litigation that preceded it. Then I ask students to pair up in two's or threes. If in two's, then one takes on the lawyer and the other the client role. If a group of three, then one is the observer, takes notes for reporting to the later discussion.

I ask the clients to "ham it up," protest the other side's demands, say how outrageous it is, etc. The lawyer should be practicing "targeted active listening" as described in Chapter 4 of



Client Science. In other words, their efforts at active listening should target the core concern they perceive as most salient based on the client's words or situation. That interaction goes for five or six minutes. They can debrief and give each other feedback in groups – five minutes or so - with a prompt about how the “targeted active listening” made the clients feel and what the impact was. For the lawyer, what was difficult? What was awkward? The observers can be helpful here, providing feedback on what they saw and heard.

When I call the group back for plenary discussion, I usually begin with a general question about what was difficult and what was easy – what did they struggle with? Sometimes, I ask lawyers to self-report on an effort at targeted active listening that was terrible – completely missed the mark – the anti-active listen. That generates a laugh and often a good sport volunteer. I ask them to play it out – what was so bad and why?

Whether or not I've started with the “anti-active listen,” I always ask the clients or observers to report on a lawyer who did a GREAT job on at least one “targeted active listen.” I ask them to replay it – set up the client's words and lawyer's terrific targeted active listen. Often, they have indeed done a terrific job applying the “targeted active listening” advice in *Client Science* to the vignette. We applaud it! It's not unusual to notice that the effort was laudable but could also have been even more effective. We discuss ways to improve or build upon it. Often, the interesting discussion involves other directions it might have taken.

Inevitably, the question arises: what if I get it wrong? What if I think this was all (or mostly) about affiliation, and I pick up on that theme: “Gosh, how awful to feel your own brother would do this.” What if the client says: “That's not the problem. I'm at peace with my relationship with my brother. But I can't stand that he gets to force me to show my therapy records!” The lawyer's targeted active listening might be: “It just seems like a power play...”. The punch line is that it's fine. Unless your active listening is consistently far off the mark, the client will give you credit for trying, and will help you find the keys to their emotions. Fundamentally, listening to understand, and then expressing that understanding, are acts of respect.

It's important for you to emphasize and the students to understand that to actively listen is NOT to agree. It is to connect with how the client feels and let the client know that you “get what it feels like.” After that, the lawyer still must explain what the rules of civil procedure require. Hopefully, the client's emotional reaction will have calmed down and he or she will be better able to listen.